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[Weekly Reporter, Oct. 28, 1905.]

THE

WEEKLY REPORTER,

1904-1905

(FIFTY-THIRD YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL

FROM THE 24TH OF OCTOBER, 1904, TO THE 12TH OF AUGUST, 1905.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. LIII.

EDITED BY
MARTIN JOSEPH BLAKE,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

LONDON: 27, CHANCERY LANE, W.C.

1905.

ALEXANDER & SHEPHEARD, LTD.,

Printers.

NORWICH STREET, FETTER LANE, LONDON, E.C.

94315

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PREFACE.

In the fifty-third volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains a summary of the cases published from the 7th of November, 1904, to the 26th of August, 1905 (both inclusive), in the WEEKLY REPORTER, and from the beginning of September, 1904, to the end of August, 1905, in the Law Reports, the Law Journal Reports, and the Law Times Reports.

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FROM THE 24TH OF OCTOBER, 1904, TO THE 12TH OF AUGUST, 1905.

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1904—1905.

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MARTIN JOSEPH BLAKE,

BARRISTER-AT-LAW.

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COURT OF APPEAL (No. II.)	JAMES IRVINE STIRLING, HENRY STEPHEN, PERCY H. WINFIELD, and MAURICE N. DRUCQUER, Barristers-at-Law.
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CHANCERY DIVISION. *Mr. Justice Farwell and Mr. Justice Swinfen Eady*	PAUL STRICKLAND, ALFRED R. TAYLOUR, C. H. CARDEN NOAD, and HENRY STEPHEN, Barristers-at-Law.
CHANCERY DIVISION. *Mr. Justice Buckley and Mr. Justice Warrington*	NEVILLE TEBBUTT, PERCY H. WINFIELD, H. H. KING, and HENRY BEAUMONT, Barristers-at-Law.
CHANCERY DIVISION. *Company Cases*	NEVILLE TEBBUTT, Barrister-at-Law.
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(BANKRUPTCY CASES)	PAUL M. FRANCKE, Barrister-at-Law.
PROB., DIV., and ADM. DIVISION	GWYNNE HALL, Barrister-at-Law.

A TABLE

OF

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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NOTE.—In the following Table the cases are arranged in the Alphabetical order of the PLAINTIFFS' names; but for convenience of reference, with respect to cases having double titles—*e.g.*, *In re Smith*, *Brown* v. *Jones*—this Table gives the names of such cases under both titles.

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—— v Scott	C.A.	—	63	[1905] 2 K. B 160
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——— v Solomon	K.B.D.	459	77	[1905] 1 K. B. 577; 74 L. J. K. B. 262; 92 L. T. 325
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Shepheard v Broome	H.L.	111	28	[1904] A C. 342; 73 L. J. Ch. 608; 91 L. T. 178
Shepherd v Harris	CH.D. FAR. J.	570	168	
Sheppard v Sheppard	P.D. & A.D.	608	48	[1905] P. 185; 74 L. J. P. 102
Sheringham Urban Council v Holsey	CH.D JOYCE,J	—	63	91 L. T. 225
Shum, *In re.* Prichard v Richardson	CH.D. FAR. J.	—	20	91 L T. 192
Simpson v Attorney-General	H.L.	—	137	[1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610
——— v Ebbw Vale Steel, Iron, and Coal Co.	C.A.	390	100	[1905] 1 K. B. 453; 74 L. J. K B. 347; 92 L. T. 282
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Sirdar Rubber Co. v Wallington	CH.D.EADY,J	346	118	[1905] 1 Ch. 451; 74 L. J. Ch. 515; 92 L. T. 564
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Skipper v Wade. *In re* Turnoull	CH. D. FAR. J.	440	182	[1905] 1 Ch. 726; 74 L. J. Ch. 438
"Skipsea," The	P.D. & A.D.	538	155	[1905] P. 32; 74 L. J. P. 34
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——— v Giddy	K.B D	207	116	[1904] 2 K. B. 448; 73 L. J. K. B. 894; 91 L. T. 296
——— v Law Guarantee and Trust Society	C A.	—	25	[1904] 2 Ch. 569; 73 L. J. Ch. 733; 91 L. T. 545
——— v Nelson	CHD.JOYCE,J	—	167	92 L. T 313
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Woolwich Corporation v Gibson	CH.D.EADY,J.	—	97	91 L. T. 538
Woolwich Union v Fulham Guardians	K.B.D.	—	120	[1905] 2 K. B. 203; 92 L. T. 838
Wrigley v Gill	CH.D. WAR.J.	334	111	[1905] 1 Ch. 241; 74 L. J. Ch. 160; 92 L. T. 491
Yorkshire Electric Tramways v Ellis	K.B.D.	303	165	[1905] 1 K. B. 396; 74 L. J. K. B. 172; 92 L. T. 202
Yorkshire Miners' Association v Howden	H.L.	667	163	[1905] A. C. 256; 74 L. J. K. B. 511; 92 L. T. 701
Young v Naval and Military Society of South Africa	K.B.D.	447	26	[1905] 1 K. B. 687; 74 L. J. K. B. 302; 92 L. T. 458

THE

WEEKLY REPORTER,

1904-1905.

Court of Appeal.

From K. B. Div.
(Earl of Halsbury, L.C., and Stirling and Mathew, L.JJ.) — Oct. 25.

ALDRICH *v.* BRITISH GRIFFIN CHILLED IRON AND STEEL CO. (LIMITED). (*a.*)

Practice—Costs—Security for costs—Bond of foreign company—Ord. 65, r. 7.

There is no general rule that the bond of a foreign company will not be accepted as security for costs.

Appeal from an order of Phillimore, J., in chambers.

The plaintiff was a subject of, and resident in, the United States of America, and as the trustee in bankruptcy of an American company he brought the present action against the defendants in the High Court of Justice in England. The defendants thereupon obtained an order that the plaintiff, being a foreigner resident out of the jurisdiction, should give security for their costs of the action to the amount of £80. The plaintiff offered as security a bond of the Fidelity and Deposit Co. of Maryland, which the defendants objected to as being the bond of a foreign company. The Fidelity and Deposit Co. of Maryland was incorporated under the laws of the State of Maryland, in the United States of America, in 1894, and had since then carried on business in many places in the United States. In 1901 the company opened an office in London, and for the purpose of better securing the guarantee bonds of the company issued in the United Kingdom, the company by deed transferred a sum of £50,000 invested in Consols to three trustees—namely, Lord Revelstoke, Sir Clinton Dawkins, and John Pierpont Morgan, jun. By the deed no part of the abovementioned sum was to be paid or transferred to the company until it was proved to the reasonable satisfaction of the trustees that there were no guarantee bonds issued by the company in the United Kingdom outstanding and unprovided for. It was stated in the affidavits filed on behalf of the plaintiff that the company's bonds had been accepted by the Board of Trade, and also in the Chancery and Probate and Admiralty Divisions.

An application was thereupon made to the master, who, after consulting the other masters of the King's Bench Division, refused to accept the proposed security upon the ground that there was a general rule that the bond of a foreign company would not be accepted as security. Upon appeal, Phillimore, J., in giving judgment, said that the company was a sound company, having valuable assets in England, to remove which out of the jurisdiction would be a breach of faith with its clients and would possibly imply a breach of trust on the part of the trustees of those assets, and that the trustees were excellent trustees; but he agreed with the masters that there should be a general rule that the bond of a foreign company would not be accepted as security, and he accordingly dismissed the appeal.

The plaintiff appealed.

J. E. Bankes, K.C., and *Llewellyn Davies*, for the plaintiff.—There is no general rule that the bond of a foreign company will not be accepted as security. No case can be found where any such rule is laid down. Each case must be considered on its own merits, one element for consideration, no doubt, being that the company is a foreign one. The company here is thoroughly sound and the bond is fully secured by the fund in the names of the trustees in England. The learned judge came to the conclusion that the security was ample, but he declined to accept it on the ground of the existence of the alleged general rule. That being so, it is not necessary to send the case back to the master to inquire into the sufficiency of the security.

R. J. Neville, for the defendants.—The security must now, by ord. 65, r. 7, be given to the satisfaction of the party, and not to the satisfaction of the master, that rule providing that the bond shall "be given to the party or person requiring the security." It is therefore the general rule that the bond of a foreign company, when objected to as security, will not be forced on an unwilling party, especially in view of the possible difficulty of serving the foreign company and of enforcing the security against them.

He referred to *Knight* v. *De Blaquiere*, Sau. & Sc. 648.

Earl of HALSBURY, L.C.—To my mind this is a plain case. When the question of the sufficiency of a particular security comes before the master, he must take into consideration all the circumstances. To lay down a general rule that in a business inquiry as to the sufficiency of a security for, say, £80, the bond of a foreign company will not be accepted would be wrong. There is no such general rule, and each case must be decided on its own merits. The learned judge here considered the security to be amply sufficient, and he only rejected it by reason of the supposed general rule. It is not, therefore, necessary to send the case back to the master to inquire as to the sufficiency of the security offered, and we accordingly direct the bond to be accepted as security for £80.

STIRLING, L.J.—I agree that there is no such general rule as that which the learned judge supposed to exist. In the Chancery Division the judges had considered the question of accepting the bonds of foreign companies as security, but had arrived at

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

no general rule. The practice in the Chancery Division, therefore, remains that each case must be decided upon its own merits.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Bennett & Ferris.*

Solicitors for the defendants, *Radcliffe & Co.*

Lunacy.

Vaughan Williams, Romer, and Cozens-Hardy, L.JJ. } June 6; July 18, 1904.

In re A., A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION. (*a*.)

Lunacy—Jurisdiction—Person lawfully detained as a lunatic—Person appointed to exercise powers of committee of the estate—Joint power to appoint among children—Lunacy Act, 1890 (53 *Vict. c.* 5), *ss.* 116, 120, 128.

A joint power to appoint among children is a power vested in the lunatic in the character of trustee, and the judge in lunacy may, under section 128 *of the Lunacy Act,* 1890, *direct its exercise by a person appointed to exercise powers of a committee of the estate.*

Per Cozens-Hardy, L.J., dissentiente.—*In section* 128 *the words "in the character of trustee" do not apply where the consent is required as a check on the undue exercise of the power.*

This was a summons which came before Cozens-Hardy, L.J., in chambers, and was by him adjourned into court.

The applicant was the husband of A., a person of unsound mind not so found by inquisition and lawfully detained as a lunatic; the powers and provisions relating to management and administration in the Lunacy Act, 1890, were consequently applicable by virtue of section 116 (1) (*c*).

The applicant had been appointed by order dated the 27th of July, 1893, to exercise certain of the powers of a committee of A.'s estate, and he now asked that he might be at liberty, on behalf of A., to exercise, or concur with the applicant (*i.e.*, with himself in the character of husband) in exercising, the joint power of appointment contained in their marriage settlement by executing a deed-poll under the hands and seals of the applicant and the said A. appointing that, subject to the life interests of the husband and wife, certain shares of the trust property comprised in the settlement should be held in trust for two of the seven children of the marriage.

By the marriage settlement, which was dated the 7th of January, 1868, certain funds belonging to A. were settled upon trust for the husband and wife and the survivor of them for life, and after the death of the survivor upon trust for such of the children of the marriage as the husband and wife jointly, by deed revocable or irrevocable, or as the survivor by will or deed, should appoint, and in default of appointment for the children in equal shares.

Christopher Farwell, for the application.—I submit there is jurisdiction under section 128 of the Lunacy Act, 1890—if not under section 120 (*l*)—to authorize the committee to exercise the power, as being vested in the lunatic in the character of trustee. When a person in whom a power is vested proceeds to exercise it he becomes a trustee for the purpose of exercising it: *Tempest* v. *Lord Camoys*, 31 W. R. 326, 21 Ch. D. 578; *Butcher* v. *Butcher*, 1 V. & B. 79; *Coffin* v. *Cooper*, 13 W. R. 571, 2 Dr. & Sm. 365. The last two cases show that the donee of a power of appointment is a trustee. [ROMER, L.J.—In *Coffin* v. *Cooper* Kindersley, V.C., does not say the donee is a trustee, but that the power is in the nature of a trust.] Lord Hatherley almost calls him a trustee in *Topham* v. *Duke of Portland*, 18 W. R. 235, L. R. 5 Ch. 40. [VAUGHAN WILLIAMS, L.J.—What is the best instance you can give of a power vested in a trustee as such?] The power of appointing a new trustee: *In re Shortridge*, 43 W. R. 257, [1895] 1 Ch. 278. *In re Nevill*, 31 Ch. D. 161, 34 W. R. Dig. 168, is in my favour. [ROMER, L.J., referred to *In re Garrod*, 34 W. R. 157, 31 Ch. D. 164.] [VAUGHAN WILLIAMS, L.J.—In *In re Skeats' Settlement*, 42 Ch. D. 522, 527, 38 W. R. Dig. 202 Kay, J., seems to consider that the power of appointing new trustees is a power of a fiduciary character.] [COZENS-HARDY, L.J.—The power of appointing trustees is a duty, but the power to appoint among children is not.] There may be no duty to appoint, but a person who does appoint is in a fiduciary position. [COZENS-HARDY, L.J.—*In re Nevill* is your strongest case.] If the court can authorize the committee to consent to the exercise of a power, as was done in that case, it can authorize him to exercise a power vested in the lunatic. [ROMER, L.J.—The court can authorize him to consent, but not to exercise a power unless it be vested in the lunatic in the character of trustee or guardian.]

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J.—In this case the question is whether the 128th section of the Lunacy Act, 1890, gives to a judge exercising jurisdiction in lunacy jurisdiction to make an order for the exercise, by the committee of the estate of a lunatic not so found, in the name and on behalf of the lunatic, of a limited power of joint appointment vested by a marriage settlement in the lunatic (the wife) and the applicant (the husband). [His lordship read the power.] The 128th section of the Lunacy Act, 1890, runs thus: "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs."

Now, is this power of appointment by the husband and wife jointly during their joint lives with or without power of revocation and new appointment a power which is vested in the lunatic in the character of trustee or guardian? In the case of *Coffin* v. *Cooper*, 13 W. R. 571, 2 Dr. & Sm. 365, Kindersley, V.C., dealing with the exercise by a married woman of a power of appointment by will over a fund to be divided among her children, which power had been exercised by the married woman, in pursuance of covenants by deeds with one of her sons and third parties, that she would appoint in favour of such son not less than a certain sum out of the fund, and by the same deeds the son mortgaged to such third parties all his interest in the fund whether by appointment or in default of appointment, held, that the appointment was good notwithstanding the covenants in the deeds, and in the course of his judgment used these words (p. 373): "In the absence of

(*a*.) Reported by R. HILL, Esq., Barrister-at-Law.

authority I should have decided this case with reference to certain broad principles, the soundness of which cannot (I think) be disputed. One is that a power to appoint among children is a power in the nature of a trust, created and intended to be exercised with a view to the benefit of the objects of the power, as a class and as individuals."

In the case of *In re Nevill*, 31 Ch. D. 161, which was a case in which trustees had a power of advancement with the consent of the husband and wife, and the husband was found lunatic, the court, purporting to act under section 137 of the Act of 1853, the section corresponding with section 128 of the Act of 1890, held that there was jurisdiction to authorise his committee to consent. There is no reason why the exercise of a power and the giving of a consent should be dealt with differently.

In the case of *In re Harwood*, 36 W. R. 27, 35 Ch. D. 470, the court doubted as to how far a power of sale fell within section 136 of the Act of 1853, the section dealing with powers vested in a lunatic for his own benefit.

The next case is *In re Skeats' Settlement*, 42 Ch. D. 522, a case dealing with power of appointment of new trustees. Kay, J., dealing with that power, says (p. 527): "I come to the conclusion that this is a power of a *fiduciary character*, and consequently that the man who exercises it is exercising a duty of a fiduciary nature to the *cestuis que trust*."

In *In re Little and In re Harrison*, 37 W. R. 289, 40 Ch. D. 418, Kay, J., dealing with power of appointment by a married woman under a limited power in favour of children, after pointing out that there is no doubt that there may be a case in which, where there has been a *bonâ fide* release not made for any corrupt purpose of the appointor, the release is good, goes on to say (p. 422): "The power to distribute the fund among the children of the tenant for life is a power which contemplates that the circumstances of the family may so alter that it may be of the highest possible importance to give a larger share to one child than to another. It is a power essentially, in that respect, *in the nature of a trust*."

In *In re Baggs*, [1894] 2 Ch. 416*n*, 38 SOLICITORS' JOURNAL 127, 71 L. T. 138, the Court of Appeal held that the power of sale vested in a lunatic as tenant for life under the Settled Land Act, 1882, was not exercisable by the committee under the jurisdiction conferred by section 128 of the Act of 1890.

Having regard to these authorities I have on the whole come to the conclusion that section 128 of the Act of 1890 does give jurisdiction to the judge to direct the committee to exercise the power of appointment on behalf and in the name of the lunatic. I have come to this conclusion with more hesitation because I regret to say that COZENS-HARDY, L.J., does not concur in it.

The section is not very clear, but the words "in the character of trustee" are wide enough if liberally construed to cover this power of appointment, in respect of which the appointor undoubtedly owes a fiduciary duty to the children, although, as pointed out by Kay, J., and indeed by Kindersley, V.C., the appointor may release the power and do other things which a trustee in the strict sense of the word could not do. It seems to me, therefore, one should examine the section and the nature of the power and consider whether the Legislature could have intended that such a power should be exercised by the committee.

Now it is true that the power is such that the parties to the settlement must have contemplated the personal qualifications of a mother conjointly with the father to exercise such a power, and it might therefore be said that such a power was not proper to be exercised by the committee or a trustee, who would have presumably no such personal qualifications; but I think that the answer to this is that this must often be equally true of a trustee strictly so called, for many a trustee is chosen either for his personal qualifications or for the relation in which he stands to the *cestui que trust*, and notwithstanding this objection, it is plain that section 128 would give jurisdiction to the court to direct the committee to exercise all the powers and discretions of the named trustee.

It follows, therefore, that this case must go back to Master Ambrose to consider if this is a case in which the order ought to be made.

ROMER, L.J., also thought that the limited power of appointing to children did fall within section 128. He referred to *In re Shortridge*, where an argument that the power of appointing new trustees was not a power vested in the lunatic in the character of trustee was described by Lord Halsbury as a "hypercritical objection," and said it was significant that the section did not say "where a lunatic is a trustee," but "where a power is vested in a lunatic in the character of trustee." His lordship could not help thinking that section 128 was the correlative of section 120 (*l*), under which the judge might direct the committee to "give any consent required for the exercise of any power where the power to consent is in the nature of a beneficial interest in the lunatic," and coupling those words with the words of section 128, it seemed as if provision were made for every case in which a power to consent could be vested in a lunatic. Under section 128 a committee under an order of the judge might, where the consent of a lunatic to the exercise of a power was necessary in the character of a trustee or as a check upon the undue exercise of a power, give the consent. These words were very wide, and it seemed strange, if his lordship's view were the correct one, why a distinction should be made between the exercise of a power and the giving of a consent.

It was said that in the case of a joint power given to husband and wife the power could not be exercised if the wife was a lunatic, but that if the power were given to the husband with the consent of his wife, *i.e.*, as a check on its undue exercise, then the committee under order of the judge could give the consent. It would be strange and anomalous if there were jurisdiction in the one case and not in the other.

COZENS-HARDY, L.J.—This summons raises an important and difficult question — whether it is competent to the court to authorize a committee to exercise a special power of appointment in favour of children, contained in the marriage settlement of the lunatic. The settlement is in common form—that is to say, subject to the life interests of the parents, the capital is held upon trust for such one or more of the children as the parents jointly by deed, or the survivor by will, shall appoint, and in default for the children at twenty-one or marriage equally. The wife in the present case is a person of unsound mind not so found by inquisition, and the application is made under section 116 of the Lunacy Act, 1890.

Now it is clear that some statutory authority must be found to justify what is proposed. Two sections of the Act have been referred to, section 120 (*l*) and section 128. With respect to the former, it is sufficient to say that this is not a power "vested in the lunatic for his own benefit," and the case cannot therefore be brought within that section. With reference to section 128 there is more difficulty. [His lordship read the section, and continued:] It has been held

under that section, and under the corresponding section, 137 of the Act of 1853, that the court can authorize the committee to exercise a power of appointing new trustees: *In re Bowmer*, 7 W. R. 313, 3 De G. & J. 658; *In re Shortridge*, 43 W. R. 257, [1895] 1 Ch. 278. This conclusion was inevitable, for section 129, which corresponds with section 138 of the earlier Act, expressly asserts that the Act extends to such a power. It may not be strictly accurate to describe a power of appointing new trustees vested in a lunatic as "a power vested in the lunatic in the character of trustee," but it is nevertheless true that the appointment of a new trustee if the donee of the power could not or would not act could be enforced or secured by the beneficiaries in a proper case under the general or statutory jurisdiction of the Court of Chancery: *In re Sparrow*, 18 W. R. 1065, L. R. 5 Ch. 662. It is therefore no great stretch of language to hold that such a power is one which falls within the terms of section 128.

There are many instances in which a power is vested in a lunatic in the character of trustee, *e.g.*, the powers of advancement and maintenance contained in the present settlement are given to "the trustees or trustee for the time being." It is sufficient to refer to *In re Boyce*, 12 W. R. 359, 4 De G. J. & S. 205; Lord Westbury says at p. 209: "But assuming the trustee to take merely a power to sell the real estate, his position under the will is this: he is appointed trustee; he is directed peremptorily to sell the testator's real estate on the widow's death; he is empowered to give effect to that sale by the execution of all necessary conveyances. In other words, three things are combined in his person under the language of the will—namely, the office of trustee, a personal obligation, and a power of fulfilling and discharging that obligation. Where these three things concur, the case, in my judgment, falls within the statute, and the court has jurisdiction thereunder to appoint a new trustee."

It is, however, difficult to maintain that a special power of appointment the exercise of which will defeat a child's vested interest, can be considered as a power vested in a parent "in the character of trustee." There is no obligation upon a parent to appoint. Such a power may be released. The Court of Chancery could not, under its general or statutory jurisdiction, provide for the execution of such a power. In *In re Baggs*, [1894] 2 Ch. 416*n*, it was contended that by virtue of section 116 and section 128 the judge in Lunacy could authorize the applicant to exercise the power of sale conferred upon the alleged lunatic as tenant for life under the Settled Land Act as being a power vested in the alleged lunatic "in the character of trustee," and the language of section 53 of the Settled Land Act, 1882, was relied upon as showing that in exercising such a power the tenant for life is deemed to be in the position of a trustee. But the Court of Appeal declined to accept this view. And in *In re Salt*, 44 W. R. 146, [1896] 1 Ch. 117, Rigby, L.J., referring to *In re Baggs*, says (p. 121) that the lunatic was clearly not a trustee within section 128.

It is true that in *In re X.*, 42 W. R. 657, [1894] 2 Ch. 415, where a settlement contained a power enabling the alleged lunatic tenant for life to sell with the consent of the trustees, and the master had found that a sale was desirable, the Court of Appeal held that it could authorize the exercise of the power of sale, but without saying whether it was under section 120, as being a power for the benefit of the alleged lunatic, or under section 128, or under both sections.

These three cases are not perhaps easily reconciled, but they seem to me to establish the proposition that it is not enough, in order to bring a case within section 128, to make out that a power is fiduciary in its nature, or that if exercised it must be exercised fairly and honestly and without any personal beneficial interest. The present power is beyond doubt one of that nature: *Palmer* v. *Locke*, 28 W. R. 926, 15 Ch. D. 294. But I am not prepared to say that it is a power vested in the lunatic "in the character of trustee." I may add that the express mention in section 120 (*h*), of a power of leasing vested in a lunatic having a limited estate supports the view that such a power would not fall within the general language of section 128.

Mr. Farwell, in his able argument, relied upon the decision of the Court of Appeal in *In re Neville*, 31 Ch. D. 161, where it was held that the court could authorize the committee to consent to the exercise of a power of advancement given to the trustees with the consent of the lunatic, but on consideration I do not think that authority helps him. That was a case falling under the second branch of section 128—the consent of the lunatic to the exercise of the power being necessary "as a check on the undue exercise of the power." The words "in the character of trustee" do not apply to such a case.

In my opinion section 120 (*l*) and section 128 do not exhaust every kind of power. There are powers which are vested in the donee neither for his own benefit nor in the character of a trustee. A power of leasing vested in a limited owner—section 120 (*h*)—is one instance of such a power. I think the present power falls within that class. It follows that, in my opinion, there is no jurisdiction to make the order asked for. I may add that there is no trace in the Lunacy Office of any such order having been ever made, although the jurisdiction has existed for half a century.

The case was sent back to the Master.

Solicitors, *Hunter & Haynes.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — July 21, 1904.

MAYOR, &C., OF WESTMINSTER v. JOHNSON.
THE SAME v. FULLER. (*a*.)

Inland revenue—Land tax—Public underground lavatories provided and maintained by sanitary authority—Land Tax Act, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4—*Public Health* (*London*) *Act*, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 44, 45.

A metropolitan borough council, acting as sanitary authority, provided and maintained a number of public lavatories and sanitary conveniences in pursuance of section 44 *of the Public Health* (*London*) *Act*, 1891. *The lavatories and conveniences were constructed under the surface of the public streets.*

Held, by Collins, M.R., *and* Stirling, L.J. (Mathew, L.J., *dissenting*), *that the borough council were liable to be charged with land tax in respect of the lavatories and conveniences.*

Judgment of Wright, J. (52 *W. R.* 350, [1904] 1 *K. B.* 19), *reversed.*

Appeals from the judgment of Wright, J., on the trial of two actions without a jury: reported 52 W. R. 350, [1904] 1 K. B. 19.

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The actions were brought by the Corporation of Westminster for declarations that certain underground public lavatories and sanitary conveniences, situate in the City of Westminster, were exempt from land tax.

The actions were tried together upon agreed statements of facts, which are set out, 52 W. R. 350-1.

Wright, J., was of opinion that the corporation had only such an interest in the lavatories and conveniences as was necessary for the purpose of discharging their public duties, and not such a right of property as would render them liable to be charged with land tax. He accordingly gave judgment for the plaintiffs.

The defendants appealed.

Macmorran, K.C., and *S. A. T. Rowlatt*, for the defendants.

Danckwerts, K.C., and *Sylvain Mayer*, for the plaintiffs.

The following cases were cited: *Metropolitan Railway Co.* v. *Fowler*, 42 W. R. 270, [1893] A. C. 416; *Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104; *Rolls* v. *Vestry of St. George the Martyr, Southwark*, 28 W. R. 867, 14 Ch. D. 785; *Wandsworth Board of Works* v. *United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904; *Mayor, &c., of Tunbridge Wells* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92; *Attorney-General* v. *Conduit Colliery Co.*, 43 W. R. 366, [1895] 1 Q. B. 301; *Battersea Vestry* v. *County of London Electric Lighting Co.*, [1899] 1 Ch. 474, 47 W. R. Dig. 129; *Finchley Electric Light Co.* v. *Finchley Urban District Council*, 51 W. R. 375 [1903] 1 Ch. 437; *Holywell Union* v. *Halkyn Drainage Co.* [1895] A. C. 117, 43 W. R. Dig. 131; *Lord Colchester* v. *Keeney*, 14 W. R. 994, 15 W. R. 930, L. R. 1 Ex. 368, L. R. 2 Ex. 253; *Lambeth Overseers* v. *London County Council*, 46 W. R. 79, [1897] A. C. 625.

Cur. adv. vult.

July 21.—COLLINS, M. R., read the following judgment: The question in this appeal is whether the appellants, who are collectors of land tax in the parish of St. James, Westminster, are entitled to demand land tax from the respondents, who are the sanitary authority of Westminster, in respect of certain lavatories and conveniences erected and controlled by them under their statutory powers.

By section 44, sub-section 1, of the Public Health (London) Act, 1891, the sanitary authority may provide public conveniences, and by sub-section 2 the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority. By section 45, where the sanitary authority provide and maintain lavatories or conveniences they may make regulations for the management thereof, and may let them for any term not exceeding three years at such rent and subject to such conditions as they may think fit, and charge such fees for the use of any lavatories or water-closets provided by them as they may think proper.

In the first of the two cases before us, *Johnson's case*, the sanitary authority have made such a convenience containing a lavatory, &c., at Piccadilly-circus, and have settled a scale of fees for the use thereof. The convenience is described in the written statement of agreed facts. It is a walled and roofed structure covering a considerable area, and is open to the public from 7 a.m. to 1 a.m., when it is shut up. Male and female attendants are in charge while it is open; the cost of erection was about £5,000. The fees received at this convenience produce an income in excess of the expenses. All the other conveniences are worked at a loss. Can the respondents be said to have or hold land or a hereditament or tenement in the case of this particular convenience within the meaning of the Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 4? Wright, J., has held that they cannot, on the ground that "having or holding" in the Land Tax Act, 1797, must *primâ facie* import ordinary unqualified rights of property, and are not satisfied by a restricted and qualified property which the sanitary authority in his view possessed in this case.

No doubt the tendency of modern decisions has been to limit the meaning of the word "vest" in the Public Health Acts in connection with a street to vesting "in the urban authority such property, and such property only, as is necessary for the control, protection, and maintenance of the street as a highway for public use," as stated by Lord Herschell in the passage cited by Wright, J., from *Mayor, &c., of Tunbridge Wells* v. *Baird*. But no case has gone so far as to hold that actual property as distinguished from an easement only was not passed to the authority by that word. *Coverdale* v. *Charlton* decided that it conferred the right to demise the right of pasturage. In *Rolls* v. *Vestry of St. George the Martyr, Southwark*, Jessel, M.R., treated the former case as deciding that the soil of the street vested in the vestry so as to entitle them to sell it on the closing of the street. This decision was qualified on appeal by the Court of Appeal, who held that the property of the vestry in the highway was determined as soon as the highway ceased to be a highway. In *Wandsworth Board of Works* v. *United Telephone Co.* Brett, M.R., reviewed these decisions, and, adhering to his opinion in *Coverdale* v. *Charlton*, pointed out that the case of *Rolls* v. *Vestry of St. George the Martyr, Southwark*, dealt only with the duration, not the extent, of the right conferred. When the authority has used the powers vested in it for that purpose, and has brought into existence a building out of which a profit is made, a building vested in it which it has statutory powers to let, it seems to me difficult to contend that the authority does not come within the words of the Land Tax Act as "having or holding" a "tenement or hereditament." I think it is impossible to deny that what they hold is an interest in land. In fact this is a stronger case than *Metropolitan Railway Co.* v. *Fowler*, for here the site is actually vested in the local authority, and it could not be suggested here, as it was there, that what they took was an easement only. Here, as there, the persons acquiring the interest are a corporation and acquire it in fee. If it be possible that the respondents might at some time have to abandon and close the convenience and that in such case their statutory interest in the subsoil might cease, so also, as Lord Watson points out in *Metropolitan Railway Co.* v. *Fowler*, might the Metropolitan Railway lose their interest in the site of their tunnel.

Unless, then, the fact that the convenience is held subject to the statutory obligation to admit the public at such times as by their regulations they deem fit exempts from rateability, the statutory conditions are fulfilled. We are not, however, dealing with the poor rate or the paving rate, neither is there any statutory exemption, though the statute does make some exemptions, and this is not Crown land. The objection really goes to quantum, not to rateability, and in the present case if the convenience is a tenement or hereditament and the corporation "have" or "hold" it, it is undoubtedly being turned to profitable use and has some value.

With respect to the conveniences in *Fuller's case*, the same reasoning applies, though the fact that the expenses exceed the income will presumably be taken into account in assessing the value. This is not the tribunal for determining that question, which would have to be decided as provided in the Act: see section 8. If and so far as the land tax has been

redeemed in respect of any part of the site, a proper allowance must, of course, be made. I am of opinion that the appeal must be allowed.

STIRLING, L.J., read the following judgment: In each of these cases the parties have agreed to submit to the court the question whether land tax can be assessed in respect of certain conveniences recently constructed by the plaintiffs or their predecessors under a public street, in exercise of the powers conferred by the Public Health (London) Act, 1891, sections 44 and 45.

Land tax was first imposed for one year only by 4 W. & M. c. 1 (1692). In every subsequent year down to and including 38 Geo. 3 (1797) a similar Act was passed. The last of these annual Acts was 38 Geo. 3, c. 5, which was made perpetual by another Act of the same session, 38 Geo. 3, c. 60, which contained provisions for the redemption and purchase of the tax. Most of the enactments of the last mentioned statute have been repealed, but re-enacted with variations by 42 Geo. 3, c. 116. The nature of the existing tax has been considered and explained in two cases—*Reg.* v. *Land Tax Commissioners*, 1 W. R. 479, 2 E. & B. 694, and *Lord Colchester* v. *Kewney*. The whole of England is for the purpose of this taxation divided into districts, and a fixed annual sum is required to be raised from the land in each of them. The sum to be so raised is assessed yearly by assessors chosen by and acting under the directions of commissioners appointed for the purpose in each district; 38 Geo. 3, c. 5, s. 8. The assessment is to be "charged with as much equality and indifference as is possible by a pound rate" (section 4), or, as it is afterwards more briefly expressed (section 8), "by an equal pound rate" upon all manors, lands, hereditaments, and other premises within the district. There are, however, certain exceptions from this taxation. First, land in the occupation of the Crown at the date when the Act became perpetual is exempt (*Attorney-General* v. *Hill*, 2 M. & W. 160); but land which is Crown property, but not in the occupation of the Crown, is not free: *Lord Colchester* v. *Kewney*. Secondly, lands belonging to any colleges, hospitals, and other institutions specified in section 25 are thereby made exempt; this exemption extends only to lands held by such institutions at the date when the tax was made perpetual—*Lord Colchester* v. *Kewney*—but continues as regards such lands even after they have been sold by the institution to which it belonged: *Cox* v. *Rabbits*, 26 W. R. 483, 3 App. Cas. 473. Thirdly, lands as to which the land tax has been redeemed are, of course, exempt; but it is provided that the amount of tax so redeemed is to be deducted from the total amount leviable within the district, and the remainder only levied on the lands remaining charged with the tax, as if these had formed an entire district: 38 Geo. 3, c. 60, s. 74; 42 Geo. 3, c. 116, s. 180. The broad result is that all land which was chargeable with the tax at the time when it was made perpetual remains chargeable therewith, unless in the meantime the tax in respect thereof has been redeemed. But, as was pointed out by Channell, B., in delivering the judgment of the Court of Exchequer in *Lord Colchester* v. *Kewney*, the amount for which any particular piece of land is assessed may vary from year to year, according as its value decreases or increases relatively to the rest of the land in the district. It may even happen that the value may become nominal, in which case the property would in practice not be included in the assessment, and thus would in a sense cease to be assessable. Whether this has taken place or not is a matter for the determination of the commissioners for the assessment; it is not one on which this court can be asked to express an opinion, and I do not understand the questions submitted to the court in these cases to relate to anything of this kind, but to be in substance whether the plaintiffs have or hold any messuages, lands, tenements, or hereditaments capable of being assessed to land tax.

Objection is taken on behalf of the plaintiffs to the taxation of these conveniences in question on two grounds—first, the use to which they are applied; and, secondly, the nature of the interest which the plaintiffs have in them. As to the former of these objections, the point is that the conveniences are for the benefit of the public, and that the public cannot be excluded from them. Conveniences have been erected under the authority of the Public Health (London) Act, 1891, which authorizes the sanitary authority to provide and maintain them "in situations where they deem the same to be required." The sanitary authority has power to make them in the subsoil of a road, but there appears to be nothing to prevent the authority from erecting buildings for the purpose above ground. If the plaintiffs had erected such a building on a piece of land acquired for the purpose, and subject at the time of its acquisition to land tax, would land tax cease to be payable merely by reason of the use to which the erection is applied? I fail to see why it should be. The case would not fall within any of the exceptions which I have pointed out. By the statute the tax is, in my opinion, made payable by reason of ownership, not by reason of occupation, and still less by reason of the nature of the occupation. The *Brockwell Park case* (*Lambeth Overseers* v. *London County Council*) was referred to in this connection. There, however, the liability to poor rate was in question, and fell to be decided in reference to statutes expressed in very different terms from those with which we are here concerned. But even as regards liability to poor rates, it does not seem to me to be clear that the *Brockwell Park case* would govern. Lord Herschell, in advising the House of Lords, contrasts that case with *London County Council* v. *Churchwardens of Erith*, 42 W. R. 330, [1893] A. C. 562, in which the London County Council was held to be rateable to poor rates in respect of a station and works for pumping sewage. His lordship said: "The land on which the pumping-stations were constructed, the rateability of which was there in question, was not by statute dedicated to that use. The London County Council could place their pumping-stations where they pleased; they could remove them elsewhere at any time they thought fit, or dispense with them altogether, if they adopted some other method of dealing with their sewage, and could sell or let the land to a tenant, whose use of it would be unrestricted. About the rateability of the land there could be no real controversy." Some of these observations would apply to the hypothetical case which I have put of a building erected on land acquired for the purpose. That, of course, is not the actual case under consideration; but if, as I think, the land which I have supposed to be acquired would not be freed from land tax by reason of the use to which it was put, it seems to me that neither can the existing conveniences be exempted solely by reason of the nature of their use.

It remains, then, to consider whether the plaintiffs have or hold a messuage, land, tenement, or hereditament within the meaning of 38 Geo. 3, c. 5, s. 4. The Public Health (London) Act, 1891, s. 44, sub-section 2, provides that "for the purpose of such provision" (that is, the provision of such a convenience) "the subsoil of any road . . . shall be vested in the sanitary authority." Section 45 provides that where a sanitary authority provide and maintain public

lavatories or sanitary conveniences, "such authority may (a) make regulations and bye-laws with respect to the management and user thereof; (b) let the convenience for any term not exceeding three years at such rent and subject to such conditions as they may think fit"; and (c) "charge such fees for the use of any lavatories provided by them as they may think proper." It seems to me that the powers conferred by this section enable the sanitary authority, having made proper regulations and bye-laws and fixed reasonable fees for the use of the conveniences specified, to hand over to others the administrative part of their duties in connection therewith, and with that view to let the same for terms not exceeding three years. I think that, when letting is spoken of, the term is used in the ordinary sense. The estate vested in the sanitary authority by section 44, sub-section 2, is not defined; but it seems to me that what is to vest is not a mere easement, but such an estate or interest as will enable the authority to perform the duties imposed and to exercise the powers conferred by the Act, including the power of letting. This appears to me to be in accordance with what is laid down in *Metropolitan Railway Co.* v. *Fowler* and *Mayor, &c., of Tunbridge Wells v. Baird.* This being so, in my opinion the conveniences in question fall under one or other, or even more than one, of the designations of messuages, lands, tenements, or hereditaments, held by the sanitary authority, within the meaning of 38 Geo. 3, c. 5, s. 4. It appears that the site of the convenience which is the subject of the first of these actions was formerly occupied partly by the street and partly by houses; the land tax had been redeemed in respect of one these houses, but not of the others. The houses were bought by the plaintiffs' predecessor for the purpose of street improvements and thrown into the street. Since that time no land tax has been paid in respect of the site, the reason being, I presume, that the commissioners regarded the value as nominal merely. It is for the commissioners and not for this court to determine whether the structure erected by the plaintiffs (so far as the site consists of land the tax on which has not been redeemed) is or is not of nominal value merely. Similar remarks apply to the conveniences which are the subject of the second action. In my judgment, therefore, the appeal ought to be allowed.

MATHEW, L.J., read the following judgment: In these cases I agree with my brother Wright, and am of opinion that his judgment should be affirmed. The Land Tax Act, 1797, s. 4, seems to me to deal with estates known to the common law, which might be held in perpetuity, and the tenure of which was subject to no restrictions. It was contended for the appellants that the word "vested" in the Public Health (London) Act, 1891, s. 44, sub-section 2, indicated an intention to create an ownership in the plaintiffs. But the sense in which the term is used with respect to the rights granted to local authorities is explained in the cases referred to in the judgment of Wright, J. Whether it be the street or the subsoil mentioned in the Act, the position of the plaintiffs seems to me to be the same. They have no property in the ordinary sense. They are not owners or occupiers. They have control as custodians only, and are granted by implication in that capacity such property and authority as will enable them to protect and preserve the rights of the public. In support of the appeal the main reliance was placed on sub-section 1 of section 45 of the Public Health (London) Act, 1891. It was urged that the provisions of that sub-section showed that the plaintiffs were owners in fee of the structures in question. They are empowered to charge for their use, and what was received, it was said, was in the nature of rent. They were further entitled to let them for any term not exceeding three years. It was contended that the plaintiffs therefore possessed the ordinary rights of the landlord. But the charges made to the public are described in the statute as "fees," and, as appears from the agreed facts, they are not made for purposes of profit, but with the object of aiding in meeting the necessary expenditure incurred in the interest of the public, and in order to place some check on a too indiscriminate public user. The fees which are paid are no more rents than the small sums paid for the use of chairs in the public parks. Further, with reference to the power of letting, any demise must be subject to the obligations of the plaintiffs. Provision must be made that the premises should be maintained for the purposes indicated in the statute. What would be received by the tenant would be the difference between the fees paid and necessary outgoings, which, as I have already said, would not be a return in the nature of rent. Further, it must be borne in mind that the right to receive payments from the public and the right to let are both statutory. They do not spring from ownership and would not exist without the sanction of Parliament. The appellants argued that, if the building in *Johnson's case* was assessable, the other similar structures would be subject to the tax, because of the power which the plaintiffs possessed to make such charges for their use as they thought proper. But this reasoning would seem to involve the consequence that the enclosures provided for similar purposes on the surface of the street would become hereditaments liable to land tax. The case seems to me not to be distinguishable in principle from the *Brockwell Park case* (*Lambeth Overseers* v. *London County Council*) and the *Tooting Common case* (*London County Council* v. *Wandsworth Borough Council*, 51 W. R. 499, [1903] 1 K. B. 797). I see no reason in the absence of express enactment for imposing on the ratepayers the additional burden of the land tax. For these reasons it seems to me the appeal should be dismissed.

Appeal allowed.

Solicitors for the plaintiffs, *Caprons, Hitchins, Brabant, & Hitchins.*

Solicitors for the defendants, *Miller, Vardon, & Miller.*

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) June 1, 1904.

In re ATKINSON.
BARBERS COMPANY *v.* GROSE-SMITH. (a.)

Tenant for life and remainderman—Capital and income—Settled fund—Mortgage—Authorized security—Arrears of interest—Deficient security.

If a fund, which is settled upon a tenant for life and remainderman, is properly invested on a mortgage which proves insufficient to pay principal and interest in full, the sum realized ought to be divided between the tenant for life and remainderman in the proportion which the amount of interest in arrear bears to the amount of principal due under the mortgage, without taking into consideration any sums received by the tenant for life by way of interest from the security.

In re Foster, 39 *W. R.* 31, *and* In re Phillimore, [1903] 1 *Ch.* 42, *disapproved.*

In re Moore, 33 *W. R.* 447, *and* In re Alston, [1901] 2 *Ch.* 584, *followed.*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was an appeal from a decision of Kekewich, J.

John Atkinson, by his will dated the 30th of August, 1858, gave his residuary estate upon trust for conversion and investment, and upon further trust, subject to certain interests which had determined, to pay the income to his eleven nephews and nieces for life and the survivors and survivor of them, and, after the decease of the survivor upon trust to pay the capital to the Barbers Company to be held by them upon certain charitable trusts.

The testator died on the 8th of November, 1861.

£29,000, part of the residuary estate, was invested on a mortgage, which carried interest at 5 per cent. reducible to 4 per cent. on punctual payment.

In January, 1889, the interest on the mortgage began to fall into arrear; and in May, 1889, the trustees entered into possession. Since that time the rents arising from the mortgaged property had been paid to the tenant for life, but they were insufficient to keep down the interest, and it was apprehended that the property when sold would not realize enough to pay the principal moneys and the arrears of interest in full.

In March, 1892, the present action was commenced by the Barbers Company against the then trustees of the testator's will and the then tenants for life for the purpose of determining whether the mortgaged property ought not to be realized.

By an order made on the 2nd of June, 1892, the court ordered the trusts of the will to be carried into execution, and directed an inquiry whether any and what proceedings should be taken to realize, among other securities, this mortgage.

In 1894 the chief clerk certified that this mortgage ought not to be realized.

In April, 1898, part of the mortgaged property was sold in pursuance of an order made in the action and realized £4,600.

In 1903 the tenants for life took out a summons in the action asking that the £4,600, and also the proceeds of sale of the rest of the mortgaged property when sold, might be apportioned between the tenants for life for the time being of the residuary estate and the trustees of the will, as representing the capital, in proportion to the amount due in respect of arrears of interest and the amount of capital remaining due on the mortgage, and asking, further, that directions might be given for the realization of so much of the mortgaged property as remained unsold. At the date of this application the amount due for capital on this security was about £22,000, and the amount due for arrears of interest about £9,000.

Kekewich, J., ordered an immediate sale of the remaining farms, and ordered, further, that the £4,600 should be apportioned between the tenants for life and the capital in the proportion which the amount of interest in arrear at 5 per cent. bore to the amount of principal due under the mortgage.

The Barbers Company appealed from this decision so far as it related to the apportionment.

Carson, K.C., and *Spencer*, for the appellants.—We submit that the right principle of apportionment in this case is that followed by Kay, J., in *In re Foster*, 39 W. R. 31, 45 Ch. D. 629. The moneys received by the tenant for life by way of interest ought to be added to the proceeds of sale and the total treated as the sum recovered on the mortgage; then it must be ascertained how much at the date of sale would have come to the tenant for life and how much to the *corpus* if there had been no deficiency, and the total is divided between the tenant for life and the remainderman in proportion to those two amounts. In the present case Kekewich, J., has followed his own decision in *In re Alston*, [1901] 2 Ch. 584, 50 W. R. Dig. 157. That principle is simply to divide the proceeds in the proportion which the amount of interest in arrear bears to the amount of interest due under the security. We submit, however, that this method bears hardly on the remaindermen.

They also cited *Stewart* v. *Kinsale*, [1902] 1 Ir. R. 496; *Turner* v. *Newport*, 2 Ph. 14; *Cox* v. *Cox*, 17 W. R. 790, 8 Eq. 343; *In re Bird*, 49 W. R. 599, [1901] 1 Ch. 916; *In re Phillimore*, [1903] 1 Ch. 942, 51 W. R. Dig. 140; *In re Chesterfield's Trusts*, 32 W. R. 361, 24 Ch. D. 643; *In re Moore*, *Moore* v. *Johnson*, 33 W. R. 447; *In re Barker*, (1897) W. N. 154; *Lyon* v. *Mitchell*, (1899) W. N. 27.

Dickinson, for two of the trustees of the will,

P. O. Lawrence, K.C., and *Lyttelton Chubb*, for all but one of the tenants for life.

Vaughan Hawkins, for the remaining tenant for life, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I think that this appeal fails. I think that the judgment of Kekewich, J., in this case and also his judgment in *In re Alston* were quite right. In this case there was an authorized investment, a mortgage, and that investment was a security for capital and interest at the rate of 5 per cent., and for a long time the security was sufficient and the interest was paid. Then the security begun to be deficient; there was not enough to keep up the full payment of the interest, and there was a grave probability that the security might not be sufficient to provide payment of the capital. Under these circumstances a portion of the securities was realized, and that produced £4,600. Then a question has arisen about apportioning this amount. Strictly speaking we cannot make a final adjustment in the case. It is impossible at present to ascertain all the factors which are necessary for this adjustment. We do not know at present what the unsold residue of the estate may be, but it is said that it will be convenient, although the time for final adjustment has not come, and the conditions are not present which would enable us to make that final adjustment, that we should declare now what will be the principle of the final adjustment, in order that, for the convenience really of all parties this sum that has been realized may be provisionally apportioned, and that any adjustment which is ultimately necessary when all the factors have been ascertained can be made on the occasion of the final adjustment. But in the meanwhile we have to make an order which will constitute really a provisional apportionment, and I may say that I do not think, as far as I can judge from Kekewich, J.'s, judgment, that he meant what he did to be anything more than a provisional apportionment. That being the case now, one has to deal with the question of what is the right principle of apportionment or adjustment. Now, as the Master of the Rolls said, in the Irish case of *Stewart* v. *Kinsale*, that, if he had to choose there between *In re Foster* and *In re Moore*, he preferred the principle laid down in *In re Moore*, and I say as he did, that I prefer that principle. Really the Master of the Rolls gives such clear and forcible reasons in his judgment for his preference that I feel that I should not better them in any way by anything that I may add now to them. But in only one respect do I at all criticize what the Master of the Rolls said. I do not think that the question whether *In re Foster* or *In re Moore* laid down the right principle of apportionment was quite as open a question according to the English cases as the Master of the Rolls assumed, because it seems to me that with regard to *In re Foster* it is a case which, as Mr. Carson

told us, has never been followed, and as he also practically had to admit it has never been preceded. I mean by that, that there never was before the decision in *In re Foster* a case in which the principles which would support that decision were in the slightest degree indicated. One cannot help seeing, when one looks at the judgment of Kay, J., in *In re Foster*, and considers it with the greatest care, having regard to his learning and carefulness as a judge, that curiously enough, although he therein particularly refused to follow in *In re Moore* he does so without the indication of any reason why he disapproved of *In re Moore* or preferred the calculation which he enunciated in *In re Foster*. I say, therefore, that I prefer *In re Moore*. Now, cases were cited to us of unauthorized investment, but I do not mean to trouble myself with those cases, because I think they have no bearing on this case whatsoever. You have a case here of authorized investment, it was given to a tenant for life, and the fund was to go ultimately to remaindermen. Now, having that state of things, and the security being a security both for principal and for interest on the mortgage at the rate of 5 per cent., what is to be done in a case where for a considerable time that interest has been paid, and then the security is realized and proves insufficient? What was it a security for? It was a security equally for the principal and the interest. Now I will venture to try and enunciate, not a calculation, but a principle here which one ought to apply in these cases, and that principle is that, there being a security for the principal and the interest, and there having been a loss, you ought to take care that there is rateable equality in the incidents of that loss. That is all that you have got to do. Now I will proceed to make the calculation which follows upon that principle, and I will now take the very words of *In re Moore*. Take the amount due for capital and the amount due to the tenant for life for arrears of interest, and then apportion the sum accordingly. That is the principle, it seems to me, we have to apply in the present case. The result of this will be that the appeal fails, but we will introduce what words may be necessary by way of precaution to prevent it being supposed that this is a final apportionment.

ROMER, L J.—I am of the same opinion. I must say that, but for the cases of *In re Foster* and *In re Phillimore*, I should have thought the principle to be applied in a case like the present was quite clear. The question may be shortly stated as follows: There was a mortgage debt, an authorized security. It is settled by a settlement on a tenant for life, with remainder to some remaindermen. Interest is paid on the mortgage debt for some time in full; then the interest falls into arrear, and after there are some arrears outstanding and due the security has to be realized, and it turns out that there is not sufficient to pay the arrears of interest and the capital of the capital debt. What is to be done under the circumstances? I should have thought, as I have said, that the way to proceed was pretty clear, and the considerations which would lead to the way in which the fund should be dealt with are pretty obvious. In the first place, as to the interest which was paid to the tenant for life, it is clear that the tenant for life was entitled to receive it, and that the remaindermen could have no possible claim upon the sum so received by the tenant for life, and no equity against the tenant for life in respect of those sums in any point of view whatever. That being so, what is the position of the tenant for life and the remaindermen so far as concerns the property that represents the security for the debt? They are simply in the position of two persons who have one security for the two debts belonging to them respectively. Notwithstanding the payment of interest to the tenant for life, so far as concerns his arrears of interest he has a right as against the remaindermen to have those arrears charged upon the security. The security is a security not only for principal but for interest, and that is a right the tenant for life had, and I fail to see any equity on the part of the remaindermen which would enable the remaindermen to challenge the position or right of the tenant for life. That being so, when the security is insufficient to pay the two debts charged upon the security, I should have thought it would follow as a matter of clear right that the tenant for life would say to the remaindermen: "Apportion our security, which is a security for my debt as well as yours, between us in proportion to the amount of the debts, in the same way as you would if you had a mortgage given on one security for two separate debts and the security is insufficient. You apportion the insufficient proceeds between the mortgage debts." That is the simple principle, and there is no possible equity that I can see to prevent the ordinary rights applying and being enforced. That, on principle, as I have said, ends the case.

About the authorities only let me say a few words after what my lord has said. So far as concerns *Turner* v. *Newport*, *Cox* v. *Cox*, and *In re Bird*, they are all authorities dealing with cases of unauthorized investment, and have no application in principle to such a case as we have to deal with here. Where you are dealing with cases of unauthorized investment from the very nature of the transaction you have to consider the rights of the parties at the time it was made. Almost of necessity you must go back to readjust those rights as I have stated. Those cases, in my opinion, have no real bearing upon the case we have to decide. The case that we have here, had to be considered in *In re Moore*, and there it received, to my mind, proper and sufficient treatment. The principle I have referred to was carried out, and rightly carried out in that case, as indeed it was also in *Lyon* v. *Mitchell*, *In re Barker*, *In re Alston*, and *Stewart* v. *Kinsale*. The only authorities that cause the slightest trouble are those of *In re Foster* and *In re Phillimore*. As my lord has pointed out, *In re Foster* had no previous authority to justify it, and speaking with great respect of the very learned judge who decided it, in my opinion the decision in that case was wrong. The learned judge there appears to have arrived at a method of apportionment which, as far as I can see, was not argued and not authorized by any previous authority, and he gave no reason for his adopting that method of apportionment. He states no principle on which he is said to have proceeded, and that case has never been followed. It was not followed even in *In re Phillimore*, and the other judges have expressly declined to follow it, as, for example, in *Lyon* v. *Mitchell* and in *In re Barker*. With regard to *In re Phillimore* I need only say this, that I think Swinfen Eady, J., was misled there by the form the argument took before him. The real point of principle on which that case ought to have been decided, in my opinion, was never brought to the attention of the learned judge; he was led to believe by the argument before him that the whole question he had to decide was one as to the point of time from which an account should be taken as against the tenant for life in respect of the income received by him, and which was to be brought in as a sort of hotchpotch in order to produce the apportionment. He was led to consider that that was the only question he had to decide. As

it was, he declined to follow *In re Foster*, but it is really, for the reasons that I have given, no authority upon the question we have here. But so far as it really proceeded on a different basis from that which I have indicated as a correct basis, I cannot help saying that, in my opinion, it was wrongly decided. Those are the only two cases which are really in any way in conflict with the principle I have indicated. To my mind, as I have said, it is a perfectly clear and intelligible principle, and one that ought to be applied without any difficulty. I will only add that in this case we are really deciding a hypothetical question, but we are led to do that under the advisability, if not the necessity, of allowing some provisional division to be made in respect of £4,600 between the tenant for life and the remaindermen. I think that justifies the court in deciding the question though as I have said it is up to the present time hypothetical. I think the order that was made by Kekewich, J., as to the apportionment of the £4,600 ought to be prefaced by a statement to the effect that the apportionment of that sum is to be without prejudice to a final adjustment when the estate is perfectly realized. It is not until the estate is perfectly realized that you can finally adjust the right, and not till then can you take a proper account between the parties. You cannot treat the £4,600, for example, as representing any specific portion of the original mortgage, and for that reason, amongst others, you could not possibly at the present time have a complete and final adjustment and apportionment as far as regards the £4 600. Therefore, as I have said, the division of the £4,600 can only be treated as provisional, and the final adjustment of the rights must take place when the estate is fully realized. There will be then time to apply for the taking of such accounts as may be necessary to finally adjust the rights of the parties on the principles we have decided.

COZENS-HARDY, L.J.—I am of the same opinion, and have very little to add after the judgments given by my lord and Romer, L.J. I think the true way to approach this question is to treat it as though the whole security had been realized and had produced a certain sum; then the inquiry which the court would have to make would be what was due on the security at the time of realization? The answer would be, the capital and the arrears of interest, nothing more would be due. It would be idle to say the interest which had been paid wholly or in part to the tenant for life was then due upon the security of the land or upon the proceeds of the sale of the land. The only charge would be for those two sums, capital, and arrears of interest. On what principle are you to apportion them? Just in the same way as you would if it were a contributory mortgage, part owing to A. and part owing to B., you would apportion it rateably. Just so here when the ultimate realization comes to pass you would have to ascertain what was due for capital and what was due for arrears of interest. It is a plain, simple, and intelligible rule which was adopted by Pearson, J., in the case of *In re Moore*. It follows from what has been said in the case of *In re Moore*, which was followed by Kekewich, J., in *In re Alston*, and by the Master of the Rolls in Ireland in what I may very respectfully refer to as his very able judgment in *Stewart* v. *Kinsale*, and again by Kekewich, J., in his judgment in this case, that those are correct. But with the greatest respect to Kay, L.J., and Swinfen Eady, J., I cannot consider the decision in *In re Foster* or in *In re Phillimore* as correct. I do not refer to the cases as to unauthorized investments. They are on a different footing to a case like this, where the tenant for life was entitled to the income derived from this mortgage. The appeal will be dismissed, the only variation being that this order is without prejudice to any ultimate adjustment on the whole scheme.

Solicitors, *Lingard & Leach; Russell, Son, & Cumming; Weir, Ford, & Leach.*

High Court of Justice.

Chan. Div. } July 12.
Buckley, J. }

In re CLUTTERBUCK'S SETTLEMENT.
BLOXAM *v.* CLUTTERBUCK. (*a.*)

Settlement — Marriage settlement — Covenant to settle after-acquired property—Accumulations of income of settled property—Investment of accumulations—"At one and same time"—Construction.

Property purchased by a wife with the accumulations of income derived from property settled by a marriage settlement is not property to which she becomes entitled during the coverture so as to fall within the meaning of the ordinary covenant to settle after-acquired property; and where the covenant is expressed to apply only to sums of a specified value to which she becomes entitled "at one and the same time," and the sums accumulated are each less than the specified amount, these words are an additional reason why the covenant does not apply.

Finlay *v.* Darling, 45 W. R. 445, [1897] 1 *Ch.* 719, *followed.*

In re Bendy, 43 W. R. 345, [1895] 1 *Ch.* 109, *dissented from.*

Lewis *v.* Maddocks, 8 *Ves.* 150, 17 *Ves.* 48, *explained.*

Originating summons.

This summons was rendered necessary because of two conflicting decisions upon what was acquired property within the meaning of the usual covenant to settle such property in a marriage settlement.

By indenture of settlement made the day before the marriage of the Rev. John Balfour Clutterbuck with the defendant Catherine Purslow Clutterbuck, then C. P. Cresswell, spinster, a sum of £3,500 to which Mrs. Clutterbuck was then entitled, payable upon the death of her father (who died in 1880), was assigned to the trustees of the settlement upon trust, after the marriage and upon the same becoming payable, to pay the income to Mrs Clutterbuck for her life, for her separate use, without power of anticipation, and after her death to pay the income to Mr. Clutterbuck for his life, or until the events mentioned, and then upon trusts for the children of the marriage as mentioned. The settlement contained the following clause: "And it is hereby agreed and declared that if the said Catherine Purslow Cresswell now is, or if during the said intended coverture she, or the said John Balfour Clutterbuck in her right, at one and the same time, and from one and the same source, shall become seized, or possessed of, or entitled to, any real or personal property of the value of £200 or upwards, for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy," except specified articles, "then and in every such case the said Catherine Purslow Cresswell and John

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Balfour Clutterbuck, and all other necessary parties, shall . . . convey, assign, and assure the said real and personal property to, or otherwise cause the same to be vested in, the said trustees or trustee" upon trusts for sale or investment, and to stand possessed of the moneys so arising, and the investments upon the trusts declared concerning the sum of £3,500, except in a particular mentioned. There were children of the marriage.

Upon the death of her father, Mrs. Clutterbuck received the income of the £3,500, and from time to time saved and accumulated sums out of it, with the result that in 1894 the accumulations amounted to £300 or more. In that year she used the £300, with £1,000, which she obtained on mortgage of the property purchased, in the purchase of certain real property, which was conveyed to her as her separate property. She subsequently mortgaged it.

The present trustees of the settlement took out this summons against Mr. and Mrs. Clutterbuck, two of their children, and the trustees of the marriage settlement of another child, asking whether they, the trustees, were entitled, under the agreement for the settlement of after-acquired property, to have a conveyance from Mrs. Clutterbuck of the hereditaments conveyed to her in 1894.

Cruickshank, for the trustees of the settlement.

H. B. Howard, for Mrs. Clutterbuck.—The property purchased by my client is not property which she had at the time of the settlement or has become seized of or entitled to since within the meaning of the covenant. It is true that the decision of Kekewich, J., in *In re Bendy*, 43 W. R. 345, [1895] 1 Ch. 109, is against this view, but the case of *Churchill* v. *Denny*, 23 W. R. 825, L. R. 20 Eq. 534, was not cited to the learned judge. That case shows that Mrs. Clutterbuck did not acquire her title to the land at the time of purchasing it within the meaning of the covenant. And in *Finlay* v. *Darling*, 45 W. R. 445, [1897] 1 Ch. 719, Romer, J., refused to follow *In re Bendy*, and decided the contrary. [He was stopped by the court.]

Douglas, for the other defendants.—I admit that the half-yearly receipts of income were not caught by the covenant. But I submit that when Mrs. Clutterbuck capitalised the income and purchased the property with it, she became seized of and entitled to the property within the meaning of the covenant: *Lewis* v. *Maddocks*, 8 Ves. 150, 17 Ves. 48. It was changed to a permanent investment, and therefore fell within the covenant: *In re Bendy*.

BUCKLEY, J.—I fail to find any ground for saying that the trustees are entitled to have the property purchased by Mrs. Clutterbuck conveyed to them. At the date of the settlement Mrs. Clutterbuck was not entitled to this future income because it did not then exist. There was no sum of £200 or any other sum existing as accumulations of income. But her right to this property purchased with the accumulations of income did not arise during the coverture. It arose under the settlement itself. It is not, therefore, within the covenant. There is another thing fatal to the claims of the trustees. The property of the value of £200 covenanted to be settled was to be property to which the wife became entitled "at one and the same time." But she did not become entitled to these accumulations of income at one and the same time, but in successive half-years. The covenant, therefore, does not apply to them. That the right of the lady to these future periodical receipts of income did not arise during coverture was decided in *Churchill* v. *Denny*, where Jessel, M.R., held that the settlor did not become entitled to the money he received for the commutation of his pension at the date of the commutation, and that he was then merely varying the investment, and not acquiring a title to the property. I am pressed with the decision of *In re Bendy*. In deciding that case Kekewich, J., relied upon *Lewis* v. *Maddocks*, 8 Ves. 150, 17 Ves. 48, where Lord Eldon held that income invested and converted into capital became subject to a covenant to settle after-acquired property. In that case the husband had agreed to settle all his personal estate. The effect of Lord Eldon's judgment was that the covenant would not bind every sovereign received by the husband, but that some effect must be given to the words "all his personal estate," and if the husband so dealt with his income as to capitalize it, it would be bound by the covenant. But the principles of that decision do not apply here. The covenant of Mrs. Clutterbuck is essentially different from the covenant to settle all the personal estate in that case. She did not covenant to settle all her property. The decision of Kekewich, J., in *In re Bendy* is commented upon by Romer, J., in *Finlay* v. *Darling*, and I respectfully agree with his observations. The decision of Romer, J., in that case is in direct conflict with that of Kekewich, J., in *In re Bendy*. And in the present case, the words "at one and the same time" are an additional reason for holding the property outside the covenant, which did not occur in *Finlay* v. *Darling*. I need only add that in *In re Dowding's Trusts*, 52 W. R. 293, [1904] 1 Ch. 441, Kekewich, J., made some comments upon his own decision in *In re Bendy*, which shows that upon reconsideration he might have preferred the view of Romer, J., to that of his own. I hold that the property purchased by Mrs. Clutterbuck is not bound by her covenant and that the trustees of the settlement have no title to it.

Solicitors, *Bloxam, Ellison, & Co.*

Chan. Div. Joyce, J. } Aug. 9, 1904.

In re RICHARDSON.
RICHARDSON *v.* RICHARDSON. (*a.*)

Settled land—Person having powers of tenant for life—Conditional residence—Invalidity of condition—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 51, 58, *sub-section* 1, *clause* 2.

A testatrix devised her residuary real and personal estate to her niece upon condition that she resided in the house of the testatrix during the lifetime of the sister of the testatrix, and there kept a home for the sister whenever she should so require it; if this condition were not complied with, then the property was to pass over to another niece upon the same condition. The sister of the testatrix was a lunatic not so found, and had been subject to restraint for twelve years.

Held, that the provision as to residence was a condition and not a trust or reservation for the benefit of the lunatic, and the devisee being a person having the powers of a tenant for life within the meaning of section 58, *sub-section* 1, *clause* 2, *of the Settled Land Act*, 1882, *the condition in question was void under section* 51 *of that Act.*

Originating summons.

Alice Richardson by her will, dated the 8th of March, 1902, appointed executors and trustees (in-

(*a.*) Reported by A. C. THOMAS, Esq., Barrister-at-Law.

cluding trustees for the purpose of the Settled Land Acts), and after various bequests devised and bequeathed all her real and personal property unto her niece, M. E. Richardson, upon condition that she resided in the house of the testatrix, called Brooklyn, during the lifetime of the sister of the testatrix, and kept there a home for the said sister whenever she should wish to use it; and in the event of the said niece predeceasing her or refusing to comply with such condition, then the testatrix devised and bequeathed all her real and personal property, subject to a like condition, to another niece, C. M. Richardson, plaintiff in the present action; and in the event of both said nieces predeceasing the testatrix or refusing to comply with the said condition, then the real and personal estate was devised and bequeathed, subject to the above condition, to another niece, A. H. Richardson; and if all the three nieces predeceased the testatrix or refused to comply with the said condition, then the whole of the real and personal estate was devised and bequeathed to trustees upon trust for her said sister, Mary Ellen Richardson, during her life, and after her decease upon trust to sell the same and divide the proceeds equally between the children of her said brother, G. Richardson, as therein mentioned.

The testatrix died on the 28th of March, 1902, and M. E Richardson, the niece, by a deed-poll disclaimed the conditional devise and bequest to her. The plaintiff, C. M. Richardson, the other niece, accepted the gift, and came over from America and resided at the house of the testatrix, called Brooklyn, and was prepared to provide there a home for the sister of the testatrix. The said sister, Mary Ellen Richardson, was a lunatic not so found by inquisition, and had been under restraint in an asylum since 1891. She was fifty-five years of age, and there was no likelihood of her recovering her reason. The plaintiff desired to sell the whole of the real estate devised to her.

An originating summons was taken on her behalf asking—(1) Whether the plaintiff was under the will of Alice Richardson a person having the powers of a tenant for life under the Settled Land Acts in regard to Brooklyn, and whether she could sell it discharged from the condition imposed by the will, and, if so, whether she was absolutely entitled to the proceeds of sale discharged from any obligation to provide a home for Mary Ellen Richardson.

Hughes, K.C., and *H. M. Humphrey*, for the plaintiff.—The condition as to residence is void under section 51 of the Settled Land Act as tending to prevent tenant for life exercising powers conferred by the Act. Section 51 of the Settled Land Act, 1882, provides as follows: "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after the commencement of this Act, a provision is inserted purporting, or attempting by way of direction, declaration, or otherwise to forbid a tenant for life to exercise any power under this Act, or attempting or tending, or intended by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real of any personal property, or by the imposition of any condition, or by forfeiture or in any other manner whatever to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have the operation aforesaid, shall be deemed to be void." Section 58, sub-section 1, clause 2: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act, namely—a tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue or in any other event." Looking at section 58, sub-section 1, clause 2, it is evident that the plaintiff, C. M. Richardson, who is tenant in fee simple under the will with an executory limitation over in a certain event, is a limited owner having the powers of a tenant for life under that section: *In re Paget's Settled Estates*, 30 Ch. D. 161; *In re Smith, Grose-Smith* v. *Bridges*, 47 W. R. 357 [1899] 1 Ch. 331. C. M. Richardson can therefore sell Brooklyn free from any condition.

Younger, K.C., and *Baden-Fuller*, for the respondent.—This is a trust for the sister of the testatrix, and the nieces were trustees. It is not really a condition: *In re Kirk, Kirk* v. *Kirk*, 31 W. R. 94, 21 Ch. D. 431; *Wright* v. *Wilkin* (1862), 10 W. R. 403. The intention of testatrix was to benefit the lunatic, and to provide her with a home; not to benefit the nieces during the lifetime of the lunatic. C. M. Richardson was not tenant for life within the Act as she was a trustee.

No reply called for.

JOYCE, J.—In this case, in the events which have happened, there is a devise to the testatrix's niece, Catherine Mary Richardson, upon condition that she resides in the house, known as Brooklyn, during the lifetime of the testatrix's sister, Mary Ellen Richardson, and provides there a home free of cost or charge of any kind for her said sister Mary Ellen Richardson whenever her said sister chose to avail herself of such home, and in the event of Catherine Mary Richardson not complying with the condition then the property was devised to another niece. Now, the sister Mary Ellen Richardson there referred to was unfortunately a lunatic, and at the date of the will had been confined as a lunatic for ten or twelve years, and I am informed that it is in the highest degree improbable that she will ever recover her mental faculties. In that state of things it appears to me that this provision with respect to residing by the devisee at Brooklyn and providing a home for Mary Ellen Richardson, if and whenever she should recover and wish to avail herself of such house is, in truth, a condition, not merely a trust or reservation for the benefit of this lunatic, as it might have been if the condition had been one merely for the payment of a sum of money, or an annuity, or a condition permitting the lunatic to reside and occupy a portion of the property during her life. It appears to me, having regard to the cases with reference to residence, that the condition in this case does not differ materially from the other cases in respect of residence, and is just as obnoxious to the provisions of section 51 of the Settled Land Act as if it had been a provision for residence merely. In that state of things I hold that Catherine Mary Richardson is "a tenant in fee simple, with an executory limitation over" in a certain event—that is to say, she is one of the class of persons within clause 2 of sub-section 1 of section 58 of the Settled Land Act, having the powers of a tenant for life, and therefore the condition in question is void under section 51 of the Act. She is entitled to sell the property free from any condition.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson*, for *Couchman, Christopher, & Lodder*, Henley-in-Arden.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Phillimore, JJ.) July 8, 1904.

BROOKS v. BRADSHAW. (a.)

Adulteration—Article purchased for test purposes—Time for instituting prosecution—Information within time specified—Issue of summons after time—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-section* 1.

By section 19 (1) *of the Sale of Food and Drugs Act,* 1899, *where any article of food or drug has been purchased for test purposes, a prosecution under the Act shall not be instituted after the expiration of twenty-eight days from the time of purchase.*

Held, that the prosecution was "instituted" if the information was laid within twenty-eight days, and that a summons, though not issued until after that time had elapsed, was not too late.

Beardsley *v.* Giddings, [1904] 1 *K. B.* 847, *considered.*

Case stated by justices of Norwich, who had dismissed an information of the appellant, an inspector under the Food and Drugs Acts, against the respondent for selling milk alleged to be adulterated with 43 per cent. of added water.

The question was whether the proceedings were out of time, having regard to section 19 (1) of the Sale of Food and Drugs Act, 1899, which enacts that a prosecution "shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

The information was laid on the 23rd of January, 1904, which was within the period of twenty-eight days from the date of purchase of the test article by the appellant. The summons was issued the same day, and was made returnable on the 11th of February. The summons should have been served not later than the 27th of January, to comply with sub-section 2 of section 19. The summons was not served until the 29th of January, and in consequence the case was not proceeded with on the return day, but on the application of the appellant a fresh summons dated the 11th of February was issued upon the information of the 23rd of January by the same justice returnable on the 3rd of March.

The respondent contended that the prosecution had not been instituted within twenty-eight days, on the ground that the laying of the information alone was not an institution of a prosecution under section 19 (1), and that the section required not only the laying of the information, but also the service of the summons within twenty-eight days from the alleged offence.

The appellant contended that the laying of the information was a sufficient institution of proceedings, and that the summons need not be served within twenty-eight days.

The justices were of opinion that it was imperative that the summons be served within twenty-eight days, and dismissed the information.

The inspector appealed.

Ernest Wild, for the appellant, cited *Reg.* v. *Lancashire Justices,* 22 W. R. 329, 29 L. T. 886; *Dixon* v. *Wells,* 38 W. R. 606, 25 Q. B. D. 249; *Beardsley* v. *Giddings,* [1894] 1 K. B. 847; *Thorpe* v. *Priestnall,* 45 W. R. 223, [1897] 1 Q. B. 159; *Ex parte Fielding,* 25 J. P. 759; *Batt* v. *Mattinson,* (1890) 82 L. T. 800; *Pickavance* v. *Pickavance,* [1901] P. 60, 49 W. R. Dig. 106; and *Simcox* v. *Handsworth Local Board,* 30 W. R. 273, 8 Q. B. D. 39.

No one appeared for the respondent.

Lord ALVERSTONE, L.C.J.—I do not think that the question in this case is exactly covered by the decision in *Beardsley* v. *Giddings,* as it is really whether there is any valid objection to a summons being issued more than twenty-eight days after the date of the alleged offence, the information having been laid within twenty-eight days, which is the time fixed by the statute. In *Beardsley* v. *Giddings* it happened that the summons was issued on the same day as the information was laid, and the court there held that a prosecution was instituted under the Act by the laying of an information and the issue of a summons, and not by the service of the summons. Therefore the court held that it was not the service though outside the twenty-eight days, that was the governing condition, but the commencement of the proceedings. Wills, J., in the course of his judgment in that case stated that he had always understood that in criminal proceedings the commencement of them was the laying of the information. In my opinion that view is the right view to take. Ever since *Ex parte Fielding* was decided in 1861, the courts seem to have held that on a valid information a series of summonses can be issued unless, of course, there had been a determination on the merits. On this ground it seems to me that in the present case we should be guided by the decision in *Beardsley* v. *Giddings,* although it does not exactly cover the question here, and that we ought to hold that as the information was laid in proper time, the issue of the second summons on the 11th of February was not too late, since the information was the commencement of the proceedings. The case must be remitted to the justices to hear and determine.

KENNEDY and PHILLIMORE, JJ., concurred.

Appeal allowed; case sent back.

Solicitors, *Sharpe, Parker, Pritchard, Barham, & Lawford,* for *A. H. Miller,* Town Clerk, Norwich.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) May 4, 1904.

TINWELL (*Appellant*) v. MAYHOOK (*Respondent*). (*a*.)

Inland Revenue—Excise licence—Sale of spirits in bond —"Dealer in spirits"—Excise Licences Act, 1825 (6 *Geo.* 4, *c.* 81), *s.* 2.

The appellant, a ships' store merchant, was the renter of a Customs bond, and in this bond he kept, amongst other dutiable articles, a quantity of spirits. The captain of a foreign vessel in the port ordered stores for his vessel from the appellant, and amongst these goods was an order for twelve reputed quart bottles of spirits. These were taken from the appellant's bonded warehouse in the ordinary course, and were conveyed to the ship and were there sealed up by a Customs official. The seal was not broken until the vessel was at sea outside territorial waters.

Held, that the appellant was a "dealer in spirits" within the meaning of section 2 *of the Excise Licences Act*, 1825, *and required an excise licence.*

Case stated by justices in and for the county of Northumberland.

At a petty sessions holden at Blyth, in and for the petty sessional division of Bedlingtonshire, in the county of Northumberland, on the 1st of December, 1903, an information was preferred by Frederick William Mayhook, officer of Inland Revenue, the respondent, against Alfred Arthur Tinwell, the appellant, charging the appellant "for that he on the 4th day of September, 1903, at Blyth, in the said county, did deal in and sell certain spirits, to wit, twelve reputed quart bottles of spirits, without having in force such a licence as by the statute in that behalf was and is required, contrary to the form of the statutes in that case made and provided."

At the hearing the following facts were proved or were admitted by both parties:

(*a*) That the appellant is a ships' store merchant carrying on business at his office and warehouse in Blyth. In this warehouse he kept such of his stock as consisted of ships' stores, stores upon which no excise duties are payable.

(*b*) That with respect to stores on which duty was payable he was a renter of a Customs bond at Blyth, and in this bond he kept, amongst other dutiable articles, a quantity of spirits.

(*c*) That none of these spirits or dutiable articles could be taken out of this bond except under the formalities prescribed by the Custom House officials and in the presence of an officer of Customs.

(*d*) That, on the 4th of September last, the captain of a foreign vessel, called *The Amor*, ordered a quantity of stores for his vessel from the appellant in the usual course of business. Amongst these goods was an order for twelve bottles of spirits. On receiving this order the appellant followed the usual procedure to obtain these spirits from the bond, which was as follows: A document called a "stores authority" was filled up and signed by the captain. This is a request from the captain to the appellant to draw the spirits from his bonded warehouse, and the signature of the captain is attested on the back by the appellant's representative. This document was taken to the Customs House, and in pursuance of the request the bond was opened by the Customs officials, and in the presence of a Customs officer the spirits were taken out of bond and permission given to the appellant to remove the spirits by licensed cart to the ship. On the arrival of the spirits at the ship the receipt of them was attested by another Customs official there on board, and the goods sealed up by him. This seal is not broken until the vessel is at sea outside territorial waters. [Copies of the necessary documents were annexed to and formed part of the case.]

(*e*) That no stock of dutiable goods was kept in the appellant's private warehouse, or at any other place than the Customs bond, and that he neither sold nor disposed of any other spirits for consumption in the United Kingdom, but only supplied the same to foreign-going vessels. On spirits supplied to such vessels no duties are payable to the Inland Revenue.

(*f*) That the appellant had supplied vessels with dutiable goods, including spirits, in a similar manner to this since the opening of the Customs bond at Blyth in 1898. That for years previous to 1898 he had also supplied vessels, but as there was no bond at Blyth the goods had to be brought from the Tyne, but always under the same formalities.

(*g*) That the appellant made yearly returns to the Inland Revenue of the quantity of spirits he supplied to foreign-going vessels, and received from them a drawback of twopence per gallon. That on no occasion had the Inland Revenue suggested to him that he ought to obtain an excise licence to deal in spirits, nor was it known to him or to the members of the ship-store trade generally in Blyth or the neighbourhood that any licence was required.

Upon these facts it was contended by the respondents that under 6 Geo. 4, c. 81, s. 2, a licence is required by every dealer in spirits not being a retailer thereof; and by section 26 of the same Act a penalty is incurred by every unlicensed dealer in spirits not being a retailer thereof. By section 104 of the Spirits Act, 1880 (43 & 44 Vict. c. 24), a sale by retail is defined as a sale of spirits in any quantity less than two gallons or less than one dozen reputed quart bottles. A dealer's licence is therefore required by every person selling spirits in quantities not less than two gallons. This applies to persons selling spirits in bonded warehouses, as, if not, there would have been no necessity for the exemption contained in section 12 of the Excise Act, 1825 (6 Geo. 4, c. 81), as amended by section 5 of the Excise Act, 1860 (23 & 24 Vict. c. 113), and section 17 of the Revenue Act, 1867 (30 & 31 Vict. c. 90), in favour of persons selling goods in bonded warehouses in quantities not less than one hundred gallons.

For the appellant it was contended that no dealing in spirits within the meaning of the said Act had been proved. That the Act was only intended to apply to dealers for delivery or consumption within the United Kingdom, and that where there was no storage of nor dealing with spirits, except in so far as drawing from bond for export was concerned, no licence was required.

The justices being of opinion that the appellant had dealt in spirits within the meaning of the said Act without having the required licence, convicted him of the offence and fined him the mitigated penalty of £1, including costs.

The question of law for the opinion of the court was whether or not the justices were right in their determination that the appellant had dealt in spirits without a licence.

The Excise Act, 1825 (6 Geo. 4, c. 81), s. 2, provides: "There shall be raised, levied, collected, and paid unto his Majesty, in and throughout the United Kingdom of Great Britain and Ireland, the several duties of excise, or rates and sums of money hereinafter following; (that is to say,)

"For and upon every excise licence to be taken out by any maker, manufacturer, trader, dealer, retailer,

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

or person hereinafter mentioned, within Great Britain and Ireland, to be paid by such maker, manufacturer, trader, dealer, retailer, and person respectively, the respective annual sum or duty of excise in British currency hereinafter mentioned . . . Spirits. Every dealer in spirits not being a retailer thereof ten pounds."

The Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 104, provides: "The sale of spirits in any quantity less than two gallons or less than one dozen reputed quart bottles shall be deemed sale by retail."

Bruce Williamson, for the appellant.—The appellant was not a "dealer in spirits" within the meaning of section 2 of the Excise Licences Act, 1825. That section was intended to deal only with persons who had excisable commodities under their own control and who had premises for the purpose of storing them. A person like the appellant dealing in spirits which are never in his own custody or possession and incapable of being charged with duty by the Inland Revenue authorities and which are exported as in the present case, ought not be brought within the purview of the Excise Acts. There are numerous provisions in the Excise Acts that spirits which are exported abroad or goods which are taken out for ship stores shall not be liable to any duty either of customs or excise. By section 82 of the Spirits Act, 1880, "spirits warehoused may, on the prescribed bond being given, subject to the prescribed regulations and subject to the conditions, regulations, and restrictions required by any Act in force for the time being, be delivered out without payment of duty for ships' stores." The excise is purely a matter of inland revenue. The appellant is dealing in articles specially exempt from duty; he ought not to be compelled to take out an excise licence.

Sir E. Carson, S.G. (*S. A. T. Rowlatt* with him), for the respondent.—Section 12 of the Excise Act, 1825 (6 Geo. 4, c. 81), provides that it shall not be necessary to take out an excise licence for the sale of any excisable commodity, but only while it is in the import warehouse; and section 5 of the Excise Act, 1860 (23 & 24 Vict. c. 113), says this section " . . . shall not extend to exempt from liability, to take out an excise licence for the sale of foreign wine or spirits, any person who shall sell at one time any quantity less than 100 gallons thereof respectively." [He was stopped.]

Lord ALVERSTONE, L.C.J.—In my opinion, the decision in this case was perfectly right. The appellant carries on the business of a ships' stores merchant, and I have no doubt he sells, and would be glad to sell, spirits to the persons who wish to buy stores from him. It is said that in this particular transaction he ought not to be regarded as being a dealer in spirits, because the quantity of spirits which he sold quite lawfully to the captain of the ship came out of bond and was taken to the ship under the protection of the Customs Consolidation Act, 1876. However, for reasons which were indicated by my brothers in the course of this argument, it seems to me that that code of regulations was simply enacted for the purpose of protecting the revenue against goods being taken out of bond and surreptitiously getting into such a state of circumstances that the duty ought to be paid, and is certainly not in any way conclusive, and is not an argument which helps us very much on the question whether excise duty is payable or not by the appellant as a dealer. The Act of 1825 imposes a duty upon every dealer in spirits, and I agree that for dealers in spirits in the ordinary sense there are other protective sections to which counsel for the appellant called our attention—namely, as to keeping certain books, and stock books, and certain securities that his trade would be carried on in a way which could be supervised by the officers of excise. Those precautions in the case of an ordinary dealer in spirits—a man who does sell spirits and has or may have, spirits for the purpose of sale on his premises—do not do more than afford some evidence of what was thought necessary for protecting that kind of trade. Therefore we have to see whether or not there is anything in this Act which excludes from the words "a dealer in spirits"—which are the words I have just read from the schedule in question—a man who does deal or has happened to deal, and deals as part of his trade, in spirits in bond and sells them while they are in bond. I ought to say that the terms of the certificate or the excise licence, though not given in form, are really given in section 7 of the same Act, as counsel for the respondent told us. They are to contain the true name and place of abode of the person or persons taking out the same, and the true date or time of granting such licence, and the place at which the trade or business for which the licence is granted shall be carried on. Therefore, that does not of necessity contain any particulars or details as to the character of the warehouse or anything of that kind, but only identifies the person and indicates the place at which he is going to carry on this business. That being the nature of the certificate, from the time that counsel for the appellant explained to me section 12 of the Act of 1825, and particularly when we consider section 12 as amended by or extended by the provisions of the Act of 1860, I do not think there is any doubt in this case. It is clear that the Act did consider that the sale of spirits in bond might require the person who sold them to have a licence, because the section says: "It shall not be necessary for any person or persons to take out an excise licence for the sale of any foreign goods or commodities for the sale of which in any manner an excise licence is required by this Act . . ." It is perfectly obvious that those words refer to foreign goods and commodities which would be the subject of duty if they were sold in this country or imported into this country. That is made clear by the next sentence: "whilst such goods and commodities shall be and remain in the warehouse or warehouses in which the same shall have been deposited, lodged, or secured according to law, before payment of duty upon the importation thereof." Counsel for the appellant ingeniously suggested that that meant that there might a sale before the payment of duty, and it was not necessary to take out a licence for sale as a dealer before the payment of duty. I think this is not what the section means, but that those words 'before payment of duty" are only the description of bonded warehouse in which the goods have been deposited. Then the section does not make all sales of that character sales in respect to which no licence need be taken out, but it has this important proviso: "Provided always, that every such sale shall be of not less than one entire cask," and when the Legislature refer to that in the Act of 1860, they speak of it as enacting "That it shall not be necessary for any person or persons to take out an excise licence for the sale of any foreign goods or commodities, for the sale of which in any manner an excise licence is required, whilst such goods or commodities shall be and remain in the warehouse." They again repeat the language of the section and go on to say it "shall not extend to exempt from liability to take out an excise licence for the sale of foreign wine or spirits any person who shall sell at one time any quantity less than 100 gallons." Therefore, both

sections, to my mind, contemplate that the Act would have included all sales, but has limited first a smaller quantity and then a larger quantity as not being sales where a licence is required. Counsel for the appellant always assists us in these licensing cases, and in other cases too, and we pressed him to say why was that section wanted, if his view was right that all these excise licences are only required when you are selling dutiable goods—goods upon which the duty would have to be paid. He was obliged to say that they were inserted for the purpose of making it clear that a transaction which might otherwise come under the Act did not come under the Act. That is ingenious, but it does not seem to me to be consistent with the proviso. It would have been so easy to avoid all doubt by saying, "People making those sales should not be considered dealers," and then you could have understood it; but it only exempts certain kinds of sales from the necessity of a licence being taken out under an earlier section of the Act. I think, therefore, that this man does deal in spirits within the meaning of the Act of 1825. No doubt he does a most respectable and lucrative business in the sale of wines and spirits to ships, but he must do that business by being a licensed dealer and not an unlicensed dealer.

WILLS, J.—I have nothing to add to my lord's judgment.

KENNEDY, J.—I have nothing to add.

Appeal dismissed.

Solicitors for the appellant, *Ince, Colt, & Ince*, for *William Charlton*, Blyth.

Solicitor for the respondent, *The Solicitor to the Inland Revenue.*

Privy Council.

(*On appeal from the Supreme Court of Jamaica.*)

Feb. 4, 1904.

AMYOTT *v.* DWARRIS AND OTHERS. (*a.*)

Will—Construction—Eldest son of my sister.

A testator devised an estate "to the eldest son of my sister and his heirs for ever." At the date of the will the sister had two sons, but the elder of these two died in the testator's lifetime.

Held, that at the date of the will there was a person in existence answering the description in the will, and the words used were sufficient to pass the fee simple to him, had he survived the testator; but as he predeceased the testator, that there was an intestacy.

Appeal from the Supreme Court of Jamaica.

The words of the will and the circumstances sufficiently appear in their lordships' judgment.

Macnaghten, K.C., and *J. Austen-Cartmell*, for the appellant.

Norton, K.C., and *Waggett*, for the respondents.

The judgment of their lordships (Lords MACNAGHTEN, ROBERTSON, LINDLEY, and Sir ARTHUR WILSON) was delivered by

Lord MACNAGHTEN.—The point raised on this appeal is a very short one, and in their lordships' opinion free from difficulty. The question, such as it is, turns on one passage in the will of Sir Fortunatus William Dwarris. After certain limitations, which have failed or determined, he disposed of a property called "Golden Grove" by giving it in these words: "To the eldest son of my sister Frances McKeand Gibney and his heirs for ever." It appears that at the time when the testator made his will Mrs. Gibney had two sons. There was, therefore, at that time in existence a person answering the description of the "eldest son" of his sister Frances. It was contended that the word "eldest" was not properly applicable to the elder of two persons, and that, if the testator had really meant Mrs. Gibney's first-born son, he would have said "elder," not "eldest." In their lordships' opinion, that objection savours of hypercriticism. If a man has two sons, and only two, the ordinary way of speaking of the first-born, if not designated by name, is to call him the eldest son of so-and-so. There being, then, a person in existence at the time answering the description in the will, their lordships are of opinion that that person, though he died afterwards in the testator's lifetime, was the object of the testator's bounty. There is nothing in the context to warrant any departure from the proper and ordinary meaning of the words employed.

All the authorities from *Lomax* v. *Holmden*, 1 Ves. sen. 290, to *Meredith* v. *Treffry*, 12 Ch. D. 170, point in the same direction. The case of *Re Harris' Trust*, 2 W. R. 689 (1854), on which the appellate court seems to place some reliance, cannot be regarded as an authority to the contrary. The learned Vice-Chancellor who decided that case was at the time of the decision under a misapprehension as to the operation of the Wills Act. He seems to have thought that with reference to the objects of testamentary bounty the Act had an effect similar to that which it has "with reference to the real and personal estate comprised in it" (section 24), an error afterwards corrected by the Court of Appeal in *Bullock* v. *Bennett*, (1855) 3 W. R. 291, 7 D. M. & G. 283.

Their lordships will therefore humbly advise his Majesty that the appeal ought to be allowed, and that the question put ought to be answered by saying that the testator died intestate as regards the fee simple expectant upon the failure or determination of the limitations set out in paragraph 5 of the special case, and that upon the facts stated in the special case the estate is now vested in the appellant.

As an arrangement has been made as to costs, there will be no order as to costs except that the parties are to be at liberty to apply for an order to tax their their costs.

Solicitors, *Parkes & Browne; Guscotte, Wadham, & Co.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Court of Appeal.

From Manchester Assizes. (Collins, M.R., and Stirling and Mathew, L.JJ.) July 15, 1904.

HALL AND WIFE v. LEES AND OTHERS. (a.)

Master and servant—Nurse supplied by nursing association—Negligence by nurse—Liability of committee of association.

By the carelessness of a nurse supplied by the defendants, the committee of an association formed to supply trained nurses to attend on patients during illness, the female plaintiff, while under the influence of anæsthetics, was seriously burned by a hot-water bottle placed by the nurse in direct contact with her body. In an action to recover damages for the injury so sustained,

Held, that under the rules of the association the latter did not undertake to nurse the patient, but only to supply, so far as reasonable care could ensure it, a duly certified nurse, who was to be under the control and instructions of the medical man. Therefore at the time of the alleged negligent act the relation of master and servant did not exist between the association and the nurse, and the defendants were not responsible for her negligence.

Application by the defendants for judgment or a new trial in an action tried before Jelf, J., and a jury at Manchester Assizes.

The action was brought by Harry Hall and his wife, Mary Sophia Hall, against the members of the House Committee of the Oldham Nursing Association to recover damages for personal injuries sustained by the female plaintiff by reason of the negligence of a nurse who was supplied to the plaintiffs by the said association.

The plaintiffs alleged by their statement of claim as follows: That it was part of the business of the Oldham Nursing Association (the defendants) to supply trained nurses for reward for the purpose of nursing persons during sickness and assisting at operations, and that all the nurses supplied as aforesaid were engaged by the defendants and all contracts for the supply of such trained nurses were entered into with the defendants. That in March, 1902, the plaintiff, Mary Sophia Hall, was about to undergo a surgical operation, and the defendants, at the request of the plaintiffs and for reward to be paid to them by the plaintiffs, supplied two trained nurses to attend Mrs. Hall during the operation and to nurse her afterwards until her recovery. That the nurses were so negligent and unskilful in their attendance on Mrs Hall that she was severely injured. The alleged negligence was that the nurses without instructions from the surgeon who performed the operation placed hot-water bottles between Mrs. Hall's legs whilst she was unconscious under chloroform, and left them in contact with her legs during the operation and for a long time after the operation was over, and that the hot-water bottles were so hot that they severely burned Mrs. Hall's legs.

The defendants pleaded that they did not undertake to nurse Mrs. Hall, but only to find and supply her with two nurses of reasonable skill and competence to assist her at and after the operation, and to be throughout their attendance on her subject to the control and directions of the surgeons employed by the plaintiffs. Further, they pleaded that the nurses supplied by them were skilful and competent, and they (the defendants) had no power or control over them as servants, agents, or otherwise, or over their work while they were attending on Mrs. Hall.

At the trial the rules and regulations of the associa- were put in evidence, and it was further stated that the association was a voluntary association of persons who had undertaken the work of supplying trained nurses to persons in need of them within the district of Oldham, and that the wages of the nurses were paid by the association.

The material portions of the rules and regulations of the associations were as follows: "1. Name.—This institution shall be named the Oldham Nursing Association. 2. Object.—To supply aid and instruction in skilled nursing by nurses located in Oldham in accordance with these rules and regulations. 5. Officers and House Committee.—The officers shall consist of president, treasurer, and secretary or secretaries. The House Committee shall consist of the officers, with not less than seven ladies and three gentlemen, one of whom shall be a doctor. 6. Superintendent.—To be appointed by the House Committee, one month's notice for the termination of the appointment to be given on either side. Duties.—(a) To receive all applications for nursing service, and promptly attend to the same; (h) to control the work of the domestic servants; (i) to superintend the work of the nurses, and to devote what time she can command to nursing duties. 7. Nurses.—(a) Nurses shall be supplied to attend infectious cases; (b) maternity nursing shall be undertaken; (c) a proportion of nurses shall be reserved for non-infectious medical and surgical cases only. (d) Appointment and Discharge.—Nurses to be appointed or discharged by the House Committee in consultation with the superintendent. Nurses shall be recommended for appointment by the superintendent to the House Committee; for the termination of such appointment one month's notice shall be given on either side. Any nurse who infringes the rules or is guilty of misconduct is liable to dismissal by the superintendent without notice, after consultation with the president or the doctor on the House Committee, or one of the secretaries. (e) Qualifications.—Each nurse shall have had at least two years' training in a general hospital, and none shall be eligible for appointment who are over thirty-five years of age. (g) General Department.—Each nurse shall be expected to devote all her energy and skill to the work entrusted to her—viz., by affording aid and instruction for the relief of suffering, and the promotion of recovery from sickness; she shall avoid gossip, and not interfere with the domestic affairs or with the religious opinions of the patients. (h) Responsible to Superintendent.—Each nurse shall be responsible to the superintendent, to whom she shall at once refer in a case of doubt or difficulty, and shall conform to her instructions in all matters pertaining to work and conduct, and shall give to her a daily account of work done, and pay each day to the superintendent any money received for nursing. 8. Regulations as to Nurses when on Duty.—(c) Each nurse, when engaged in weekly nursing, shall be allowed eight hours' sleep and two hours' leisure daily; when on duty she shall wear the uniform provided for her. (d) When a nurse is engaged in continuous nursing and sleeps at the home, she shall be allowed ten hours out of the patient's house, the time being arranged to suit the doctor attending. (e) When at a case the nurse shall not absent herself from duty without the permission of the patient's friends. (j) Only such cases shall be undertaken as are attended by a medical man, whose instructions the nurse must implicitly follow. 10. Charges.—(a) The charges stated below are minimum charges, and may be increased at the discretion of the House Committee. (d) For continuous nursing twenty-one

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

shillings a week with board and lodging. (*k*) Payments for nursing should be made to the superintendent at the time of application; if this is not done, then to the nurse when her visits are made. (*m*) Washing to be charged at 2s. 6d. per week, which sum, as well as travelling expenses, should be paid to the nurse."

The ordinary method of dealing with an application for a nurse was to send to the applicant with the nurse a printed form headed "Oldham Nursing Association," and to the following effect: "At the request of . . . I send herewith Nurse . . . to attend the case of . . . The charge for her services will be at the rate of £ s. d. per week." This was signed by the lady superintendent. There followed certain observations for the information of the applicant. Attached to this form was a form of "Discharge and confidential report to be returned 24 hours before the termination of the nurse's services." This consisted of a statement that the nurse's services not being required after a day named she had been notified that she might leave on that day. There was a space for a report on her "efficiency as a nurse," "to be filled in by the medical attendant," and other spaces for a report on her "care and kindness in attendance on patient" and on her "general conduct," "to be filled in by employer."

In the present case the application for a nurse was made orally by Dr. Robertson, who was Mrs. Hall's medical attendant. He asked that a particular nurse whom he named might be sent, but he was informed that her services were not available. It then appeared that two nurses would be required, and two nurses were sent accordingly. The forms which were forwarded to Mr. Hall stated that each of the nurses was sent at the request of Dr. Robertson, and that the charge for the services of each of them would be at the rate of £1 11s. 6d. per week.

The evidence showed that Mrs. Hall underwent two operations, and that, when she recovered consciousness after the second operation, it was found that a hot-water bottle had been left in direct contact with her body instead of having been separated from it by a blanket, and that she thereby suffered serious injuries.

At the trial the learned judge left two questions to the jury. The first question was—Was the injury to Mrs. Hall caused by negligence on the part of the nurses or either of them? Their answer was, Yes. The second question was—Did the association undertake to nurse Mrs. Hall through the agency of the two nurses as their servants, or only to procure for her the services of two nurses? The jury answered that the association undertook to nurse her through the agency of the nurses as their servants. They assessed the damages at £300. The learned judge directed judgment to be entered for the plaintiffs for that amount.

The defendants appealed.

Montague Lush, K.C. (*T. F. Byrne* and *Arthur Page* with him), for the defendants.—Whether the verdict of the jury that there was negligence here on the conflicting evidence given was right or wrong, for the purposes of this appeal it was not challenged. The sole ground of the appeal was that on the true construction of the contract the finding of the jury to the second question could not be supported. There was no undertaking, no contract, on the part of the defendants to perform the work of nursing. All they undertook to do was to supply trained certified hospital nurses. When the nurse entered on her duties at the patient's house the defendants ceased to have any control over her so far as the details of nursing went, she received her instructions from the medical man and became the servant of the patient engaged to carry out the orders of the doctor and assist and wait on the patient during her illness as her servant for the time being.

Rourke v. *White Moss Colliery Co*, 25 W. R. 263, 2 C. P. D. 205; *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, 41 W. R. 455, [1893] 1 Q. B. 629; and *Murray* v. *Currie*, 19 W. R. 104, L. R. 6 C. P. 24, were cited.

Pickford, K.C., and *W. Ambrose Jones*, for the plaintiffs.—By the rules of the association the committee supply trained nurses on payment of certain fees to the association to nurse patients through illness, the nurses being paid regular salaries by the association. The superintendent's duty was to receive and attend to all applications for nurses; and each nurse was responsible to the superintendent, from whom she received her instructions. The committee therefore exercised general control over all the nursing staff and had power to dismiss for misconduct, incompetency, or other reasonable cause. They therefore were liable for the nurses' negligence. The jury having found that the plaintiff's injuries were caused through want of care or skill on the part of one or both of the nurses whom the defendants sent to perform the work of nursing, the defendants were liable, the relation of master and servant having been established between the association and the nurses. To say that the nurse was the servant of the doctor because she received instructions from him was as startling a proposition as it was unsound. It was true that the doctor's orders were to be carried out by the nurse, but the parting with control over a servant for a specific purpose did not relieve the master from liability arising from the servant's negligence in the performance of that special duty.

COLLINS, M.R.—This is certainly an interesting case and one of some public importance, for it has to do with a state of things which is very common and in which the community at large are very much concerned. The defendants were the house committee of an association of persons who from philanthropic motives had organized a system by which they supplied skilled nurses to attend surgical operations and other cases of sickness. They did this for persons who could not afford to pay for the attendance of nurses, and also for persons who could pay. The nurses were selected by them, and they took great care to get competent nurses. They paid them regular salaries, and in this way they were able to keep at their disposal a number of nurses of whose qualifications they were assured. In the present case the applicant for a nurse was a person who was able to pay. He required a nurse to attend his wife who had to undergo a serious operation. The application was made personally by the doctor who was attending the patient. He asked for a particular nurse, with whose capability he was acquainted, but he was unable to obtain her services. It turned out that two nurses were necessary, and two were supplied, and the operation was performed. After the operation it was discovered that, while the patient was unconscious by reason of anæsthetic which had been administered to her, one of the nurses had carelessly applied a hot-water bottle in such a way as to cause the patient a serious burn. In respect of this injury the patient's husband and herself brought this action against the association who had supplied the nurses. The question was whether the association on supplying a nurse became responsible to the patient for any negligence on the part of the nurse. That is a question the answer to which turns on what is the real contract between the parties. If by the contract the association undertook to nurse the patient, then they would be responsible

for any want of skill on the part of the person whom they sent to perform the work of nursing. If, on the other hand, all the association contracted to do was to supply the patient with a competent nurse, then, if they exercised ordinary care and skill in choosing the nurse, their responsibility was at an end, and they were not responsible for any want of care or skill on the part of the nurse.

Now, looking at the rules and regulations, what did they show? There appeared to be no other evidence, except the rules and regulations and the other printed documents to which they had been referred, as to what the association undertook to do. Did they show an undertaking to nurse or only to supply nurses? The jury had found that the association undertook to nurse. But in my opinion this is not a question of fact for the jury, but a question of law for the court on the construction of documents. It seems to be clear, on a consideration of those documents, that the undertaking of the association was to find and supply nurses as to whom they had taken all possible means to secure that they were properly qualified and efficient. That is the extent of their undertaking. The plaintiffs called attention to some rules which they said suggested the relation of master and servant between the association and the nurses. The rules only aimed at securing efficiency on the part of the nurses for the benefit of those to whom they were sent. [His lordship having referred at length to the rules and regulations and the other documents, continuing said:] The conclusion at which I have arrived is that the association did not undertake to nurse the patient, but to supply her with a nurse, so far as reasonable care could ensure it, competent to perform the duties of a nurse, who, while she was with the patient, should be under the control and instructions of the medical attendant, and should not, so far as nursing was concerned, be the servant of the association. It seems to me unnecessary to refer to any authorities, but I should like to quote a few words from the judgments in the case of *Murray* v. *Currie*, 19 W. R. 104, L. R. 6 C. P. 24. There the question arose whether stevedores engaged in loading a ship were servants of the owner of the ship. Willes, J., said: "In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself." And Brett, J., said: "I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor." Applying the principle laid down there to the present case, it cannot be said that the relation of master and servant existed so as to make the association liable for the negligence of the nurse. It follows, therefore, that the appeal must be allowed, and judgment entered for the defendants.

STIRLING and MATHEW, L.JJ., delivered judgment to the same effect.

Solicitors for the defendants, *Field, Roscoe, & Co.*, for *G. S. Claydon*, Oldham.

Solicitors for the plaintiffs, *Jaques & Co.*, for *J. Armstrong*, Oldham.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — July 13, 1904.

CHAPMAN *v.* WINSON. (*a.*)

Principal and agent — Commission — Sale of house — "When and if the purchase is completed by private treaty."

The defendant, who had a house for sale, agreed with the plaintiff that if the latter introduced to him a person within a week who should become the purchaser of the house, he would pay the plaintiff as and by way of commission a sum of £50 "when and if the purchase is completed by private treaty." The plaintiff introduced a lady, who signed a contract to purchase the house and paid the defendant a deposit. The lady was, however, unable to carry out the contract, and an arrangement was come to between her and the defendant that the latter should release her from the contract and should retain the deposit, and this was done. The plaintiff having claimed commission,

Held, that the commission was payable only in the event of the purchase being completed in the ordinary legal meaning of the word by the execution of the conveyance and the handing over of the purchase-money, and that, as the purchase went off through no default of the vendor, the plaintiff was not entitled to commission.

Judgment of the Divisional Court (52 *W. R.* 478) *reversed.*

Appeal from the judgment of a Divisional Court (Wills and Kennedy, JJ.) reversing the judgment of Judge Austin sitting at the Bristol County Court (reported 52 W. R. 478).

The action was brought to recover commission. In June, 1902, the defendant, who was a trustee of the property, was trying to sell the Full Moon Hotel, particulars of which he gave to the plaintiff, who knew a lady who was a likely purchaser. On the 8th of September, 1902, the defendant gave the plaintiff the following commission note: "I have seen Mr. Dunwell (Bass & Co.'s manager), and he is agreeable that if your friend is named and introduced within one week and becomes the purchaser of the above hotel that you shall be paid as and by way of commission the sum of £50 when and if the purchase is completed by private treaty. This is, of course, subject to your friend not having previously been introduced and no one else being entitled in respect of the same introduction."

The lady was thereupon introduced to the defendant by the plaintiff, and on the 11th of September she signed a contract agreeing to purchase the hotel from the defendant for £2,000, and by way of deposit she paid the defendant £200. Subsequently she found that she would be unable to complete the contract, and she wrote to that effect to the plaintiff, who on the 30th of October wrote the following letter to the defendant: "I have this morning received a remarkable letter from the lady *Re* Full Moon, in which she says the landlords have upset her. I am perfectly willing to help try and get her to complete, but whether she does now do so or not, as per custom I shall look to you for my commission out of her deposit."

An arrangement was thereupon come to between the defendant and the lady whereby it was agreed that the defendant should release her from the contract, and that he should retain the deposit of £200, and this was accordingly done. The plaintiff thereupon brought this action in the Bristol County Court claiming commission.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The county court judge gave judgment for the defendant, being of opinion that in construing the commission note he was bound to give some effect to the words "when and if the purchase is completed by private treaty," and that inasmuch as the purchase never was completed in the ordinary meaning of the word, and inasmuch as the purchase went off through no default of the vendor, the plaintiff was not entitled to commission. The Divisional Court held that the word "completed," as used in the commission note, did not mean completed in the ordinary legal sense—namely, by execution of the deed of conveyance and the handing over of the purchase-money; that the purchase was "completed by private treaty," the vendor being bound by the contract to sell and the purchaser to buy; and that the plaintiff was entitled to commission.

The defendant appealed.

Montague Lush, K.C., and *Brooke Little*, for the defendant.

D. M. Kerly and *A. J. Lawrie*, for the plaintiff.

The following cases were referred to: *Beningfield* v. *Kynaston*, 3 Times L. R. 279; *Grogan* v. *Smith*, 6 Times L. R. 427, 7 Times L. R. 132; *Lott* v. *Outhwaite*, 10 Times L. R. 76; *Passingham* v. *King*, 14 Times L. R. 392; and *Nosotti* v. *Auerbach*, 15 Times L R. 140.

COLLINS, M.R.—This is an appeal from the judgment of the Divisional Court, reversing the judgment of the judge of the Bristol County Court in an action by the plaintiff to recover commission. The county court judge held that the plaintiff was not entitled to commission upon the ground that the conditions precedent which had to be performed in order to entitle him to commission had not in fact been performed by him. The question turns wholly upon the construction of this particular commission note. By it the defendant agreed that "if your friend is named and introduced within one week, and becomes the purchaser of the above hotel, you shall be paid as and by way of commission a sum of £50 when and if the purchase is completed by private treaty. This is, of course, subject to your friend not having previously been introduced and no one else being entitled in respect of the same introduction." In fact, a lady was introduced by the plaintiff, and that lady entered into a contract to purchase the hotel for £2,000, and she agreed to pay a deposit of £200 at once, and £1,800, the balance of the purchase-money, later. She paid the deposit, and then found that it was out of her power to complete the purchase. In these circumstances the plaintiff wrote a letter to the defendant advising him of that fact, in which he said: "I am perfectly willing to help try and get her to complete, but whether she does now do so or not as per custom I shall look to you for my commission out of her deposit." That raises the question at issue. In that letter the plaintiff placed his own construction upon the word "completed," saying that the lady had not completed, and yet by what he called "custom" he claimed to be entitled to commission. The county court judge found that upon the true construction of the commission note completion meant completion by payment of the purchase-money, and that therefore the condition upon which the commission was to become payable was not fulfilled. The Divisional Court took a different view, and dwelling upon the later words "by private treaty," held that those words were attached to and governed the previous word "completed," and that they meant that when and if the treaty to purchase was completed by an agreement, then whether the actual purchase was completed or not, the commission became payable. It is, no doubt, possible for a party to agree to pay commission in any event he pleases, and therefore we must see what is the agreement which the parties have made in the present case. It seems to me that upon the true construction of the contract the parties have made it a condition precedent to the right to commission on the introduction of a purchaser that the purchase should be completed—that is to say, that the purchase-money should be paid over. The commission note emphasises this twice. It first states "if your friend is named and introduced within one week and becomes the purchaser." That does not mean a mere agreement on paper by some one to become the purchaser, but it means that the person introduced shall actually become the purchaser. For instance, it cannot be supposed that commission would be payable if a crossing-sweeper entered into a contract to become the purchaser. There is no question here of the purchase going off owing to the default of the vendor. Then the commission note later on speaks of the commission being payable "when and if the purchase is completed by private treaty." As my brother Stirling has pointed out during the argument, those words cannot mean that the agreement of purchase is to be completed by another agreement or treaty. They mean that the purchase is to be completed in the ordinary sense. The contract shows that the defendant meant to exclude any liability to pay commission upon a mere agreement to purchase. He intended that the transaction should begin by a treaty of purchase to be carried to completion by payment of the purchase-money. This view is in accordance with the authorities which have been referred to. The question depends in each case upon the terms of the particular contract, but in *Lott* v. *Outhwaite* it seems to me that in all its essentials the contract was the same as that in the present case. There Lindley, L.J., in giving judgment, said: "In order to entitle himself to his commission the agent must prove either that the purchase had been completed, or that, if it had not, the non-completion was due to the default of the vendor." The learned Lord Justice there used the word "completion" in the same sense as it was used in the contract in the present case. He went on: "Had the purchase in the present case in any fair business sense of the word been 'completed'? The answer must be unquestionably, No. Deane had admitted in cross-examination that he was unable to complete. The vendor had not been in default. He gave the purchaser facilities for completing the contract in bits. The purchaser paid £3,000, and the vendor received a further sum of £3,000 from sub-purchasers. There the thing stopped. The purchase had never been completed, and there had been no default of the vendor." In that case the contract did not go on, because the whole of the purchase-money was not paid, and therefore the purchase was not completed. The same thing in effect has happened here. The appeal must, therefore, be allowed.

STIRLING, L.J.—I am of the same opinion. The real question which we have to decide is, what is the true meaning of the commission note in the present case. Mr. Kerly admitted that, if the words "by private treaty" had not been inserted after the words "when and if the purchase is completed," he would be out of court, and indeed he could not have avoided that admission by reason of the decision of this court in *Lott* v. *Outhwaite*. The Divisional Court attached great weight to the words "by private treaty," and thought that the defendant's contention required them to transpose those words and to place them next after the word "purchase," and that it would be a wrong construction of the agreement so to trans-

pose them. The Divisional Court in reality thought that by reason of the words "by private treaty" coming immediately after the word "completed" the agreement meant, "when and if an agreement to purchase is completed by private treaty." That seems to me to be a wider departure from the language of the commission note than the mere transposition of the words "by private treaty." With all respect I am unable to take the same view of the commission note as that taken by the Divisional Court, which, if I may be allowed to speculate on the matter, does not seem to me to be in accordance with the intention of the parties.

MATHEW, L.J.—I am of the same opinion. Each case must be determined according to the terms of the particular commission note. Everything here points to this, that the commission was intended to be payable when, and only when, the purchase-money was paid to the defendant. The vendor was only a trustee of the property, and he had no personal interest in the matter beyond that of a trustee. In these circumstances, the commission note was drawn up. It seems to me that the material words are "when and if the purchase is completed." Here the purchase never was completed.

Appeal allowed.

Solicitor for the plaintiff, *W. G. Card*, for *E. Woodhouse Veale*, Bristol.

Solicitors for the defendant, *Darley & Cumberland*, for *F. J. Tarr*, Bristol.

High Court of Justice.

Chan. Div. } Farwell, J. } July 9, 1904.

In re BEST (DECEASED).

JARVIS *v.* BIRMINGHAM CORPORATION. (*a.*)

Will—Charity—"Charitable and benevolent"—Validity of gift—Construction.

Where a testator by his will gave the residue of his real and personal estate to "charitable and benevolent" institutions,

Held, that there was no uncertainty, and that the gift took effect as a charitable bequest.

In re Sutton, Stone *v.* Attorney-General, 28 *Ch. D.* 464, *followed.*

Adjourned summons.

By his will dated the 12th of June, 1899, Thomas Best, the testator, after making divers dispositions of his property, gave, devised, and bequeathed all the residue of his real and personal estate unto his trustees therein named and their heirs, upon trust to pay thereout his just debts and legacies, and the testator gave, devised, and bequeathed all the ultimate residue of his said real and personal estate unto the Lord Mayor and corporation of the city of Birmingham upon trust to apply the same and the income thereof in aid of such charitable and benevolent institutions in the city of Birmingham and the Midland counties in such manner and in such proportions as the said lord mayor and general purposes committee for the time being of the said corporation should in their sole discretion from time to time determine and direct.

The testator died on the 1st of June, 1903, and his will was duly proved by the executors therein named.

The present application was made by trustees of the will, in order to obtain the opinion of the court as to the validity of the said charitable gift.

Hewett, for the trustees of the will.

Methold, for the Birmingham Corporation.—A gift to charitable *or* benevolent objects has been held void for uncertainty, but a gift to charitable *and* benevolent objects has never been so held. In several Scotch cases similar words have been held to be good, and in one case, *Cobb* v. *Cobb's Trustees*, 21 Rettie 638, the actual words in question in the present case were upheld. On this construction, "charitable" governs "benevolent," and there is no uncertainty: *In re Sutton, Stone* v. *Attorney-General*, 28 Ch. D. 464, 33 W. R. Dig. 243.

Parker, for the Attorney-General, took the same view.

Preston, for the next-of-kin of the testator.—Scotch cases are not binding in this court and in the present instance they are not applicable; the statute 43 Eliz. c. 4, does not apply to Scotland, and the Scotch courts will not execute a trust: *Blair* v. *Duncan*, 50 W. R. 369, [1902] A. C. 37.

Ellis v. *Selby*, 1 My. & C. 286, was also cited.

FARWELL J., in giving judgment, said: On the construction of the words of the will, in my opinion the gift is good. The words "charitable and benevolent" must be taken as referring to one class of objects. I cannot, as I am asked to do, infer from the wording of the will that the testator intended two classes of objects to benefit. If I did so it would be in effect to read the words of the gift as "charitable *or* benevolent." I am not surprised that, owing to the technical meaning that the word "charity" has acquired in the English law, the testator, if he wished the charities which were to benefit under his will to be those of a benevolent nature, should insert words to give effect to such wish. The effect is that any object in order to take under the gift must be a charitable one in the legal sense, and further, that it must be benevolent as well.

Cases decided in the Scotch courts are in no sense binding here, and for the reasons that have been given in argument, in my opinion, the Scotch cases that have been cited are inapplicable to the present case.

The *dictum* of the court in *Ellis* v. *Selby*, 1 My. & C. 286, was merely interlocutory and is overruled. This is outweighed by *In re Sutton, Stone* v. *Attorney-General*, 28 Ch. D. 464, and I must follow it.

The result is, therefore, that the gift in question is good as a charitable bequest.

Solicitors for the trustees of the will and the Birmingham Corporation, *Sharpe, Parkers, & Co.*, for *E. O. Smith*, Birmingham.

Solicitors for the next-of-kin, *Stow, Preston, & Lyttleton*, for *Alfred Pointon*, Birmingham.

Solicitor for the Attorney-General, *The Treasury Solicitor.*

Chan. Div. } Buckley, J. } July 21, 22, 1904.

MILWARD *v.* BARRY URBAN DISTRICT COUNCIL. (*a.*)

Local government—Education—Scheme—Education committee—Appointment by local authority—Power of local authority to determine order of retirement of members—Determination by local authority—Subsec-

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

quent variation of order of retirement—Validity—Education Act, 1902 (2 *Ed.* 7, *c.* 42), *ss.* 17 (1), 21 (3).

A district council, as the local education authority under the Education Act, 1902, *established an education committee, which was constituted in accordance with a scheme made by the council and approved by the Board of Education. The scheme provided that the committee should consist of nine members, each of whom was to hold office for three years; but it was provided that one-third go out of office on the* 1st *of May,* 1904, *and in each succeeding year. The council was to determine the order in which they should retire. The council resolved that the plaintiff should be a member of the committee, and should retire on the* 1st *of May,* 1905. *Subsequently the council resolved that he should retire on the* 1st *of May,* 1904.

Held, that the second resolution was ultrà vires.

Motion.

The Barry Urban District Council, as the local education authority for the urban district of Barry, under section 1 of the Education Act, 1902, established an education committee which was constituted in accordance with the scheme made by the council and approved by the Board of Education.

The scheme provided that the education committee should, when complete, consist of nine members, of whom five were to consist of members of the council. Under clause 6, the five members of the committee who were elected as members of the council were not to hold office after they had ceased to be members of the council, and subject thereto, and to another provision, immaterial to be here stated, the members of the committee were to hold office for a period of three years, "provided nevertheless that one-third shall go out of office on the 1st day of May, in the year 1904, and in each succeeding year. The council shall determine the order in which they shall retire."

The proceedings of the council are regulated by standing orders framed under the authority of the Local Government Act, 1894, s. 199, and the Public Health Act, 1875, Schedule I.

Under standing order No. 19, notices of motion are to be given in writing five days before the meeting of the council.

Under No. 35, no motion to rescind any resolution which has been passed within the preceding six months, is to be in order, unless one month's notice thereof has been given, and unless the same has been mentioned in the notice of the meeting at which it is to be discussed.

Under No. 40, all or any of the standing orders may be suspended for any specific purpose by a two-thirds majority of the council.

At the annual meeting of the council, held on the 20th of April, 1903, nine persons, including the plaintiff and four other members of the council, were appointed members of the education committee. It was resolved that three members of the committee, of whom the plaintiff was not one, should retire at the end of the first year, that three other members, including the plaintiff, should retire at the end of the second year, and that the remaining three should retire at the third year.

Owing to the redistribution of the wards in the urban district of Barry, the whole of the members of the council went out of office on the 15th of April, 1904, on which day there was an election, the plaintiff again being elected as a member of the council.

On the 18th of April, 1904, the annual meeting of the council was held. At this meeting, the standing orders having been suspended by the requisite majority it was resolved "that so much of the resolution passed by the council on the 20th of April, 1903, deciding that Miss M. E. Meredith should retire from the education committee at the end of the first year, and that Mr. Milward (the plaintiff) should retire from such committee at the end of the second year, be rescinded, and that in lieu thereof Miss M. E. Meredith retire on the 1st of May, 1905, and Mr. J. Milward (the plaintiff) retire on the 1st of May, 1904."

Subsequently to the passing of this resolution the council interfered with and prevented the plaintiff from attending at and acting as a member of the education committee.

The plaintiff accordingly brought an action against the council asking for a declaration that the resolution of the 18th of April, 1904, was *ultrà vires*, and that he was entitled to act as a member of the education committee until 1905. He asked for an injunction against the council.

It was arranged that the hearing of a motion for an interlocutory injunction should be treated as the trial of the action.

Under section 17 (1) of the Education Act, 1902, a council having powers under the Act is to establish an education committee, or education committees, constituted in accordance with a scheme made by the council and approved by the Board of Education.

Under section 21 (3), a scheme under the Act, when approved, is to have effect as if it were enacted in the Act, and any such scheme may be revoked or altered by a scheme made in like manner and having the same effect as an original scheme.

Buckmaster, K.C., and *O. Leigh Clare*, for the plaintiff.—The statute and the scheme together constitute a complete code of all the rights of all parties. There is no power given to the council to enable it from time to time to vary the order of retirement of the members of the education committee. Consequently as soon as the council has once fixed the order of retirement, its powers in this matter are exhausted.

Astbury, K.C., and *Lushington*, for the defendant council.—There is a distinction between acts of the council which are done under the Education Act and the scheme, and acts which are done by virtue of its own discretion. Thus we agree that the plaintiff once having been elected a member of the education committee, could not be ousted before his term of office had expired. But it was open to the council, in the exercise of its own discretion, provided that it did not transgress the provisions of the scheme, to vary the order of retirement of the members of the committee, and thus cut short the plaintiff's term of office. It might further be objected that the plaintiff has no title to sue. It is clear from section 17 (2) of the Act that the committee has no property, and membership of the education committee is, therefore, merely an administrative office which confers no vested right on its holders. *Aslatt* v. *Corporation of Southampton*, 29 W. R. 117, 16 Ch. D. 143, and *Livingstone* v. *Mayor of Westminster*, 52 W. R. 395, [1904] 2 K. B. 109, are distinguishable on this ground. The council, however, has no desire to press this objection.

BUCKLEY, J., after reading the above-cited section of the Education Act, and referring to the scheme, continued: Now it is to be noticed that the Act simply provides that the council is to establish an education committee. The members of the committee, how they are to retire, and all other details are left, so far as the Act is concerned, to be determined under the word "establish." The council is to establish the committee, determine its constitution, and so on, and then that which they so establish is to be "the education committee." Under the term "establish" they

either could, or they could not, determine the method of retirement. If they could not determine the method of retirement, of course they could not resolve that one of the members should retire at a particular date. I have doubt myself that they could determine the method of retirement. If they determine the method of retirement, could they reserve to themselves power from time to time to vary the method of retirement which they had once established under the Act? I think not. What they did was this. [His lordship read the resolutions passed at the two meetings of the council, and continued:] That is to say, the council purported to rescind the resolution at which it had previously arrived, that Mr. Milward should retire at the end of the second year. I think it had no power to do so. When, in 1903, the council passed the resolution that he be appointed, and that he do retire at the end of the second year, it was *functus officio* until it procured the approval of a new scheme under section 21 (3) of the Act. The council had appointed Mr. Milward to be a member of the education committee to hold office until the 1st of May, 1905.

The argument on the other side really comes to this, that by introducing into the scheme the words, "the council shall determine the order in which they shall retire," they had provided that the council shall from time to time determine the order in which they shall retire. I do not think that they had any power to do that. Their own power was to make a scheme which was to be a final scheme, and they could not make a scheme as to which they could say, "This is not to be a final scheme, but is to be revocable and alterable as we from time to time think proper." The Act of Parliament prohibits that by section 21 (3), which says that a scheme may be revoked or altered by a scheme made in like manner, but not otherwise. I do not think that they had any power to reserve to themselves by the scheme any authority to vary from time to time that which they had done under the scheme. I think that the effect of this resolution of 1903 is just as if they had written in the scheme, "the members shall consist of nine people, of whom Mr. Milward shall be one, and Mr. Milward shall hold office until 1905." I do not think that they had any power to alter that.

A question was suggested, though Mr. Astbury said he was not in a position to raise it, as to whether Mr. Milward could sue in respect of an office in respect of which he had no property—a mere administrative office. Of course the question would be capable of being raised somehow by the defendants, or others interested in being in office, but Mr. Astbury does not raise the question that the plaintiff is not the proper person to sue, and asks for a decision, and says that there is no defect as regards the power to sue.

I think, therefore, that the plaintiff is entitled to a declaration that the resolution that he should retire in 1904 is *ultrà vires*, and that he is entitled to act as a member of the committee until May, 1905, and that an injunction must go to restrain the defendants from acting contrary to the Act.

Solicitors, *Burton, Yeates, & Hart*, for *J. A. Hughes*, Barry; *Leonard West*, for *T. D. Tordoff*, Barry.

K. B. Div. (Channell, J.) July 1, 1904.

ALIANZA CO. (LIMITED) v. BELL (SURVEYOR OF TAXES). (a.)

Inland Revenue—Income tax—Company resident in United Kingdom—Trade carried on partly in the United Kingdom and partly abroad—Exhaustion of capital—Caliche beds—Manufacture from caliche of nitrates and iodine—Exhaustion of beds—Deduction from gross profits of the cost of raw material—Income Tax Acts, 1842 (5 & 6 *Vict. c* 35), *s.* 100, *Schedule D, case* 1, *rr.* 1, 3; *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

A company purchased nitrate grounds in Chile. The business of the company was to manufacture from the "caliche" dug up from the surface of the nitrate grounds, at works situated some miles distant, nitrates and iodine, from the sale of which their profits were made. In assessing the profits of the company to income tax under Schedule D, the company claimed a deduction in respect of the cost of the raw material, the "caliche," as being a disbursement or expense for the purposes of their trade.

Held, that the company must be treated as a company formed for the purpose of working a bed of "caliche"; that the exhaustion of the "caliche" was in the nature of expenditure of capital, and that no allowance could be made in respect of it, although the beds were being exhausted.

Case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London, upon an appeal to them by the Alianza Co. (Limited) against an assessment made upon them under Schedule D of the Act of 16 & 17 Vict. c. 34 for the year ended the 5th of April, 1901, of £67,950 based on the company's printed accounts for the three preceding years ended the 31st of December, 1899.

The material facts set out in the case were as follows:

The appellant company is an English company and was, incorporated on the 11th of June, 1895, under the Companies Acts, 1862 to 1890, with memorandum and articles of association, and has a registered office at 3, Gracechurch-street, in the city of London.

The appellants are the owners of nitrate grounds known as Alianza, in the province of Tarapaca, in the Republic of Chile, containing 361 Peruvian estacas, or thereabouts, with the buildings and machinery thereon; and they have erected a factory and acquired for refuse ground other lands immediately adjoining the said nitrate grounds, and they have acquired wells on grounds for sources of water supply at Pozo Quinto and elsewhere; and they have also acquired and hold in connection with the said nitrate grounds lands at the port of Chucumata, some of which are held by them absolutely and other parts of which are held for terms of years. The appellants manufacture from "caliche," nitrates and iodine, and export the same for sale.

The objects for which the company was established were as stated in the memorandum of association to be (*inter alia*)—(*a*) "To acquire and take over the nitrate grounds known as 'Alianza' in the province of Tarapaca, in the Republic of Chile, containing 361 Peruvian estacas, or thereabouts, with the buildings and machinery thereon, and a site for the erection of a factory and for refuse ground, also other lands immediately adjoining the said nitrate grounds and certain lands at the port of Chucumata, together with all rights acquired in connection therewith being the property of Messrs. Gibbs & Co., of Iquique,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Chile, and with a view thereto to enter into and carry into effect, with or without modification, the agreement referred to in clause 5 of the articles of association of this company." (*b*) "To carry on the business of manufacturers and exporters of and dealers in nitrates, iodine, and other products." (*d*) "To open, work, explore, develop, and maintain the nitrate grounds or deposits, minerals and other properties and works of the company."

The capital of the company is £1,000,000, divided into 200,000 shares of £5 each. Articles 81 and 82 relate to the powers of directors and include powers as therein mentioned of issuing debentures, bonds, mortgages, debenture stock, and other securities. Article 83 relates to reserve fund, and provides as follows: "The directors before recommending any dividend may carry to a reserve fund such assets as they think proper, and such reserve fund shall be available to meet contingencies or for dividends or for making good loss or depreciation or for repairing, improving, and maintaining any of the property of the company and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and subject to clause 4 hereof the directors may invest the reserve fund upon any investments which are or may be authorized by law in England as investments for trustees, and the directors may from time to time deal with and vary such investments and dispose of all or any part thereof for the benefit of the company and divide the reserve fund into such special funds as they think fit, and shall not be bound to keep any of the assets constituting such reserve fund separate from the other assets of the company." Article 85 provides that: "The directors may from time to time write off from the amount standing in the books of the company, to the credit of cost of any assets of the company or on any other account, such sums as the directors may consider reasonable or proper either for depreciation or on account of bad or doubtful debts or otherwise howsoever." Article 96 provides that: "The cost to the company of and incident to the acquisition of any property may for the purposes of the balance-sheet be taken into account in estimating the value of such property and may be spread over a series of years."

By agreement dated the 14th of June, 1895, the nitrate grounds known as Alianza referred to in the memorandum were duly acquired from Messrs. Gibbs & Co., and the company took possession of the said property and the other properties referred to in the agreement. They erected large manufacturing works (termed officina) in Chile on the said property. The raw material (caliche) from which nitrate is produced is found in deposits upon the said nitrate grounds either at or close to the surface, and in layers covering the said nitrate grounds about six feet in depth. The chief value of the nitrate grounds consists in the caliche, which is found on the land, and, when the same has been worked out and exhausted, the commissioners are of opinion that the land, machinery, and plant will be of little value. Before the purchase of the nitrate grounds acquired by the appellant company, the same had been examined and tested by numerous bore holes for the purpose of ascertaining the presence and extent of the layers of caliche.

The process of manufacture which has been, and is, followed by the appellant company is as follows: The raw material (caliche), which usually contains about 30 per cent. of nitrate of soda, is loosened in the ground by the means of explosives, and is then dug up and carted or railed to the works. It is then crushed and subjected to various processes of manufacture, and is then bagged and sent by rail to the ports and shipped. To produce nitrate of potash, subject to certain modifications of detail in manufactures, the general treatment is the same. The "caliche" on the said nitrate grounds owned by the appellant company is year by year consumed and worked out, being the raw material used for the production of the nitrates and iodine.

The exact amount of "caliche" used by the appellants in any year can be ascertained without difficulty.

The appellants' gross profit on takings are wholly derived from the sale of nitrate and iodine, the raw material of which is extracted from the said grounds as aforesaid. According to the report of the company for the year 1898 it is stated that a sum had been advanced by Messrs. Antony Gibbs & Sons for working capital, which sum had since been liquidated principally by the issue in January, 1898, of 2,000 5 per cent. debenture bonds of £100 each (£200,000), which issue would be gradually redeemed by annual drawings during a period of about fifteen years or sooner at the discretion of the directors. In the report of the directors submitted to the shareholders at the sixth annual general meeting of the company on the 27th of June, 1900, the directors stated that "the gross profits arising from nitrate and iodine shipped during the year amount to £101,699 17s. 2d., and the balance at credit of profit and loss, including the balance brought forward from 1898, amounts to £88,186 12s. 5d., of which total £83,000 1s. 4d. was earned during the year." The balance of profit and loss was divided as follows: A dividend of 6 per cent. on the share capital, £60,000; redemption of capital account, £25,000; carried forward to 1900, £3,186 12s. 5d.—£88,186 12s. 5d. "The directors are of opinion that, so long at all events as any debentures of the company are outstanding, a fund should be formed to meet the yearly exhaustion of the grounds and to redeem the capital expended on machinery and plant which will be of but little value when the grounds are completely exhausted. The board therefore propose to form a redemption of capital account and to credit this account with £25,000 out of the earnings of the year under review."

The appellant company contended that the nitrate grounds not being situate in England they could not be assessed under Schedule A of the Income Tax Acts, and that the Crown could only assess, and had in fact only assessed, the appellants under Schedule D, case 1, in respect of profits produced by a trade, manufacture, adventure, or concern partly carried on in England and partly abroad, according to the case of *San Paulo Railway Co.* v. *Carter*, 44 W. R. 336, [1896] A. C., p. 31, and *Bank of Mexico* v. *Apthorpe*, 39 W. R. 564, [1891] 2 Q. B. 378; they contended that the facts showed that part of the expenses of the trade or business is the purchase or acquisition of raw material, which is worked up into the finished article for the purposes of sale and produces a profit, and that the profits ought to be ascertained on the same principle as those of any other business which consists in the purchase and working up of any raw material so as to produce profit, and that, in estimating the balance of the appellants' profits and gains, a deduction ought to be made for the actual cost of the raw material worked up in the year as being a disbursement or expense, being money wholly and exclusively laid out or expended for the purposes of the appellants' trade. It was further contended that the fact that the stock of raw material required for a series of years was purchased at one operation could make no difference in principle, and the case of a wine merchant laying in a stock to ripen for sale was referred to as being analogous.

The surveyor contended (*inter alia*) that the deduction claimed was inadmissible, inasmuch as the cost or value of the nitrate grounds was treated in the com-

pany's balance-sheet as a capital asset, and that any deduction therefrom or depreciation thereof must necessarily be a capital charge, and that the appellants' claim was in effect a claim for exhaustion of capital. He referred also to the case of the *Coltness Iron Co.* v. *Black*, and specially to the terms of the Lord President's judgment in the First Division, 1 Tax. Cas., pp. 307-9.

The commissioners considered the provisions of the Income Tax Acts, and, *inter alia*, the following cases, viz.: *Miller* v. *Fairie*, 16 Sc. L. R. 189; *Forder* v. *Handyside*, 24. W. R. 764, 1 Ex. D. 233, 1 Tax. Cas. 65; *Caledonian Railway Co.* v. *Banks*, 18 Sc. L R. 85, 1 Tax. Cas. 487; *Knowles* v. *McAdam*, 26 W. R. 114, 3 Ex. D. 23, 1 Tax. Cas. 161; *Coltness Iron Co.* v. *Black*, 29 W. R. 717, 6 App. Cas. 315, 1 Tax. Cas. 287; *Watney & Co.* v. *Musgrave*, 28 W. R. 491, 5 Ex. D. 241, 1 Tax. Cas 272; *Gillat and Watts* v. *Colquhoun*, 33 W. R. 258, 2 Tax. Cas. 76. There was no evidence as to the proportion of the purchase-money or consideration applicable or attributable to the "caliche" as distinguished from the nitrate grounds and other subjects of purchase, nor was there any evidence as to the cost or quantity of the raw material or of the number of years it would take to exhaust the nitrate fields. The commissioners disallowed the claim of the appellant company, and confirmed the assessment.

Danckwerts, K.C., and *Bremner*, for the company.

S. A. T. Rowlatt (*Sir R. B. Finlay, A.G.*, with him), for the Crown.

The following cases were also cited in addition to those referred to in the special case during the argument: *Secretary of State for India* v. *Scoble and Others*, 51 W. R. 580, [1903] 1 K. B. 494, [1903] A. C. 299; *Addie & Sons*, 1 Tax. Cas. 1; *City of London Contracts Corporation* (*Limited*) v. *Styles*, 2 Tax. Cas. 239; *Edinburgh Southern Cemetery Co.* v. *Kinment*, 2 Tax. Cas. 516; *Tennant* v. *Smith*, 3 Tax. Cas. 158.

The argument, as will be seen from the judgment, turned on the question whether the undertaking of the company ought to be regarded as that of a manufacturing company, or one whose business consisted in working the nitrate grounds in the same way as minerals are worked by a mining company. In the former case the company would be entitled to deduct in respect of the caliche—the raw material they manufactured the nitrates of soda and iodine from, and by the sale of which they derived their profits—consumed each year from their property, which was thus year by year being exhausted and decreased in value.

CHANNELL, J.—In this case I have to deal with an appeal by the Alianza Co. from an assessment to income tax, and the ground of the appeal is that they were improperly disallowed a deduction which they claimed from the amount at which they were assessed in respect of the cost price to them of material called caliche which they consumed in the course of the manufacture of nitrates, upon the sale of which nitrates there are substantial profits and from which their profits come.

The business which the company carry on appears to be this: They are the owners of certain property in Chile called at one place in the case "nitrate grounds," but which I understand comprise a tract of country upon which there is a sort of deposit of this substance called caliche, the valuable part of which consists in these nitrates. The nitrates have to be extracted by a process which I may call a process of manufacture. The plaintiffs are owners of this tract of country, and their business consists in digging up this stuff, carrying it for a considerable distance on a private railway of their own, and then dealing with it in such a way as to extract the valuable products. It is one of those cases in which the process necessarily exhausts the material, and in all cases where you have to ascertain for the purpose of rating the annual value of the annual income of an undertaking which necessarily consumes, in the course of its working, the stock upon which it starts, you always have a problem of considerable difficulty. It arises in the case of mines, quarries, and brickfields, and, for a slightly different reason, in the case of cemetery companies and so forth which have been dealt with in the same way. In most cases you have some conventional rule by which you have to go. In the case of income tax you have the Income Tax Acts, and if they deal with the case and if they provide a mode of dealing with it, that mode is the one which you must follow. Now, income tax is somewhat peculiar in some respects. An income is assessed in the same way and on the same basis whether it is permanent income or whether it is a temporary income. In some cases that is rather hard on a man. A man's earnings are dealt with for the purpose of income tax exactly as an income from some permanent investment such as Consols or something else which does not come to an end, and the income is ascertained according to that which is actually received in a year, apart from the question whether or not it is permanent. I think that circumstance affords the solution of difficulties which otherwise it would be extremely difficult to solve in reference to the mode in which you assess such an undertaking as a mine. The mineowner starts with his stock of coal or mineral in his mine and he works it out. In the course of time, if he has a leasehold interest in it, his term comes to an end, it very often is so, but even if he has not a leasehold interest, in course of time his seam of coal gets exhausted. It is quite clear that in the case of a mine in this country the mineowner pays income tax upon what he gets out of the mine, less, of course, the current expenses of getting it, but without any allowance for the original cost price to him of acquiring the mine. So with other undertakings of a similar character. All of those are assessed under Schedule A, and Mr. Danckwerts' argument is that, although that is the case when the properties are assessed under Schedule A, yet it is not the case when they are assessed under Schedule D. In the case of properties assessed under Schedule A it is property in the United Kingdom, and the assessment is upon the annual value of the property. The words are: "For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof" so much. The annual value is taken in those cases by a considerable number of decisions—including at least one in the House of Lords—to be measured by what you can get out of the property irrespective of any charge for having acquired the property in the first instance. A coal mine pays upon the coal brought to bank and sold, less the expenses in getting it there and any royalties, if it happens they are working upon royalties, but without regard to any sum that would have been paid in the first instance for the acquisition of the mine.

Now in the case of properties abroad Schedule A does not apply, but Schedule D does, and that schedule is in these words: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom"—this company for the purposes of this case is admitted to reside here—"from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains

K. B. Div. (Bigham, J.) Aug. 2, 1904.

In re L. SOLOMONS.
Ex parte THE BANKRUPT. (a.)

Bankruptcy—Practice—Claim by bankrupt to inspect the record of the minutes of the committee of inspection —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 80.

A bankrupt has no right to inspect the records of the minutes of his committee of inspection, and in the absence of exceptional circumstances the court will not give him leave to do so.

Application by the bankrupt for an order that he be permitted to inspect all records of minutes of the committee of inspection in his bankruptcy, and copies of letters addressed to creditors and others by the trustee.

On the 9th of May, 1904, the bankrupt applied to the official receiver for leave to inspect a record of the minutes of a meeting of the committee of inspection held on the 23rd of February, 1899.

The official receiver, in reply, gave the bankrupt the required permission, but pointed out that the bankrupt had no legal right to inspect the minutes.

The bankrupt, not finding what he wanted in the minutes of the 23rd of February, 1899, made further application to the official receiver for leave to search the entire record of minutes, letters, and other papers needed.

The official receiver refused to grant leave, and the inspector-general in bankruptcy declined to interfere with the official receiver's decision.

The bankrupt thereupon served notice of the present motion upon the official receiver.

The bankrupt appeared in person, and stated that he wished to search the minutes in order to obtain material for making certain charges against the trustee who had obtained his release from the Board of Trade some considerable time previous to the application.

Muir Mackenzie and *Francke*, for the official receiver.—The bankrupt has no right to inspect the minutes of the committee of inspection. The trustee is required by section 80 of the Bankruptcy Act, 1883, to keep proper books containing a record of the proceedings of the committee of inspection, and that section goes on to say, "Any creditor of the bankrupt may, subject to the control of the court, personally or by his agent inspect such books." Thus no right is given to the bankrupt by statute to inspect these records, and it would be entirely contrary to the practice, and would establish an extremely dangerous precedent, to allow him to do so. A bankrupt with free right of access to the minutes of his committee would be able to discover their intentions as to proceedings against himself or his friends and to take steps to frustrate them.

BIGHAM, J.—I think this application must be refused. It is apparently against the practice of the court to permit inspection of this kind, and the affidavit of the bankrupt does not satisfy me that there are any exceptional circumstances which ought to induce me to depart from the ordinary practice. I rather gather that the object of the application is to enable the bankrupt to formulate some sort of charge against the trustee, and I do not think that I ought to depart from the practice of the court to enable the bankrupt to take that course.

Application refused.

Solicitor, *The Solicitor to the Board of Trade.*

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). May 2.

COLLS v. HOME AND COLONIAL STORES. (a.)

Easement — Light — Prescription — Extent of right — Right for ordinary purposes.

The owner or occupier of a dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and in these cases the question to be considered is whether the obstruction complained of amounts to an actionable nuisance. The actual user will neither increase or diminish the right.

Decision of the Court of Appeal (50 *W. R.* 227, [1902] 1 *Ch.* 302) *reversed.*

Warren *v.* Brown, 50 *W. R.* 97, [1902] 1 *K. B.* 15, *overruled.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.), 50 W. R. 227, [1902] 1 Ch. 302, which reversed a decision of Joyce J.

The action was brought to restrain the defendant (the present appellant) from erecting on the site of 41, Worship-street any building so as to darken, injure, or obstruct any of the ancient lights of the respondents.

The facts are given very fully in the report in the court below and shortly in the judgment of Lord Davey.

The Court of Appeal held that there was a substantial interference with the respondents' ancient lights so far as related to two windows on the ground floor of their buildings, and granted a mandatory injunction requiring the appellant to pull down anything erected in breach of the terms of injunction.

The question turned on the amount of light which "ancient lights" gives to the dominant tenement, and the whole question is discussed at length in their lordships judgments.

Bray, K.C, and *Leigh Clare* (*Nutter* with them), for the appellant.

Haldane, K.C., and *Hughes, K.C.* (*W. E. Vernon* with them), for the respondents.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—In this case, which was tried before Joyce, J., the learned judge gave judgment for the defendant upon the ground that the plaintiffs had failed to prove any actionable wrong. although he found that the erection of the buildings of which the plaintiff complained had appreciably diminished the light which the plaintiff had previously enjoyed. The Court of Appeal, as I understand their judgment, thought this was wrong, and ordered a mandatory injunction to pull the premises down so as to restore all the light that had been previously enjoyed. If this principle should be sanctioned by your lordships, it would be for the first time that, in this House at all events, such a principle had been determined. I do not deny that authorities may be found for it, some of which have been cited at the bar; but I do not think that the exact question which is now in debate has ever been brought before this House until now.

The question may be very simply stated thus: After an enjoyment of light for twenty years, or, if

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the question arose before the Prescription Act, for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at the end of such a period? If that were the law it would be very far-reaching in its consequences, and the application of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to utilize their own land. Strictly applied, it would undoubtedly prevent the erection of many buildings which have hitherto been admitted to be too far removed from others to render any obstruction of light to be actionable; but if the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of forty-five degrees, but any appreciable diminution of light which has been enjoyed (that is to say, has existed uninterruptedly) for twenty years constitutes a right of action, and gives a right to the proprietor of a tenement that has had this enjoyment to prevent his neighbour building on his own land. I do not think this is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none. If the same proposition against which I am protesting could be maintained in respect of air, the progressive building of any town would be impossible. The access of air is undoubtedly interfered with by the buildings which are being built every day round London. The difference between the town and country is very appreciable to the dweller in cities when he goes to the open country or to the top of a mountain or even a small hill in the country; but would the possessor for twenty years of a house on the edge of a town be at liberty to restrain his neighbour from building near him because he had enjoyed the free access of air without buildings near him for twenty years? No doubt this is an extreme case, but it is one of the extreme cases which tries the principle.

The truth is that, though there were objections to ask a jury whether the enjoyment *talis qualis* was such that they might presume a lost grant when nobody supposed that such a grant was ever really made, yet it gave the opportunity of considering what was the extent of the supposed grant; and if anything so extreme as I have just supposed were claimed, no jurymen in their senses would have affirmed such a grant. The statute upon which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The statute literally construed by the use of the words "the light" would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it; yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof; but though I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think the language of the statute has led to some of the decisions which your lordships are now called upon to review. Certainly, in the older decisions which have been brought to your lordships' notice in counsel for the appellant's very able argument, the proposition which, as I have said, underlies the judgment now under appeal finds no place.

Lord Hardwicke, long ago, in 1752—*Fishmongers Company* v. *East India Company*, 1 Dick. 163—dealing with this very question, the alleged obstruction to light, laid down what I believe to be law to-day. "It is not sufficient," he said, "to say that it will alter the plaintiff's light, for then no vacant piece of ground could be built on in the city, and here there will be 17ft. distance, and the law says it must be so near as to be a nuisance." Lord Cranworth, in *Clarke* v. *Clark*, 14 W. R. 115, L. R. 1 Ch. App. 16, adopted the same test, and his observation, though a subsequent decision of his seemed to throw doubt upon it, has received the assent of some of the most learned judges who ever sat upon the English bench. I think that the whole subject has been confused by certain decisions which are dependent on the facts proved, and were incautiously reported as laying down principles of law, when they were, in my view, only intended to be findings of fact in that particular case. At all events, I am prepared to hold that the test given by Lord Hardwicke is the true one, and I do not think a better example could be found than the present case to show to what extravagant results the other theory leads.

The owner of a tenement on one side of a street forty feet wide seeks to restrain his opposite neighbour from erecting a room which, when erected, will not then be of the same height as the house belonging to the complaining neighbour; and the only plausible ground on which the complaint rests is that on the ground floor he has a room not built in the ordinary way of rooms in an ordinary dwelling-house, but built so that one long room goes through the whole width of the house to a back wall, which has, however, no window at the back or sides, and which was therefore, at the back of it, too dark for some purposes without the use of artificial light even before the building on the other side of the street was erected. I think that no tribunal ought to find as a fact that the building is a nuisance; and, altogether apart from the inappropriateness of the remedy by injunction, I am of opinion that the plaintiff has no cause of action against the defendants. The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and whether in each case it amounts to a nuisance which will give a right of action.

I have not thought it necessary to enter into a discussion of the authorities, because I think it has been most carefully and accurately done by Wright, J., in *Warren* v. *Brown*, 49 W. R. 206, [1900] 2 Q. B. 722. Of course it must be taken that the foundation of this judgment rests upon the finding of fact of Joyce, J., that the buildings of the defendant had not so materially interfered with the light previously enjoyed by the plaintiff as to amount to a nuisance. It follows that, in my judgment, the case of *Warren* v. *Brown* was rightly decided by Wright, J., and ought to have been affirmed by the Court of Appeal. It was, however, reversed, in accordance with the same views which guided that court in the case now under review.

For the reasons I have given, I have to move that the judgment of the Court of Appeal be reversed, and

the judgment of Joyce, J., restored, and that the respondents pay to the appellant the costs both here and below.

Lord MACNAGHTEN.—The right of a person who is owner or occupier of a building with windows in it, privileged as ancient lights, in regard to the protection of the light coming to those windows is a purely legal right. It is an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement. This right in early times was vindicated by an action on the case for nuisance, in which damages might be recovered and judgment had for removal or abatement of the nuisance: *Baten's case*, 9 Co. Rep. 53 *b*. In *Aldred's case*, 9 R 57 (*b*) Lord Coke says that an action lies for nuisance done to light as one of the three essential requisites of habitation. "An action lies," he says, "for hindrance of the light, for the ancient form of the action was significant, *sc. quod messuagium horrida tenebritate obscuratum fuit.*" It was not every diminution of light that would support such an action. The form of the action itself shows that. In later times when an action for the protection of ancient lights came to be regarded rather as an action for disturbance of an easement than an action grounded on nuisance—as an action to prevent the infringement of a right rather than an action to redress a wrong—the necessity of showing the gravity of the injury complained of was not so obviously apparent. Still the principle was the same, and it must always be the same. "It is not sufficient," as Lord Hardwicke observed in *Fishmonger's Company* v. *East India Company* "to say it will alter the plaintiff's lights . . . the law says it must be so near as to be a nuisance."

Probably the most satisfactory statement of the rule to be applied in all cases of ancient lights is to be found in *Back* v. *Stacey*, 2 C. & P. 465, and *Parker* v. *Smith*, 5 Car. & P. 438. *Back* v. *Stacey* was an issue directed by the Lord Chancellor to try two questions—first, whether the ancient lights of the plaintiff in his dwelling-house in Norwich had been "illegally" obstructed by a building of the defendant; and secondly, if so, what damage the plaintiff had sustained in respect of the injury. So that if the jury had found that the obstruction complained of was an illegal obstruction the damages would have gone to the whole of the injury and not merely to the loss sustained up to the date of the writ. It was contended there that, as it was evident that the quantity of light previously enjoyed had been diminished, the plaintiff was at any rate entitled to a verdict on the first issue, any obstruction of ancient lights being illegal. But according to the report, "Best, C.J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as beneficially as he had formerly done. His lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises." *Back* v *Stacey* was determined in 1826. *Parker* v. *Smith* was heard during the sittings after Michaelmas Term, 1832. It is, I think, the earliest reported case dealing with the question of light after the passing of the Prescription Act, which came into operation on the first day of Michaelmas Term, 1832. It was tried before Tindal, C.J. The marginal note states accurately, I think, the effect of the decision in these words: "That diminution of light and air which the law recognizes as the ground of an action against a party who builds near another's premises, is such as really makes them to a sensible degree less fit for the purposes of business or occupation." It does not seem to have been suggested either by the counsel or the judge that the Prescription Act had made the slightest alteration in the nature of the right to light or the principle on which the question of an alleged infringement of that right ought to be determined.

To these two cases I would only add the case of *Wells* v. *Oddy*, 7 Car. & P. 410, before Parke, B., in 1836. In his charge to the jury the learned judge said that he entirely adopted the law as laid down by Tindal, C.J., in *Parker* v. *Smith*. And then, after reading a passage from *Parker* v. *Smith*, he concluded his address to the jury by saying: "The question, therefore, which I shall leave to you is, whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation." So much for the right at law.

Courts of equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief or where an injunction was required to prevent multiplicity of actions. Under Lord Cairns's Act (21 & 22 Vict. c. 27) the court was empowered, in all cases in which it had jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages to the party injured, either in addition to or in substitution for such injunction. The Act commonly known as Sir John Rolt's Act (25 & 26 Vict. c. 42) provided that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought, whether the title to such relief or remedy was or was not incident to or dependent upon a legal right, every question of law or fact cognizable in a court of common law on the determination of which the title to such relief or remedy depended should be determined by or before the same court. These Acts are superseded by the Judicature Acts, and now the High Court has all the jurisdiction of the Court of Chancery and of the several courts of law. But still, so far as the right in question is a legal right, the court in the exercise of its jurisdiction must be guided by the principles established at law. And those principles, in my opinion, are still to be found most clearly and most concisely exhibited in the cases before Best, C.J., and Tindal, C.J., to which I have already referred.

Although the question thus stated appears tolerably simple, it cannot be disputed that the reported cases of questions of light in recent times are not altogether consistent. There seem to be two divergent views, neither of which, I think, is absolutely accurate. The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to a continuance of the whole or substantially the whole quantity of light which has come to the windows during a period of twenty

years. This view is conspicuous in *Calcraft* v. *Thompson*, 15 W. R. 387, before Lord Chelmsford, L.C., and in *Scott* v. *Pape*, 34 W. R. 465, 31 Ch. D. 554, where Cotton, L.J., speaks of a "cone of light," and Bowen, L.J., of "a specific quantity of light" as the measure of the plaintiff's right. The extreme view on the other side is that the right is limited to a sufficient quantity of light for ordinary purposes.

I think this divergence of view comes from a difference of opinion, consciously or unconsciously entertained, as to the meaning and effect of the provisions of the Prescription Act, 1832; and, if I am not mistaken, it may be traced to certain expressions, not perhaps sufficiently guarded, which are to be found in judgments delivered in this House in the case of *Tapling* v. *Jones*, 13 W. R. 617, 11 H. L. C. 290. In that case Lord Westbury, Lord Cranworth, and Lord Chelmsford all assume that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of the period of twenty years. No doubt section 3 says so in terms, but section 4 must be read in connection with section 3; and if the two sections are read together it will be seen that the period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question. Unless and until the claim or matter is thus brought into question, no absolute or indefeasible right can arise under the Act. There is what has been described as an inchoate right. The owner of the dominant tenement of twenty years' uninterrupted enjoyment is in a position to avail himself of the Act if his claim is brought into question. But in the meantime, however long the enjoyment may have been, his right is just the same, and the origin of his right is just the same as if the Act had never been passed. No title is as yet acquired under the Act. This point seems to have been much discussed shortly after the Act was passed. It was finally settled in a series of cases at common law, beginning, I think, with *Wright* v. *Williams*, 1 M. & W. 77, and including *Richards* v. *Fry*, 7 Ad. & E. 698, and *Cooper* v. *Hubbuck*, 12 C. B. N. S. 456, in which there is an interesting consroversy between Willes, J., and Williams, J., on the question whether the twenty years' uninterrupted enjoyment under the third section is the period of twenty years before any suit or action, or twenty years before each suit or action in which the point may from time to time arise. The former construction, in which Erle, C.J. and Byles, J., concurred with Willes, J., eventually prevailed.

The question is of little or no practical importance. But the construction established by the series of decisions to which I have referred, in accordance with the express language of the statute, goes, I think, a long way to show that the view taken by James, L.J., Mellish, L.J., and Lord Selborne as to the effect of the Act is absolutely correct, and that the qualification suggested by Bowen, L.J., in *Scott* v. *Pape* is not well founded. It certainly would be strange if the court had been compelled to hold that the Prescription Act confers upon a person whose right is questionable, at least to this extent that it has been actually brought into question, a higher and a larger right than that possessed by a person whose prescriptive claim to the enjoyment of light is so clear as to be beyond all question. I have, therefore, no doubt that the Prescription Act has not in the slightest degree altered the pre-existing law as to the nature and extent of the right of access of light or the principle on which it is to be determined in any particular case whether the right has been infringed. Now, if this be so, it seems to me, in accordance with the opinion expressed by James and Brett, L.JJ., in *Ecclesiastical Commissioners* v. *Kino*, 28 W.R. 544, 14 Ch. D. 213, and by many other judges, that the direction given by Best, C.J., in *Back* v. *Stacey* is the direction which a court exercising the functions of both judge and jury ought to keep steadily in view.

Having come to this conclusion, I do not propose to trouble the House with any comments upon the mass of cases by which in comparatively modern times the question has been elucidated or obscured. It is enough, I think, to refer to what was said in *Kelk* v. *Pearson*, 19 W. R. 665, L. R. 6 Ch. App. 809, *City of London Brewery Co.* v. *Tennant*, 22 W. R. 172, L. R. 9 Ch. App. 212, and *Ecclesiastical Commissioners* v. *Kino*. Speaking for myself, I doubt very much whether it is a profitable task to re-try actions which depend simply on questions of fact or to review and endeavour to reconcile or distinguish a number cases that naturally enough contain some statements which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of Brett, L.J., in *Ecclesiastical Commissioners* v. *Kino*. "To my mind," said his lordship, "the taking some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion, as laying down a rule of conduct for other judges in considering a similar state of fact in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration."

If I may trespass for a few minutes longer, I would rather spend the time in making one or two practical suggestions. I do not put them forward as carrying any authority. But they may possibly be of use to those who have to try such questions as this, if and so far as they appear to be consistent with good sense.

It will be observed that in *Back* v. *Stacey* the learned judge told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient light had undergone. Now, a judge who exercises the functions of both judge and jury cannot be expected to view the premises himself, even if he considers himself an expert in such matters. But I have often wondered why the court does not more frequently avail itself of the power of calling in a competent adviser to report to the court upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in court if required. I am not in the least surprised that the plaintiffs in the present case objected to a report from a disinterested surveyor; but, in my opinion, the court ought to have obtained such a report for its own guidance.

Then, with regard to giving damages in addition to or substitution for an injunction—that, no doubt, is a delicate matter. It is a matter for the discretion of the court, and the discretion is a judicial discretion. It has been said that an injunction ought to be granted when substantial damages would be given at law. I have some difficulty in following out this

rule. I observe that in some cases juries have been directed to give one shilling damages as a notice to the defendant to remove the obstruction complained of. And then, if the obstruction was not removed, in a subsequent action the damages were largely increased. In others a substantial sum has been awarded, to be reduced to nominal damages on removal of the obstruction. But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff, as of course, to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money; if the defendant has acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the court to protect some ancient lights which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises.

The common form of injunction which has been in use since the case of *Yates* v. *Jack*, 14 W. R. 618, L. R. 1 Ch. App. 295, is not, I think, altogether free from objection. I think it would be better that the order, when expressed in general terms, should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. If the action is brought to a hearing before the defendant's new buildings are completed, and there seems to be good ground for the plaintiff's apprehensions, an order, I think, might be conveniently made in that form, with costs up to the hearing, and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages as he might be advised.

With the present case I may deal very briefly. It cannot be disputed that some diminution of light is caused by the defendant's buildings, but such as it is I think it is exactly what Best, L.C.J., described as partial inconvenience rather than serious injury. I am satisfied that if the case had been tried at law before the question was so much embarrassed by the multiplicity of decisions no jury would have given any damages.

Perhaps I ought to add a word about *Warren* v. *Brown*, which is referred to in both the judgments below. I cannot say that that case is quite satisfactory to my mind either as dealt with in the court of first instance or in the Court of Appeal. In the court of first instance the learned judge who tried the case found a special verdict which is not very easy to understand. The room in which the light had been materially diminished "in its present state is," he says, "better lighted than the ground-floor front rooms in many of the principal streets." I do not see what bearing that fact had on the question at issue. Then, instead of keeping in view the direction which judges over and over again have said ought to be kept in view, the learned judge embarks on an inquiry to determine which of two extreme views is correct. I doubt whether either the one or the other can be accepted as a safe guide without qualification. The Court of Appeal, in their turn, instead of dealing with the facts of the case before them, combat a particular view which, rightly or wrongly, they attribute to Wright, J. I do not think *Warren* v. *Brown* helps one much.

I think the appeal ought to be allowed, with costs here and below.

Lord DAVEY.—I am of opinion that the finding of the learned judge who tried this action as to the facts of this case is borne out by the evidence and I accept his finding as the basis of my judgment. After describing the dimensions of the room on the ground floor of the plaintiff's premises which is used as an office, Joyce, J., says: "It is, I think, the result of the evidence that it has ordinarily, if not always, been the practice to make use of the electric light in the back part of the room, and a most extraordinary amount of light from the windows in Worship-street would be required to enable the use of the electric light in the back part of the room to be dispensed with, even on ordinary days. Practically, I think it may be taken that the use of electric or some other artificial light is now and always must be necessary in order to light the back part of the room, even in the daytime. There is no evidence to show that such an extraordinary amount of light has been enjoyed or acquired for anything like the period of twenty years." And the learned judge sums up his finding in these words: "Apart from any question with respect to the back part of the plaintiff's premises and to the extraordinary light required if it be possible to be obtained so far back in the absence of illumination by electric light, the plaintiff's premises would still, in my opinion, after the erection of the defendant's building be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business. For all ordinary days they have amply sufficient light—at present they have abundance of light, and are in my opinion unusually well lighted. If, as it is contended on behalf of the plaintiffs, they are entitled to the full amount of light now enjoyed without appreciable diminution, the plaintiffs would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building if and when erected is sufficiently serious to entitle the plaintiffs to an injunction." On these findings the learned judge, following the judgment of Wright, J., in *Warren* v. *Brown*, which had not then been reversed by the Court of Appeal, held that the action failed and must be dismissed. The Court of Appeal reversed this judgment. The legal grounds of their judgment are contained in a single sentence. "If ancient lights," says Cozens-Hardy, L.J., "are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief." By the expression "interfered with substantially" I understand the Lord Justice to mean

"if the amount of light having access to the premises by means of the ancient lights is substantially diminished." This proposition appears to me to assume or imply that the owner of the dominant tenement is entitled to have the full amount of light which has gained access to the tenement by the ancient windows during the previous twenty years maintained without substantial diminution. The "real damage" may be occasioned by an alteration in the internal structure of the dominant tenement which has been made within the period of twenty years, or its adaptation within that period to some special use for which an extraordinary amount of light is required, but nevertheless, if the proposition be sound, the owner or occupier of the tenement is entitled to be protected in the enjoyment of the light required for his altered premises or for the special use to which he has put them. In perfect consistency with this view of the law, Vaughan Williams, L.J., expressed a doubt whether the rule of forty-five degrees can any longer be applied even as a rough measure.

The question for this House to determine is whether this view of the law is correct, or, in other words, what is the true nature and extent in English law of the easement of light. It must be regretfully admitted that the numerous decisions on this subject in the courts are not easily reconcilable and are not infrequently contradictory. No judgment of this House has been referred to, except that in the case of *Tapling* v. *Jones*, the decision in which does not directly affect the point now before your lordships. I do not propose to travel through the long catena of authorities. They were copiously referred to at the bar, and the principal cases are stated and carefully analyzed in the judgment of Wright, J., in *Warren* v. *Brown*.

It will be found that in the earlier authorities the obscuration of light to a tenement having ancient lights is dealt with on the footing of a nuisance. In *Aldred's case* the "hindrance of light" in the same category as the nuisance of fouling the air by pigsties. In *Fishmongers Company* v. *East India Company*, 1 Dick. 164, Lord Hardwicke said: "As to the question whether the plaintiffs' messuage is an ancient building, so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here, for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. . . . But I am of opinion that it is not a nuisance contrary to law; for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city; and here there will be 17ft. distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground." Consistent with this view is the direction of Best, L.C.J., to the jury in the oft-quoted case of *Back* v. *Stacey*. The learned judge said: "It was not sufficient to constitute a legal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise be applied. In order to give a right of action, there must be a substantial privation of light, sufficient to render the occupation uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as beneficially as he had formerly done." In *Clarke* v. *Clark* Lord Cranworth stated the question thus: "Whether the obstruction complained of is such as to deprive the complaining party of such a supply of light and air as he might reasonably calculate on enjoying." After saying that the plaintiffs' rooms were rendered less cheerful, he adds: "But I cannot think that this is such an obstruction of light as to amount to a nuisance. . . . What the plaintiff was bound to show was that the buildings of the defendant caused such an obstruction of light as to interfere with the ordinary occupations of life." In *Robson* v. *Whittingham*, decided in the following year, Knight-Bruce and Turner, L.JJ., expressed themselves as entirely satisfied with Lord Cranworth's judgment, and Turner, L.J., accentuated his approval by saying that he thought this class of cases had been carried too far before the decision in *Clarke* v. *Clark* was pronounced. Nothing that I can say will add to the respect and authority with which the opinions of those two learned and experienced judges must command with your lordships.

It has been thought that the third section of the Prescription Act, 1832, altered substantially the previously existing law as to ancient lights, and had the effect of conferring on the owner of the dominant tenement, by twenty years' enjoyment, an absolute and indefeasible right to the full amount of the light enjoyed during that period. And it must be admitted that the language of the section lends some plausibility to that opinion. It is, however, not consistent with the language of Lord Cranworth in *Clarke* v. *Clark*, and the point was expressly determined by James and Mellish, L.JJ., in *Kelk* v. *Pearson*, decided by them in the year 1871. James, L.J., there says: "I am opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and convenient." The statute, in fact, has only altered the conditions or length of user by which the right may be acquired, but not the nature of the right. In the case of *City of London Brewery Co.* v. *Tennant*, Lord Selborne expressed his complete adherence to the view of the law taken in the case of *Kelk* v. *Pearson*, correcting some impressions which might have arisen from the language used in some former cases by some learned judges. This doctrine, however, has not been unchallenged. In an Irish case of *Mackey* v. *Scottish Widows Society*, Ir. R. 11 Eq. 541, decided in 1877, Christian, L.J., criticized in vigorous language the judgments of James, L.J., and Lord Selborne, and held that the right is to an average maximum of the light which nature has been shedding upon the window for twenty years before the defendant interrupted it. It is also difficult to reconcile the language used by Cotton and Bowen, L.JJ., in the case of *Scott* v. *Pape*, or the language of the Queen's Bench judges in *Moore* v. *Hall*, 26 W. R. 401, 3 Q. B. D. 178, with the decisions in *Kelk* v. *Pearson* and *City of London Brewery Co.* v. *Tennant*, though the authority of those cases was not in terms questioned by them.

I regard the decisions in *Kelk* v. *Pearson* and *City of London Brewery Co.* v. *Tennant* as complimentary to, and on the same lines with, Lord Cranworth's judg-

ment in *Clarke* v. *Clark*. And so regarding it, I entirely approve of it. Romer, L.J., however, in delivering the judgment of the court in *Warren* v. *Brown*, seems to have taken a different view of the effect of *Kelk* v. *Pearson*. He says: "Since the case of *Kelk* v. *Pearson* it is impossible to hold properly that the statutory right is not interfered with merely because after the interference the house comes up to a supposed standard as to what a house ordinarily requires by way of light for purposes of inhabitancy or business"; and he quotes some words used by Mellish, L.J. I must remark that the particular point which was under discussion in *Warren* v. *Brown*, and in another form in the present case, was not before the court in *Kelk* v. *Pearson*. There was no question there of a claim for protection in the use of an extraordinary amount of light required for some special purpose, or required by some unusual peculiarity in the internal structure of the building. And I regard what was said by Mellish, L.J., as directed to the arguments addressed to the court in that case. According to any standard short of holding that the right is to all the light which has come through the window, the right to light has a ragged edge to it, and it is impossible to assert that any man has a right to a fixed amount of light ascertainable by metes and bounds. I do not think that Mellish, L.J., intended to differ from James, L.J., and in *City of London Brewery Co.* v. *Tennant*, when James, L.J., repeated the substance of what he had said in the earlier case, Mellish, L.J., according to the report, contented himself with a simple concurrence.

I must advert for a few moments to an impression which has been entertained by some distinguished judges, and was the subject of argument at the bar, to the effect that within the space of a few months Lord Cranworth overruled himself. The judgment in *Clarke* v. *Clark* was delivered on the 25th of November, 1865, and that in *Yates* v. *Jack* was delivered on the 24th of March, 1866. It was thought by Lord Chelmsford in *Calcraft* v. *Thompson* that the effect of the later case was to hold the dominant tenement entitled to the whole light that had previously been enjoyed, and Wood, V.C., in *Dent* v. *Auction Mart Co.* to a certain extent shared the same impression. There is not a hint in the judgment in *Yates* v. *Jack* which indicates that Lord Cranworth thought that he was departing from the law as laid down in his earlier judgment. Both cases were decided and probably reported before *Robson* v. *Whittingham*, 14 W. R. 291, L. R. 1 Ch. App. 442, but the Lord Justices, as we have seen, adopted *Clarke* v. *Clark* as an authority which had their approval. And if the question at issue in *Yates* v. *Jack* be looked at, it will be seen that the argument to which Lord Cranworth's judgment was directed was that it was not necessary for the plaintiff to have the ordinary quantity of light because the business which he was carrying on required a diminished quantity only. That was the argument to which Lord Cranworth could not accede. So understood, and reading it by the light of *Clarke* v. *Clark*, I do not dissent from the language used by Lord Cranworth in *Yates* v. *Jack*: "The right conferred by the statute 2 & 3 Will. 4, c. 71 is an absolute indefeasible right to the enjoyment of the light without reference to the purposes for which it has been used."

We were told, and my experience at the bar confirms it, that the order made in *Yates* v. *Jack* has been adopted as a common form of order in cases of this description. I think this is unfortunate. It was a very proper order to make in that case, and in nineteen cases out of twenty, or perhaps ninety-nine out of one hundred, where no question arises such as that in the present case, it would be sufficient and appropriate. But it is an erroneous proceeding to deduce an absolute rule of law from the form of order made in a particular case.

In *Lanfranchi* v. *Mackenzie*, 15 W. R. 614, L. R. 4 Eq. 421, Malins, V.C., held that a person could not, by using the dominant tenement for a period less than twenty years for a special purpose requiring an extraordinary amount of light in excess of what was required for the ordinary purposes of inhabitancy or business, entitle himself to protection for such extraordinary requirements, and thereby impose an additional restriction on his neighbour's use of his own land. In that case, as in the present one, it was not proved that the extraordinary amount of light had been used for twenty years. "No man," said the Vice-Chancellor, quoting the words of another judge, "could, by any act of his, suddenly impose a new restriction upon his neighbour." In their judgment in *Warren* v. *Brown*, 50 W. R. 97, [1902] 1 K. B. 15, the Court of Appeal dissented from this decision, and their opinion was a logical conclusion from the views which they expressed as to the nature and extent of the easement. I do not concur with the opinion of the Court of Appeal, for I think that the case of *Lanfranchi* v. *Mackenzie* was rightly decided. I agree with the Vice-Chancellor that it would be contrary to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement. The easement is for access of light to the building, and if the building retains its substantial identity, or if the ancient lights retain their substantial identity, it does not seem to me to depend on the use which is made of the chambers in it, or to be varied by any alteration which may be made in the internal structure of it. I do not propose to discuss at length the question how far a variation in a tenement will destroy an easement appurtenant to it. The law on that subject is as old as *Luttrell's case*, 4 Co. 86*a*.

In the case of *Martin* v. *Goble*, 1 Camp. 320, a malthouse had been converted into a workhouse, and it was held that the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. That case has been the subject of much criticism, and I think that some judges have thought that the language of the Lord Chief Baron had a wider scope than it was intended to have. Following the suggestion of Wood, V.C., it may be supported on the ground that (to use the language of *Luttrell's case*) the alteration affected the substance and not only the quality of the tenement. But while agreeing that a person does not lose his easement by any change in the internal structure of his building or the use to which it is put, and that regard may be had not only to the present use, but also to any ordinary uses to which the tenement is adapted, I think it is quite another question whether he is entitled to be protected at the expense of his neighbour in the enjoyment of the light for some special or extraordinary purpose. It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights or by not using the full measure of light which the law permits. If that measure be by common law or by the statute the whole amount of light which has had access to his windows, *cadit quæstio*. But if this view of the law be not accepted, you must introduce that "supposed standard" which Romer, L.J., repudiates. If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extra-

ordinary character in excess of that standard? It does seem to me unreasonable to hold that where a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some similar purpose, he can suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour. If the action be brought a month before the change it would be dismissed. If it be brought a month afterwards an injunction would be granted. I am of opinion that the courts have gone too far in this question of lights, and have imposed undue restrictions on persons in the exercise of their lawful right to build on their own land.

In the second argument before your lordships the leading counsel for the respondents contended that his clients had for more than twenty years enjoyed the access of light over the appellant's land to their ground floor office in its present condition. I believe that all your lordships are agreed with Joyce, J., that there is no proof to support such a contention. The fact relied on was not put in issue at the trial, and the evidence was not directed to it. If the plaintiffs had intended to claim and rely on a special easement of that description, it was for them to state their claim and prove the facts to support it. It is unnecessary to say, therefore, whether such a claim would be good in law. Malins, V.C., thought it could be sustained if the special user was had with the knowledge of the owner of the servient tenement. I will only say that I see some difficulties in the way, and reserve my opinion.

I must apologise for the length at which I have trespassed on the attention of the House. According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance. I do not myself think that this rule is difficult of application in practice. In the majority of cases no such questions as those which have been raised in *Warren* v. *Brown* and the present case occur. The experience of surveyors who are practically conversant with this matter are entitled to great respect. As Mr. Vigers states in his evidence, they have adopted a working rule for the purpose of advising those who consult them and settling differences by negotiation. The rule of forty-five degrees is not, of course, a rule of law, and is not applicable to every case. But I agree with Lord Selborne (*City of London Brewery Co.* v. *Tennant*, 22 W. R. 172, L. R. 9 Ch. App. 212) that it may properly be used as *primâ facie* evidence.

For these reasons I think that the appeal should be allowed, and the decree of Joyce, J., restored, with costs here and below.

Lord ROBERTSON.—I agree with the judgment of Lord Davey.

Lord LINDLEY.—Joyce, J., who was asked to grant an injunction before the defendant's buildings had been erected, considered that, although the buildings would sensibly diminish the plaintiffs' light, the diminution would not materially affect their comfort or convenience, and would not be sufficient to entitle the plaintiffs to any relief, and he dismissed their action. The Court of Appeal, however, took a different view, and granted a mandatory injunction ordering the defendant to pull down part of his building which had been completed after the injunction had been refused. Hence this appeal.

The language of section 3 of the Prescription Act, 1832, shows that in order to acquire a right to light there must be: First, access and use of light, not access alone. Access here is understood to refer to free passage of light over the servient tenement: see per Fry, L.J., in *Scott* v. *Pape*, and per Kay, J., in *Cooper* v. *Straker*, 40 Ch. D. 21. Secondly, such access and use must be to and for some dwelling-house, workshop, or other building: as to which see *Harris* v. *De Pinna*, 31 Ch. D. 238. Thirdly, such access and use must be actually enjoyed therewith. Fourthly, such enjoyment must be without interruption for twenty years. Fifthly, if all these are proved, the right to the access and use of light so enjoyed becomes absolute and indefeasible, unless it can be explained by some deed or writing.

Pausing here for a moment, it will be observed that the statute does not in terms confer a right to light, but rather assumes its acquisition by use and enjoyment, and declares it to be "absolute and indefeasible." Again, it will be observed that nothing is said about enjoyment as of right; and notwithstanding section 5 of the Act, which refers to enjoyment as of right, it was early decided that as regards light claimed under section 3 enjoyment as of right need not be alleged or proved; and that the right, whatever it may be, is acquired by twenty years' use and enjoyment without interruption and without written consent: see *Truscott* v. *Merchant Taylors Company*, 11 Ex. 855, and *Frewen* v. *Phillips*, 11 C. B. N. S. 449; *Simper* v. *Foley*, 2 J. & H. 555, and *Harbidge* v. *Warwick*, 3 Ex. 552. This was not so under the old law.

As regards use and enjoyment there are some instructive decisions on unfinished and uninhabited houses, and on windows kept closed by shutters. These decisions show that a right to light may be acquired in respect of a house which has stood for twenty years without being occupied or even finished so as to be fit for occupation; and that the fact that shutters have been closed for some months at a time does not prevent the acquisition of a right to light through the windows: see *Courtauld* v. *Legh*, 17 W. R. 466, L. R. 4 Ex. 126; *Cooper* v. *Straker*; *Collis* v. *Laugher*, 43 W. R. 202, [1894] 3 Ch. 659; and *Smith* v. *Baxter*, 48 W. R. 458, [1900] 2 Ch. 138. These decisions did not, however, turn upon or settle with any precision the amount of light to which a right is acquired by twenty years' user. Nor is the statute clear upon this point. At one time it appears to have been considered that in all cases the size and situation of the aperture through which light had come for twenty years formed both the maximum and minimum measure of the right acquired, without reference to the use and enjoyment of the light which had so come. This view was based on some observations made by Lord Westbury in *Tapling* v. *Jones*, and on Lord Cranworth's judgment in *Yates* v. *Jack*, which I will notice presently. Lord Chelmsford took the same view in *Calcraft* v. *Thompson*. But this view was emphatically negatived by the Court of Appeal in Chancery in *Kelk* v. *Pearson*, *City of London Brewery Co.* v. *Tennant*, and *Leech* v. *Schweder*, 22 W. R. 633, L. R. 9 Ch. 463. In *Moore* v. *Hall*, 26

W. R. 401, 3 Q. B. D. 178, however, Mellor and Manisty, JJ., adopted the interpretation thus repudiated, but it does not appear that they were aware of the repudiation. *Kelk* v. *Pearson* shows that in ordinary cases a person does not necessarily acquire a right to all the light which he has had for twenty years. He may have had more than he reasonably required either for domestic or business purposes; and in that case his right is limited to the amount of light reasonably required.

There can be no doubt that Lord Cranworth's language in *Yates* v. *Jack* and the form of injunction granted have been regarded as authorities for the view that in all cases the statute confers a right to all the light which has come to a window for twenty years; and there are passages in the judgments of Cotton and Bowen, L JJ., in *Scott* v. *Pape* which support the same view. This is to be regretted, as it has tended to unsettle the rule laid down in *Kelk* v. *Pearson*. The decision in *Yates* v. *Jack* did not, however, really go so far as has been supposed, for the plaintiff's windows were darkened to such an extent as to render the house much less convenient for purposes of business than it was before. The case did not turn on the mere fact that some diminution of light was proved. The plaintiff's right to light was clearly infringed, whether the measure of the light to which he was entitled was all that had come through his windows, or only so much as was reasonably necessary for business purposes. If these facts are borne in mind, nothing will be found in the actual decision which conflicts with the views previously expressed by Lord Cranworth in *Clarke* v. *Clark*, and adopted by the Court of Appeal in the cases already mentioned.

The common form of injunction in these cases is that adopted in *Yates* v. *Jack* and *Dent* v. *Auction Mart Co.*, 14 W. R. 709, L. R. 2 Eq. 238. It is to restrain the defendant from erecting any building so as to obstruct the free access of light to the ancient windows of the plaintiff as such access was enjoyed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. This form is framed upon the supposition that the plaintiff has established his right to the amount of light which he in fact enjoyed before the obstruction complained of. But it by no means follows from the form that every one is entitled to an injunction who can prove that he has been deprived of some of the light which he in fact had before it was interfered with. He may have had more than he can acquire a right to use and enjoy in future. I am, however, under the impression that this inference has been drawn, and that the form has been regarded as strengthening the view of the law repudiated in *Kelk* v. *Pearson*. So to regard the form is, in my opinion, a mistake. The doctrine laid down in *Back* v. *Stacey*, as I understand it, is the same as that laid down, although in somewhat different language, by the Court of Appeal in *Kelk* v. *Pearson* and *City of London Brewery Co.* v. *Tennant*, and must, I think, be taken as finally established and as good sound law which this House should adopt, notwithstanding the observations in the Irish case of *Mackey* v. *Scottish Widows Co.* That doctrine, as stated in *City of London Brewery Co.* v. *Tennant*, is that, generally speaking, an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business. The expressions "the ordinary notions of mankind," "comfortable use and enjoyment," and "beneficial use and occupation," introduce elements of uncertainty; but similar uncertainty has always existed, and exists still, in all cases of nuisance; and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement. If a more absolute standard had been adopted in all cases certainty would, no doubt, have been gained; but the consequences would frequently have been very oppressive to the owner of the servient tenement, and far more so than under the old law. The owner of the servient tenement could have done nothing on his own land which in fact diminished the light acquired by his neighbour, even if all of it was not wanted for comfortable enjoyment or business purposes. It would follow that the owner of a piece of vacant land opposite to a house in an ordinary street could not build upon it at all after twenty years. The adherence to the old but uncertain standard of comfort and convenience avoids the danger of oppression and extortion, and renders it necessary to take a wider view of each case, especially when an injunction is asked for.

The decision in *Kelk* v. *Pearson* has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance. If there is no right of action, *à fortiori*, there is no right to an injunction to prevent a permanent diminution of light unless it amounts to a nuisance. But in considering what is an actionable nuisance regard is had, not to special circumstances which cause something to be an annoyance to a particular person, but to the habits and requirements of ordinary people, and it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action for a diminution of light if only his special requirements are interfered with. [See, as to nuisances to persons carrying on delicate trades or requiring more comfort or freedom from annoyance than ordinary people, *Walter* v. *Selfe*, 4 De G. & Sm. 315; *Crump* v. *Lambert*, 15 W. R. 417, L. R. 3. Eq. 409; and *Eastern and South African Telegraph Co* v. *Cape Town Tramways Co.*, 50 W. R 657, [1902] A. C. 381; and as to the character of the neighbourhood see *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. C. 642.]

The expression "right to light" is sanctioned by the Prescription Act, and is convenient; but its use is apt to lead to error and to forgetfulness of the burden thrown on the servient tenement. This burden, however, ought never to be lost sight of in considering the extent of the right claimed in respect of the dominant tenement. But the adoption of the more flexible standard of comfort and convenience has introduced difficulties of a serious nature, especially when dealing with places of business; and it is not surprising that different views on this subject should have been taken, and that the decisions upon it should be inconsistent with each other. That they are inconsistent is apparent from the careful review of them by Wright, J., in *Warren* v. *Brown*.

In applying the rule laid down in *Kelk* v. *Pearson* it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance. If he has, it is no defence to say that he has as much light left as most other people: see *Dent* v. *Auction Mart Co.* Too much weight may have been given by Wright, J., to the amount of light left in *Warren* v. *Brown*, and this explains the reversal of his decision by the Court of Appeal. There is no rule of law that if a person has forty-five degrees of unobstructed light through a particular window left to him he cannot maintain an

action for a nuisance caused by diminishing the light which formerly came through that window: *Theed* v. *Debenham*, 24 W. R. 775, 2 Ch. D. 165. But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of forty-five degrees is left to him, especially if there is good light from other directions as well. Cotton, L.J., pointed this out in *Ecclesiastical Commissioners* v. *Kino*; see also *Parker* v. *First Avenue Hotel Co.*, 21 Ch. D. 282.

As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James, V.C., in *Dyers Company* v. *King*, 18 W. R. 404, L. R. 9 Eq. 438, the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as as to render the interference complained of non-actionable.

I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account.

The purpose for which a person may desire to use a particular room or building in future does not either enlarge or diminish the easement which he has acquired. If he chooses in future to use a well-lighted room or building for a lumber room, for which little light is required, he does not lose his right to use the same room or building for some other purpose for which more light is required. *Aynsley* v. *Glover*, 23 W. R. 147, L. R. 18 Eq. 544, L. R. 10 App. 283, is in accordance with this view. But if a room or building has been so built as to be badly lighted, the owner or occupier cannot by enlarging the windows or altering the purpose for which he uses it increase the burden on the servient tenement. *Martin* v. *Goble*, where a malthouse was turned into a workhouse, may, I think, be upheld on this principle, and the observations of Wood, V.C., on *Martin* v. *Goble* in *Dent* v. *Auction Mart Co.* support this view. There was in fact no substantial interference with the light to which they were entitled.

Coming now to the present case, I am clearly of opinion that no injunction, and certainly no mandatory injunction, ought to have been granted. Joyce, J., was asked for an injunction and he refused it, and, in my opinion, quite rightly. He came to the conclusion that, although there would be a sensible diminution of light and some inconvenience to the plaintiffs, yet they had not established by twenty years' user a right to all the light which they had had, and that the obstruction complained of would not amount to an actionable nuisance, and so infringe the plaintiffs' right. The Court of Appeal, taking a different view of the amount of light to which the plaintiffs were entitled, reversed this decision, and ordered a partial demolition of the buildings erected by the defendant. For the reasons already given, I have come to the conclusion that this was wrong.

I should stop here, were it not that I feel very strongly that in any view of the case it was not one for a mandatory injunction. I am convinced that, even if the plaintiffs have a cause of action, the damages which could properly be awarded them would be very small, and to grant a mandatory injunction in such a case as this would be unduly oppressive and not in accordance with the principles on which equitable relief has been usually granted: see *Curriers Company* v. *Corbett*, 2 Dr. & Sm. 355, *Robson* v. *Whittingham*, 14 W. R. 291, L. R. 1 Ch. App. 442, and *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.*, 6 Ch. D. 757, in all of which an injunction was refused, although the plaintiff's legal right had been infringed. In *Warren* v. *Brown* the Court of Appeal only gave damages. The present case is eminently one in which damages would be an adequate remedy, even assuming that the plaintiffs could prove a small nuisance for which some damages could be properly given; and where that is the case an injunction, and especially a mandatory injunction, ought not to issue. The doctrine that where a legal right is continuously infringed an injunction to protect it ought to be granted is subject to qualification, as was carefully explained by Jessel, M.R., in *Aynsley* v. *Glover*, and more recently by the Court of Appeal in *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 2 Ch. 388.

The result of the foregoing review of the authorities is not altogether satisfactory. The general principle deducible from them appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends upon considerations wider than facts applicable to the particular case. There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages. But, notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand, and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies.

In this case the Court of Appeal have, in my opinion, gone too far, and the appeal ought to be allowed, with costs here and below.

Appeal allowed.

Solicitors for appellant, *Hyde, Tandy, Mahon, & Sayer.*

Solicitors for respondent, *Slaughter & May.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling, L.J.) } July 5, 1904.

LOGAN *v.* BANK OF SCOTLAND AND OTHERS. (*a.*)

Practice—Writ—Service—Scottish corporation—Branch office in England—"Statutory provision regulating service of process"—Citation Amendment (Scotland) Act, 1882 (45 & 46 *Vict. c.* 77), *s.* 3—*Ord.* 9, *r.* 8.

The plaintiff, who was resident in Scotland, issued a writ in England against the Bank of Scotland in respect of a cause of action which arose in Scotland. The bank was incorporated by an Act of the Parliament of Scotland, where its head office was, but neither in that Act nor in any subsequent Act relating to the bank was there any provision as to service of process on the bank. The writ was served on the manager of the London branch of the bank at the London office.

Held, that the bank was in the same position as a foreign corporation carrying on business within the jurisdiction, and could be served here under ord. 9, *r.* 8,

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

there being no "statutory provision regulating service of process," the Citation Amendment (Scotland) Act, 1882, *only applying to process issued from the courts of Scotland.*

Appeal by the plaintiff from an order made by Bruce, J., at chambers, affirming an order of the master's setting aside the service of the writ of summons on the Bank of Scotland in London.

The facts are fully set out in the judgment. The writ was an ordinary writ for service within the jurisdiction, and was served upon the London manager of the Bank of Scotland at their branch office in the City of London. The Bank of Scotland was a Scottish corporation, having its head office in Edinburgh, with a branch in the City of London. The bank entered a conditional appearance, and took out a summons to set the service aside. The master and judge at chambers set it aside.

By ord. 9, r. 8, "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . ."

James Dunbar (*Eric Dunbar* with him), for the plaintiff.—The Bank of Scotland, having a branch here, is domiciled and carries on business here as well as in Scotland, and can therefore be served with a writ. The bank is a foreign corporation, and can be sued here as it carries on business here: *Newby* v. *Von Oppen*, 20 W. R. 383, L. R. 7 Q. B. 293; *Lhoneux* v. *Hong Kong and Shanghai Banking Corporation*, 34 W. R. 753, 33 Ch. D. 446; *Haggin* v. *Comptoir d'Escompte*, 37 W. R. 703, 23 Q. B. D. 519; *La Bourgogne*, [1899] A. C. 431. The cases of *Wood* v. *Anderston Foundry Co.*, 36 W. R. 918, and *Watkins* v. *Scottish Imperial Insurance Co.*, 37 W. R. 670, 23 Q. B. D. 285, were cases of companies formed under the Companies Act, 1862, section 62 of which contains "statutory provision regulating service of process," within the meaning of ord. 9, r. 8. The service was therefore regular and ought not to have been set aside.

Rufus Isaacs, K.C., and *A. M. Bremner* (*Stair C. Agnew* with them), for the Bank of Scotland.—The cases relied upon by the plaintiff are cases of foreign corporations carrying on business here. A Scottish corporation is not in the same position for this purpose as a foreign corporation. The policy of the Legislature is to place Scottish and Irish corporations on a different footing from foreign corporations, because there are courts in Scotland and Ireland under the Crown with equal authority with the courts in England: see ord. 11, rr. 1 (*e*), 2. Moreover, ord. 9, r. 8, only applies "in the absence of any statutory provision regulating service of process." The Citation Amendment (Scotland) Act, 1882, regulates service of process, because by section 3 it allows service of a citation on a person by registered letter; and by section 7 "person" includes a corporation. In *Palmer* v. *Caledonian Railway Co.*, 40 W. R. 562, [1892] 1 Q. B. 823, Fry, L.J., said: "It is to be observed that the rule of the general order that provides for service upon corporations aggregate provides a particular mode of service in the absence of any statutory provision. I read that to mean any provision of a statute passed by the Imperial Parliament, whether it relates to service in this country or any other place which is subject to the Imperial Parliament." Therefore ord. 9, r. 8, does not apply. [They also referred upon this point to *Watkins* v. *Scottish Imperial Insurance Co.*, and Buckley on the Companies Act (8th. ed.), p. 227]. Further, a company carries on business where its head office is situate: *Jones* v. *Scottish Accident Insurance Co.*, 17 Q. B. D. 421, 34 W. R. Dig. 150. It resides where its head office is. The Bank of Scotland is not resident in this country. The plaintiff, too, is resident in Scotland, and the cause of action arose there. Residence of a corporation for this purpose depends upon whether the cause of action arose here. A foreign corporation may have a residence here in respect of business transacted here. The Bank of Scotland has a residence here only for the purpose of its business carried on here. The bank, therefore, was not resident here in respect of this transaction, which was a purely Scottish one. There was therefore no jurisdiction to serve the bank here.

They also referred to *Dunlop Pneumatic Tyre Co.* v. *Actien Gesellschaft, &c., Co.*, 50 W. R. 226, [1902] 1 K. B. 342.

Cur. adv. vult.

July 5.—STIRLING, L.J., read the judgment of the court as follows: This is an appeal by the plaintiff from an order of Bruce, J., made in chambers, affirming an order of the master, setting aside the service of the writ on the defendant bank. The writ is by James Bowie Logan (described as residing at Inverary, in the county of Argyll) against the bank (described as of Bishopsgate-street, in the City of London), James Scott (described as of 36, Great Tower-street, in the City of London), Robert Young and George Anderson* (both described as of Edinburgh), and claims damages for fraudulent conversion and misrepresentation in floating a firm of James Young & Sons into a limited liability company, and for fraudulent misrepresentation alleged to be contained in a prospectus of James Young & Sons (Limited) issued by the defendants. The writ was served on the 2nd of May, 1904, on the manager in London of the London branch of the Bank of Scotland, at 19, Bishopsgate-street, where the defendants have a large office with the name Bank of Scotland displayed on brass plates on the outside and at the entrance, and where they carry on the business of bankers with a large staff. The bank was incorporated in 1695 by an Act of the Parliament of Scotland, which is stated to have been recognized and confirmed by various Acts of the Imperial Parliament. None of these Acts contain any provision as to service of process on the bank. The principal office is at Edinburgh, and there all the board meetings are held. The cases of *Newby* v. *Von Oppen*, *Haggin* v. *Comptoir d'Escompte*, and *La Bourgogne* show that a foreign corporation, which carries on business in England, may be sued here, and that the writ may be served on the proper officer of the corporation here in accordance with ord. 9, r. 8. For the purposes of this rule a Scottish corporation is a foreign corporation; but it is contended that there exists in the language of the rule "statutory provision regulating service of process," in accordance with which service ought to have been made at the head office of the bank. Undoubtedly such statutory provision exists in some cases, as, for example, in the case of railway companies, into whose constitution the provisions of the Companies Clauses Act, 1845, have been incorporated (see *Palmer* v. *Caledonian Railway Co.*); and also in the case of companies formed under the Companies Act, 1862: see *Watkins* v. *Scottish Imperial Insurance Co.* In both these cases the statutes provided for service at the head office of the company, and it was held that service at a branch office within the jurisdiction was irregular, the proper course being to obtain leave to serve the writ at the head office out of the jurisdiction under order 11. No such statute applicable to banking companies has been

* Young and Anderson had not been served with the writ.

brought to our notice. The statute relied on was 45 & 46 Vict. c. 77, entitled "An Act to amend the law of citation in Scotland"; but when that Act is examined and read in connection with the Citation Amendment (Scotland) Act (34 & 35 Vict. c. 42), referred to in the preamble, it is found to relate exclusively to process issued from the courts of Scotland, and to contain no provision applicable to the service of process issuing from an English court. It seems to us that this Act does not constitute a statutory provision regulating the service of process within the meaning of the rule. It was also said that the right to serve a foreign corporation carrying on business in England exists only when the cause of action has arisen in England, and therefore does not exist in the present case, inasmuch as the cause of action arose in Scotland. It is difficult to see why this should be so. If a foreigner is found within the jurisdiction, he may be served with a writ, although the cause of action did not arise in England; and it is not easy to see why there should be a difference as to the right to serve a foreign corporation which is found to have a place of business and to be trading in this country, and which is therefore to be treated as resident here. Further, the decided cases do not support this contention. In *Haggin* v. *Comptoir d'Escompte* the action was brought on a contract made in Paris, and in *La Bourgogne* the cause of action was a collision on the high seas. Lastly, it was said to be contrary to the policy of the law that actions of this kind should be brought in England when they might be brought in the Scottish courts, within whose jurisdiction the defendant bank has its head office, and the defendants Young and Anderson, as well as the plaintiff, reside. In support of this contention reference was made to ord. 11, r. 2. This rule relates to service out of the jurisdiction, and must receive careful attention when any application for that purpose is made to the court, as, for example, if leave should be sought to serve the defendants Young and Anderson out of the jurisdiction. No such rule applies where service is made within the jurisdiction. If the defendants Young and Anderson were found within the jurisdiction, the plaintiff would be entitled to serve them with the writ as of right, and without any leave obtained from the court; and in the circumstances of this case the plaintiff also, in our opinion, is entitled to serve the defendant bank as of right and without leave. We therefore think that the appeal ought to be allowed, and that the orders made by the master and the judge should be discharged.

Appeal allowed.

Solicitor for the plaintiff, *D. W. Drummond.*

Solicitors for the defendant bank, *Ashurst, Morris, Crisp, & Co.*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — June 20, 1904.

In re SPARK'S TRUSTS.
SPARK *v.* MASSEY. (*a.*)

Deed — Construction — Settlement — Separation deed — Trust for children—Resumption of cohabitation—Continuing validity.

Appeal from decision of Kekewich, J. (52 W. R. 426, [1904] 1 Ch. 451), that a settlement in a separation deed in favour of the then existing children of the marriage remained in force although the parents had resumed cohabitation.

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

The husband appealed.

Ward Coldridge, for the husband.

H. Greenwood, for the trustee of the deed.

Mossop, for the wife and children.

The appeal was compromised as follows:

THE COURT (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.) held that the compromise was for the benefit of the infant respondents and approved it on their behalf. The court, with the consent of all other parties, and by way of compromise, declared that the agreement of the 25th of February, 1893, was to be construed as if the trusts in favour of the children were extended to all the children of the marriage, whether born before or after the separation, the trustee to be at liberty to pay the costs of all parties (his own as between solicitor and client) out of the fund.

Solicitors, *J. Campion; Mossop & Rolfe.*

Appeal. Vaughan Williams, Romer, and Cozens-Hardy, L.JJ. — June 16, 20, 1904.

In re PRETORIA-PIETERSBURG RAILWAY CO. (LIMITED). (*a.*)

Company— Winding up— Appeal from registrar in chambers—Companies (Winding-up) Rules, 1903, r. 7.

The Court of Appeal will not entertain an appeal direct from the order of the registrar in chambers in the winding up of a company. Motion to discharge such order should be made before the judge.

Appeal by the liquidators of the Pretoria-Pietersburg Railway Co. (Limited) from the refusal of the registrar in chambers to order V., who claimed to prove as a creditor in the winding up of the company, to give security for costs.

Younger, K.C., and *H. C. Bischoff*, for the liquidators.

F. H. M. Corbet, for V., took the point that the registrar had not given leave to appeal.

THE COURT (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.) intimated that it was not satisfied that there was an appeal direct to it from the registrar, and that it would hear that point argued first.

Younger, K.C., and *Bischoff.*—The court can vary its orders from time to time: *Engel* v. *South Metropolitan Brewing and Bottling Co.*, 40 W. R. 282, [1892] 1 Ch. 442. Counsel had fully argued the present case before the registrar, and in *Strong* v. *Carlyle Press*, 41 W. R. 404, [1893] 1 Ch. 268, where counsel had fully argued a case before a judge in chambers, the Court of Appeal heard an appeal, though the judge had not certified that he needed no further argument. This court heard an appeal direct from the registrar, *In re Strand Wood Co.*, [1904] 2 Ch. 1, 52 W. R. Dig. 26, but the point now raised was not taken. It is understood that there Buckley, J., refused to hear an application to discharge the registrar's order, on the ground that the proper course was to go direct to the Court of Appeal. This appears to be the learned judge's usual practice. The matter is now governed by rule 7 of the Companies (Winding-up) Rules, 1903. The result is that the registrar is authorized to determine any

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

matter which can be determined in chambers, unless the judge specially directs to the contrary.

THE COURT consulted Buckley, J., and

VAUGHAN WILLIAMS, L.J., delivered the judgment of the court: We are of opinion that when a matter has been before the registrar in chambers, and he has made an order granting or refusing the application made to him, those who desire to question the order should move before the judge to discharge it. We ought not to entertain an appeal direct from the order of the registrar upon an interlocutory matter disposed of by him in chambers. Buckley, J., will entertain a motion for this purpose. There has been some misapprehension, for Buckley, J., informs us that it has not been his practice to refuse to entertain motions to discharge orders made by the registrar in chambers. We make no order on this appeal, and we leave the costs of it to be dealt with by Buckley, J.

Solicitors, *Bompas, Bischoff, & Co.; Cayley & Cayley*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) June 16, 1904.

RIDOUT *v.* FOWLER. (*a.*)

Vendor and purchaser—Real estate—Payment of deposit—Purchaser's interest in land—Action for rescission—Compromise—Payment by vendor to purchaser—Judgment creditor of purchaser—Equitable execution—Receiver—Security perfected after compromise.

In June, 1901, *a purchaser under a contract for sale paid a deposit and was let into possession of certain land. The purchaser having failed to complete in March,* 1902, *the vendor gave him notice rescinding the contract and forfeiting the deposit. In May the purchaser commenced an action for return of the deposit, and the vendor counterclaimed for specific performance. In August,* 1902, *a judgment creditor of the purchaser obtained an order appointing himself, upon giving security, receiver of the rents, &c., receivable in respect of the purchaser's interest in the land in question. Notice of the order was served on the vendor, and it was registered under the Land Charges Registration and Searches Act,* 1888, *and the Land Charges Act.* 1900, *but the creditor did not perfect his security as receiver till May,* 1903. *In January,* 1903, *the action between the purchaser and the vendor was compromised, a consent order being made for rescission of the contract and delivery up of possession by the purchaser on payment to him by the vendor of* £110. *The judgment creditor then commenced an action against the vendor, claiming to have a lien on the land for the amount of his judgment debt, and also claiming payment of the judgment debt by the vendor.*

Held, that the £110 *was not paid to the purchaser in respect of any interest that he had in the land, but on the basis that he had no interest in it. Consequently the action must fail.*

Decision of Farwell, J., *affirmed.*

This was an appeal from a decision of Farwell, J. (reported [1904] 1 Ch. 658).

On the 14th of June, 1901, the defendant Fowler agreed to sell to one Green certain freehold premises known as Oakleigh Lodge, Sunbury, for £2,850, the purchase to be completed on the 29th of September following. Green paid £300 to the defendant as a deposit in part payment of the purchase-money, and was let into immediate possession of the premises.

On the 8th of March, 1902, the defendant gave Green formal notice rescinding the agreement and forfeiting the deposit, and on the 29th of May, 1902, Green commenced an action of *Green* v. *Fowler*, against the defendant claiming return of the deposit, to which the defendant counterclaimed for specific performance.

On the 1st of July, 1902, the plaintiff Ridout, in an action in the King's Bench Division of *Ridout* v. *Green*, recovered judgment against Green for £55 and costs and such costs were subsequently taxed at £100 7s.

On the 8th of August, 1902, Ridout was appointed receiver in his action of *Ridout* v. *Green* (upon first giving security in the usual way) to receive the rents, profits, and moneys receivable in respect of Green's interest in the premises, Oakleigh Lodge, Sunbury.

On the 9th of August, 1902, Ridout served Fowler with notice of his receivership order of the 8th of August, 1902, and also duly registered it under the Land Charges Registration and Searches Act, 1888, and the Land Charges Act, 1900.

On the 16th of January, 1903, an order was made by consent in the action of *Green* v. *Fowler*, by which the contract of the 14th of June, 1901, was rescinded, and Green on payment to him of £110 delivered up possession of the premises to Fowler. Ridout completed his security as receiver in May, 1903, and then commenced the present action against Fowler, claiming a declaration that by virtue of the order of the 3rd of August, 1902, and under the circumstances, he was entitled to a lien or charge upon the said premises for securing payment to him of the said sum of £155 7s. and interest thereon at 4 per cent. per annum from the 1st of July, 1902; and he also claimed payment by the defendant of said sum of £155 7s., and interest as aforesaid.

Farwell, J., held that Green was never possessed of any estate in the land on which Ridout's order by way of equitable execution could have operated. He also held that, Ridout not having perfected his security as receiver till after the compromise, had no claim in respect of the £110. He accordingly dismissed the action.

The plaintiff appealed.

Bramwell Davis, K.C., and *Crossfield*, for the appellant.—On payment of the deposit Green acquired an interest in the property: see *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. C. 672, and *Whitbread* v. *Watt*, 50 W. R. 442, [1902] 1 Ch. 835. This interest was bound by the order for equitable execution, and the £110, having been paid in order to purchase this interest of Green, ought to belong to the present plaintiff, and the fact that he had not perfected his security at the date of the compromise makes no difference.

W. F. Webster, for the respondent, was not called upon to argue.

VAUGHAN WILLIAMS, L.J.—It has been said that the agreement under which the £110 was paid to Green was an "act of oblivion." But we cannot shut our eyes to the facts of the case. It was said that on proof of the existence of the contract for the purchase of the property, the payment of the deposit and the lapse of the time fixed for completion without the purchaser completing or offering to pay the balance of the purchase-money, Green, having paid the deposit, would be entitled to judgment in an action for the return of the deposit, because the onus would be on the defendant in such action to prove the reason for the non-completion of the contract. I cannot agree. I think that, wherever the onus originally was, on proof of the above facts there would be sufficient to throw upon

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the purchaser the onus of proving the cause of non-completion. The plaintiff, who has obtained this order for the appointment of a receiver and has registered it, says that he is entitled to have the £110 which was paid to Green under the agreement between him and Fowler treated as the purchase-money of an interest which Green had in the land. If the plaintiff had proved that Green had an interest in the land, and that the £110 was paid for that interest, the plaintiff would have been entitled to succeed in this action. But he has not proved that. So far from proving that the £110 was paid as the price of an interest which Green had in the land, it is plain that the settlement took place on the basis that Green had no interest at all, that he was in default and had no right to a return of the deposit. The vendor desired to regain immediate possession of the property, and the £110 was the price paid to get Green out of possession. In my opinion the appeal fails, and should be dismissed with costs.

ROMER, L.J.—I agree. The plaintiff has entirely failed to prove that the £110 was paid by Fowler to Green in respect of any interest which he had in the property. On that short ground the appeal must fail.

COZENS-HARDY, L.J.—I agree.

Solicitors, *A. Pope; Smith, Fawdon, & Low*, for *Bone*, Bournemouth.

High Court of Justice.

Chan. Div. } July 26, 1904.
Farwell, J. }

In re CLABBON (AN INFANT). (*a.*)

Poor Law—Pauper infant—Legacy—Cost of maintenance—Statute of Limitations—Poor Law Act, 1849 (12 & 13 *Vict. c.* 103), *s.* 16.

Where a pauper infant was chargeable to the guardians of the poor, and became entitled while so chargeable to a legacy under a will,

Held, that the guardians were not limited to the recovery of the cost of one year's maintenance by section 16 *of the Poor Law Act*, 1849, *but could recover the amount expended in maintaining the infant during a period of six years.*

Adjourned summons.

The infant, Frederick William Clabbon, who was born on the 9th of October, 1889, became chargeable to the Guardians of the Poor in St. Mary, Islington, on the 29th of June, 1897, and remained so chargeable up to the date of this summons.

Under the will of his grandfather, William Clabbon, the said infant became entitled to a legacy and a share in residue, amounting together to a sum of £270.

This summons was taken out by the clerk to the guardians of St. Mary, Islington, suing as the next friend of the said infant, asking that a sum of £83, being the amount disbursed by the said guardians in maintaining the said infant during a period of six years immediately preceding the date of this summons, might be paid to them by the executor of the said will, who had been made a respondent.

The question to be decided was whether the guardians could recover the cost of maintenance for the full term of six years or whether they were limited to the recovery of the cost of one year's maintenance under section 16 of the Poor Law Act, 1849. That section provides as follows: "When any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money, or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in relief of such pauper during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof, as the case may be."

Davey, for the applicant.—An infant must pay for necessaries supplied to him during his minority (*In re Rhodes*, 38 W. R. 385, 44 Ch. D. 94), and the common law right to recover debts so incurred during a period of six years is not limited by section 16 of the Poor Law Act, 1849. The remedies given by that section to guardians of the poor are in addition to, and not in substitution of, their common law rights.

West Ham Union v. *Pearson*, 62 L. T. 638, 38 W. R. Dig. 49, was also cited.

Paterson, for the executor.—The right of guardians to recover expenses in respect of maintenance of a pauper is limited by the section to a period of one year. They have a statutory duty to provide for paupers and cannot exercise the common law right: *In re Webster*, 27 Ch. D. 710, and *In re Newbegin*, 36 Ch. D. 477.

FARWELL, J., in giving judgment, said: This case is covered by the authorities that have been cited. I do not agree that a pauper who gets relief to keep him alive takes that relief as a right, so that he cannot subsequently be sued if he acquires money, as has happened in the present case. The question was decided in *West Ham Union* v. *Pearson*, 62 L. T. 638, 38 W. R. Dig. 49, where Fry, L.J., said: "The question is whether the defendant is liable for these expenses, expenses which were properly incurred for the benefit of the defendant. I think he is so liable, and I base my decision, not upon the Lunacy Acts, but simply upon the common law liability on the part of the defendant to repay the expenses necessarily incurred for the benefit of the defendant himself." And in that case Mathew, L.J., concurred; he said: "It has been abundantly proved here that this man was not in a fit state to protect himself, that these expenses were necessaries, and that, therefore, the defendant is liable for them."

At common law an infant is liable for necessaries for six years. The question is whether section 16 of the Poor Law Act, 1849, limits such liability to one year. It is difficult to imagine why it should, and the words of the statute do not bear that construction. The section provides two additional remedies—first, it gives guardians additional security on any property a pauper may have; and secondly, a right to recover expenses in a summary manner. It does not touch their common law rights. It would require special words to limit those rights.

If it had not been for the *dictum* of Chitty, L.J., in *In re Newbegin*, 36 Ch. D. 477, the question would not have been open to doubt, but the *dictum* there was not necessary for the point to be decided in that case; the case was decided under another Act of Parliament and it is not binding on me. The result is that the executor must pay to the guardians the sum asked for by this summons.

Solicitors for the applicant, *Samuel Price & Sons.*

Solicitors for the respondent, *Crossfield, Cushing, & Wheldon.*

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

Chan. Div. }
Buckley, J. } July 21, 1904.

In re GEORGE ROUTLEDGE & SONS (LIMITED). HUMMEL *v.* GEORGE ROUTLEDGE & SONS (LIMITED). (*a.*)

Company—Debenture—Series—Transfer of some debentures to company—Subsequent transfer by company—Validity.

A limited company duly issued a series of debentures, each of which was to rank pari passu *with the others. Certain of these debentures were, for value, transferred to the company itself, and afterwards re-transferred, likewise for value, by the company to other persons.*

Held, that the debentures so dealt with did not rank pari passu *with the other debentures of the same series.*

Further consideration.

This was the further consideration of an action brought by the plaintiffs on behalf of themselves and all other holders of first mortgage debentures of George Routledge & Sons (Limited), against the company.

The company was registered on the 9th of November, 1889.

By article 5 (*f*) of their articles of association their objects, among other things, were to issue first mortgage debentures for an aggregate sum of £75,000, carrying interest at £5 per cent., and if necessary or desirable at any time to renew any of such first mortgage debentures; but the company was not to have power at any time during the existence of any first mortgage debenture so created, or any first mortgage debentures issued in renewal thereof, to grant any mortgage or charge of any kind which should have priority over or rank with the mortgage or charge created by such first mortgage debentures.

By article 107 (7) the directors were empowered from time to time to borrow for the purposes of the company such sums of money as they might think proper, and they might secure the repayment of any moneys so borrowed and the interest thereon by mortgage of the whole or any part of the company's property including capital, whether called up or not, or after the registration of the company, by the issue of mortgage or other debentures, or bonds, or upon such other security and upon such terms as they might think fit, and, in particular, might after the registration of the company create first mortgage debentures for an aggregate sum of £75,000, carrying interest at £5 per cent. which should have priority over all other mortgages or securities of the company.

On the 7th of January, 1890, the company issued 750 first mortgage debentures to secure the aggregate sum of £75,000 with interest at 5 per cent. Each debenture purported to charge by way of floating security the undertaking of the company, and all property, whatsoever or wheresoever, present and future, of the company with the payment of the principal money and interest.

The conditions subject to which the debentures were issued were stated to be, amongst others:

(1) The debenture was one of a series of like debentures limited to the sum of £75,000 issued or to be issued by the company. The debentures of the said series were to rank *pari passu* as a first charge on the property and assets of the company, without any preference or priority over one another, and such charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge in priority to the said debentures.

(3) The company was to keep a register of the holders for the time being of the debentures.

(4) Every transfer was to be in writing under the hand of the registered holder. The transfer and the debentures were to be delivered at the office of the company, and thereupon the transfer was to be registered.

(5) The registered holder was for all purposes to be regarded as exclusively entitled to the benefit thereof, and the company was not to be bound to enter on the register notice of any trust or to recognize any right in any other person.

(10) The company was, on the 1st of October, 1896 and on the 1st of October in every subsequent year, to redeem one-tenth of the debentures.

(15) The company might at any time prior to the 1st of October, 1896, postpone for a period not exceeding five years the commencement of the redemption of the debentures.

At various dates after the issue of the debentures, but all prior to the 1st of October, 1896, the company bought in the market sixteen of this series of debentures, whereby the aggregate sum of £1,600 had been secured. These debentures were transferred to the company in the usual way.

Subsequently, but at dates prior also to the 1st of October, 1896, the company, for value received, purported to transfer these same debentures to persons who were now the holders of them.

At the trial of the action it was admitted that the plaintiff and all other the holders of mortgage debentures of the company of the same issue as the plaintiff's debentures were entitled to a charge upon the undertaking of the company.

Judgment to that effect was accordingly pronounced on the 9th of August, 1900. Certain accounts and inquiries were by the judgment ordered to be taken and made.

By his certificate, dated the 23rd of February, 1904, the master certified that he had, in the third part of the first schedule thereto set forth the names of certain claimants to hold debentures of the issue of the 7th of January, 1890 (being the holders of the above-mentioned sixteen debentures). He reserved, however, for the consideration of the court, the question whether these claimants, or any of them, were entitled to be treated as the holders of these debentures.

It was admitted that the assets of the company charged by the debentures of this series were not sufficient to pay the amounts secured by them in full.

The plaintiffs took out a summons asking that the action might be heard on further consideration, and that an order might be made in theterms of accom-accompanying minutes.

The minutes contained a declaration that the respondents, the claimants of the sixteen debentures, were not entitled to be treated as holders of first debentures of the company in respect of the debentures claimed to be held by them.

J. K. Young (*Astbury, K.C.*, with him), for the plaintiffs.—The debentures held by the respondent debenture-holders are bad. A mortgagor cannot set up his own incumbrance against any other incumbrancer: *Watts* v. *Symes*, 1 D. M. & G. 240, 244; *Otter* v. *Lord Vaux*, 5 W. R. 188, 6 D. M. & G. 638. It is only where "the owner of an estate pays charges on the estate which he is not personally liable to pay" that the question whether those charges are to be kept alive for his benefit can arise: *Thorne* v. *Cann*, [1895] A. C. 11, 18, 43 W. R. Dig. 121 (per Lord Macnaghten); *Adams* v. *Angell*, 5

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Ch. D. 634, and *Thorne* v. *Cann*, where it was held that the charges were kept alive, were cases of purchasers of property subject to charges not created by them. That is not this case. The conditions subject to which these debentures were issued do not relieve the holders from equities attaching to them. The position of the respondent debenture-holders is that of purchasers of a *chose in action* with notice of a defect in title, if, indeed, notice is required at all. Again, the subsequent transfers of the debentures by the company cannot be treated as a re-issue, for the company had no power to re-issue debentures before the 1st of October, 1896, and would be prevented from so doing by the conditions relating to redemption. The plaintiffs are not estopped from disputing the validity of the debentures held by the respondent debenture-holders: *Mowatt* v. *Castle Steel and Iron Works Co.*, 34 Ch. D. 58, 35 W. R. Dig. 82.

Earle, for certain of the respondent debenture-holders.—In the present case there never was any intention that merger should take place. [BUCKLEY, J., referred to Ashburner on Mortgages, p. 475.] *Thorne* v. *Cann* and *Liquidation Estates Purchase Co.* v. *Willoughby*, 46 W. R. 589, [1898] A. C. 321, are strongly in my favour. [BUCKLEY, J.—In neither case was the person who paid off the charge liable to pay the debt.] Secondly, assuming that the original debentures had merged, the company, which had power to issue debentures of the series in question, purported to give debentures; although those debentures may be bad in point of form, the holders are equitable mortgagees, and ought to be allowed to rank *pari passu* with the debenture-holders represented by the plaintiffs: *In re Queensland Land and Coal Co.*, 42 W. R. 600, [1894] 3 Ch. 181.

Buckmaster, K.C., and *Ashworth James*, for other respondents in the same interest.—The company had power to issue debentures to secure £76,000. Supposing that they had issued a debenture to secure a loan, and had, on paying off the loan, recovered possession of it; if they had re-issued it, such re-issue would have been valid. Why should the position be altered because they have employed different machinery—viz., that of transfer and retransfer? The mere fact that the debentures contain a covenant to pay is not fatal to the contention that the security was intended to be kept alive. In this respect the case is not, in principle, different from *Capital and Counties Bank* v. *Rhodes*, 51 W. R. 470, [1903] 1 Ch. 631. It would be contrary to *Stevens* v. *Mid-Hants Railway Co.*, 21 W. R. 858, 8 Ch. App. 1064, that we should lose our security.

Arthur Sims, for other respondents in the same interest.

BUCKLEY, J.—I should have thought that this case was unarguable. I have heard argument upon it, and I am still of opinion that it is unarguable. The company had power to issue debentures to secure sums up to the aggregate amount of £75,000, each debenture ranking *pari passu* with the others. The debentures are in the usual form. There is a covenant to pay the principal when it becomes due, and in the meantime to pay interest on the same. There is also a charge by way of floating security on the undertaking and assets of the company. Amongst the conditions there is one that a register of debenture-holders shall be kept, in which every transfer is to be entered. What has happened is this. The company issued all the debentures, and the names of the debenture-holders were entered. Subsequently, the company bought in the market some of its own debentures. Upon those purchases this took place. The debenture-holder executed to the company itself a transfer in common form—"I of in consideration of the sum of £ paid to me by Geo. Routledge & Sons (Limited) (hereinafter called the transferee) do hereby bargain, sell, assign, and transfer to the transferee the debenture of and in the undertaking called Geo. Routledge & Sons (Limited)." The debenture, having been delivered at the office of the company for registration, was then stamped on the back with a rubber stamp which bore the words: "This bond was transferred 18 , from to ." This form was filled up in the case of each transfer. In the case of the debenture which is before me there is a record of its transfer from Edward Kinder to G. W. Davis, and from G. W. Davis to the company in 1893. Then they made an entry in the register of holders of debentures—"Geo. Routledge & Sons (Limited) are the registered holders of this debenture." Now, what is the effect of this transaction? The company has become the assignee of its own debt, and has become bound to pay itself £100 and interest; and it has also become the assignee of its own undertaking to pay its own debt, and of a charge upon its own property to secure the payment. The result, to my mind, is that the debt is absolutely gone; a man cannot be the assignee of his own debt and a mortgagee of property of which he is also mortgagor. And, inasmuch as the debt is gone, the security is also gone.

Subsequently the company transferred these debentures. The transfer, again, is in the common form. The debenture was again stamped on the back, "This bond was transferred October 28th, 1903, from Geo. Routledge & Sons (Limited) to W. F. Narraway and C. Gow," and their names were put on the register in respect of the debenture. To my mind that operation had no effect; W. F. Narraway and C. Gow were transferees of nothing. There was no debt in existence, and no security in existence at the date of the transfer to them.

A second argument is raised on this question. It is said, and quite truly, that when the person who took the transfer from the company paid his money for it, he thought that what was being transferred to him was a debenture forming part of the £75,000 series. But it is also said that the company was bound to give effect to that which was the real bargain between the parties by issuing to him a new debenture, if this transaction did not result in giving him such a security. Was there such a contract? To my mind there was not. To take an example. Suppose it to be a condition of this issue that a debenture is not to be assignable free from equities. A transferee of such a debenture has got that to which there are attached equities subsisting at the date of the transfer, as between the company and the debenture-holders. He will get something to which equities are attached, equities, that is to say, which are attached to the debt. The contention of the respondents must be, not that he is necessarily an assignee of the debt, but that he is a person who, if he does not get that which is nominally assigned to him, is entitled to get a new thing which is to be free from equities. But he has not bargained for that. He has made a bargain by which he is to get something which has become a dead thing. It is true that he has not paid his money in that expectation, but that is all that he has got. There is no contrast between him and the company, except that he is to get an assignment of this debenture. The second ground on which the argument for the respondent is put therefore fails.

I agree that if there is a contract that a person is to have a loan on the terms that the lender is to have a binding security, and he does not get that which he has contracted to have, he has the right to be placed in the same position as if he had got it. But this

loan was different. It was not made on the terms that there should be issued to the lender a particular security, but that there should be transferred to him something which was not a security, something which the company had not got, and could not, therefore, transfer to him. I think that these debentures ceased to be securities, and I declare, therefore, that they do not rank *pari passu* with the other debentures of the same issue.

Solicitors, *R. S. Taylor, Son, & Humbert; H. J. Mannings; Seaton Taylor; Nathaniel Reynolds.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) } April 22; May 9, 1904.

RAINBOW *v.* HOWKINS. (*a.*)

Auctioneer—Public auction—Sale of chattel of value exceeding £10—No signed "note or memorandum" of contract—Action for refusal to deliver—Liability of auctioneer—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

The defendant, who was an auctioneer, was instructed by the owner of a pony to put it up for sale at a public auction with a reserve price of £25. At the auction the defendant put the pony up for sale and disclosed the owner's name, but, forgetting his instructions as to the reserve price, orally announced that the pony would be sold without reserve. The plaintiff bid fifteen guineas, and being the highest bidder the pony was knocked down to him. The defendant made no note or memorandum in writing of the sale in his book. Immediately after the sale the defendant discovered and informed the plaintiff that he had made a mistake in offering the pony for sale without reserve, and he thereupon put it up for sale again, when it was bought in for seventeen guineas. In an action brought by the plaintiff for the delivery up of the pony, or, alternatively, for damages for breach of warranty of authority by the defendant to sell it without reserve,

Held, (1) *that the value of the pony being more than £10 the action failed by reason of the absence of a written memorandum or note of the sale in accordance with section 4 of the Sale of Goods Act,* 1893; *and* (2) *that there had been no breach of warranty of authority to sell the pony without reserve, as, the principal's name having been disclosed, there was a contract binding on the principal on which he could, but for the non-compliance with section 4, have been successfully sued by the plaintiff.*

Warlow *v.* Harrison, 8 *W. R.* 95, 1 *E. & E.* 309, *distinguished.*

Appeal by the plaintiff from his Honour Judge Ingham sitting at the county court of Rugby, in the county of Warwick. The plaintiff in his action claimed from the defendant, an auctioneer, the delivery up of a pony sold to the plaintiff by the defendant at an auction held by him at Rugby Cattle Market on the 21st of September, 1903, which the plaintiff alleged was wrongfully detained by the defendant. Alternatively the plaintiff claimed £26 5s. and damages for its detention; and in the further alternative he claimed £20 damages for breach of warranty of authority by the defendant to sell the pony "without reserve."

At the trial the plaintiff gave evidence that he attended the auction held by defendant, where the pony, the subject-matter of this action, was not catalogued but was advertised in an advertisement issued by the defendant. The auctioneer, forgetting instructions by his principal to sell subject to a reserve, orally advertised to the public assembled at the auction that he was offering the pony without reserve, and that it would be sold without reserve to the highest bidder. He disclosed the name of the vendor. The plaintiff bid fifteen guineas, and being the highest *bonâ fide* bidder, the auctioneer knocked the pony down to the plaintiff. After the lapse of a few minutes the auctioneer, discovering that he made a mistake in offering the pony for sale without reserve, put it up again and himself bid it up to seventeen guineas. The plaintiff denied that his attention was called to any conditions of sale by the auctioneer, and no evidence was called by the defendant to show that such conditions were exhibited.

The reserve price upon the pony was £25. The plaintiff tendered to the defendant the purchase price of the pony, which tender was refused. Before bringing his action the plaintiff made a demand on the defendant for delivery up of the pony, but he refused to do so.

The defendant pleaded the statutory defence under section 4 of the Sale of Goods Act, 1893, that the pony being of a value greater than £10, and there being no note or memorandum in writing of the contract of sale, the plaintiff had no right of action.

The learned county court judge gave judgment for the defendant, holding that section 4 of the Sale of Goods Act, 1893, was a good defence to the first part of the plaintiff's claim, and with regard to the claim for breach of warranty of authority to sell, that, the principal having been disclosed, the defendant was not personally liable.

From this decision the plaintiff now appealed.

J. C. Gordon, for the appellant.—Section 4 of the Sale of Goods Act, 1893, does not apply to a claim for breach of warranty of authority to sell, it only relates to direct sales: see *Warlow* v. *Harrison,* 8 W. R. 95, 1 E. & E. 309, per Martin, B., at p. 317. The defendant, by putting up the pony for sale without reserve, contracted that the sale should be without reserve, and the plaintiff being the highest *bonâ fide* bidder has a right of action against the defendant for breach of that contract. Further, by section 58, sub-section 2, of the Sale of Goods Act, 1893, a sale by auction is complete when the hammer falls, and any subsequent dealing by the auctioneer with the article that has been sold is wrongful, and an action in tort for the wrongful detention can be maintained by the purchaser against the auctioneer.

Pritchett, for the defendant.—The judgment of the county court judge was right. *Warlow* v. *Harrison* does not apply here. In that case, as is pointed out in *Mainprice* v. *Westley,* 6 B. & S. 420, the name of the vendor was not disclosed to the purchaser, but in the present case the name of the vendor was given, and but for the absence of a written memorandum of the sale the vendor could be successfully sued by the plaintiff, but he cannot sue the auctioneer. Further, there has been no breach of warranty of authority to sell on the part of the defendant.

He cited the following cases: *Gadd* v. *Houghton,* 24 W. R. 975, 1 Ex. D. 357; *Howard* v. *Sheward,* 15 W. R. 45, L. R. 2 C. P. 148; *Collen* v. *Gardner,* 21 Beav. 540; *Saffron Walden Building Society* v. *Rayner,* 28 W. R. 681, 14 Ch. D. 406; *Manser* v. *Black,* 6 Hare 443; and *Franklyn* v. *Lamond,* 4 C. B. 637.

Gordon replied.

Cur. adv. vult.

May 9.—KENNEDY, J., read the judgment of the court: In this case we are of opinion that the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

plaintiff's appeal fails. The claim is put in two ways: Firstly, for delivery of a pony or payment of £26 5s.; secondly, in the alternative, £20 damages for breach of warranty of authority of auctioneer to sell the pony "without reserve." We are of opinion, on the authority of *Woolfe* v. *Horne*, 25 W. R. 728, 2 Q. B. D. 355, which is a more recent decision than *Mainprice* v. *Westley*, cited to us by the defendant's counsel, that an action for the wrongful refusal to deliver a chattel sold at public auction may, in some circumstances, at least, successfully be brought against the auctioneer, although the principal's name is disclosed to the buyer at the time of the sale. We see no material distinction between the facts in *Wolfe* v. *Horne* and the facts in the present case, except that in that case, apparently, no question of a statutory defence arose in regard to the requirement which existed at the date of that action under section 17 of the Statute of Frauds and exists now under the Sale of Goods Act, 1893, s. 4. In the present case the chattel is of a value exceeding £10, and the statutory defence is relied upon by the defendant. It is not suggested that there was any signed memorandum or note within the meaning of the statute. The case of the plaintiff, therefore, so far as it consists of a claim for the refusal to deliver the chattel in accordance with the alleged contract of sale fails; not because an auctioneer whose principal is disclosed cannot be sued for the refusal to deliver the chattel sold, but because the purchaser, by reason of the Sale of Goods Act, cannot maintain an action in respect of the contract.

There remains for consideration the claim for damages for the alleged breach of warranty of authority to sell. In our judgment this also fails. There was—apart from the point arising under the Sale of Goods Act, s. 4—a contract of sale binding upon the defendant's principal. The hammer had fallen; and, as between the plaintiff, as the highest bidder, and the auctioneer's principal, the right of the plaintiff could not have been defeated by the principal showing that the auctioneer was authorized by him to sell only subject to a reserved price. The defendant, the auctioneer, had an apparent authority, which his principal, if he had been sued by the plaintiff, would not have been allowed, in point of law, to repudiate after a sale had been concluded by the hammer being knocked down, upon the ground that his private instructions had been contravened by the auctioneer in selling "without reserve" *Warlow* v. *Harrison* was cited to us by the plaintiff's counsel. But in that case the auctioneer never made a contract, as he refused to accept the plaintiff's bid, although it was the last genuine one; and therefore he never did effect a contract between his principal and the plaintiff. Here the answer to the plaintiff's claim on the ground of breach of warranty or misrepresentation of authority is that there was none. The defendant's principal was as much bound as if he had made the bargain himself; but the action fails for a totally different reason—viz., the want of a signed contract.

Whether an action would lie against the auctioneer for failing to make an entry in his book which would bind his principal, we do not stop to inquire. No such point, as constituting a ground of claim, was made at the trial, and it is not open to the plaintiff. We have dealt with the only questions which arose upon the present appeal.

Appeal dismissed.

Solicitors for plaintiff, *Smith, Fawdon, & Co.*, for *Sir Thomas Wright & Sons*, Leicester.

Solicitors for defendant, *Gibson & Weldon*, for *H. G. Prior*, Rugby.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) } April 18, 1904.

FRASER v. FRASER. (a.)

Practice—Trial—Referring order to master—Right of appeal—R. S. C., 1883, ord. 14, r. 7.

Where an order is made under ord. 14, r. 7, referring an action to a master for trial, no appeal lies from his decision.

Appeal from decision of a master in an action referred to him under ord. 14, r. 7.

The action was brought to recover commission on sale of shares.

The action was, by consent, under ord. 14, r. 7, ordered to be referred to a master for decision.

The master directed judgment to be entered for the plaintiff for £800.

The defendant then appealed to the Court of Appeal, who dismissed the appeal on the ground that no appeal lay to them, but expressed no opinion as to whether an appeal lay from the order of a master.

The defendant then appealed to the Divisional Court on the ground that the finding was against the weight of evidence.

By ord. 14, r. 7, it is provided "Upon the hearing of the application, with the consent of the parties, an order may be made referring the action to a master or the action may be finally disposed of without appeal in a summary manner."

Trevor Lloyd, for the plaintiff.—No appeal lies from the master. He is an arbitrator, and his decision is therefore final.

Hume Williams, for the defendant.—The master is here in the nature of a referee, and therefore an appeal lies to this court. Rule 6 of order 40 provides that, "Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment on the ground that upon the finding as entered the judgment so directed is wrong." And by rule 6 (*a*), rule 6 is made to apply to "a reference to any officer of this court . . . under an order of this court." That includes a reference to a master under ord. 14, r. 7. It would materially restrict the scope of order 14 if parties who consented to its being referred to a master lost their right of appeal thereby.

Trevor Lloyd replied.

Lord ALVERSTONE, L.C.J.—I think in this case that the meaning of the rule is that the master was to be in the position of arbitrator. I am strongly pressed with the fact that, before the Judicature Act, there was for many years a well-known practice of referring actions to Queen's Bench masters with the consent of parties, and in those cases the master undoubtedly acted as an arbitrator, and there was no appeal. I cannot think that it was intended by the words of this rule to destroy the old practice. Mr. Hume Williams relies upon the words in ord. 40, r. 6 (*a*) which provides that rules 2 and 6 "shall apply to a reference to any officer of the court . . . under an order of the court." And rule 6 is to the effect that where a referee has directed that any judgment be entered any party may move to have the judgment set aside "on the ground that upon the finding as entered the judgment so directed is wrong." That only allows an appeal where the judgment is not in accordance with the finding; and does not allow any appeal from the finding itself,

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

which is what is desired here. Those rules are not inconsistent with the view that there is no appeal from a master under ord. 14, r. 7, on a question of fact. Without saying that the judgments of the Court of Appeal in *Fraser* v. *Fraser*, [1904] 1 K. B. 56, are an authority on this point, the language they used show that they inclined to the view that there was no appeal at all.

WILLS, J.—I agree. I think that any *a priori* argument as to whether there should or should not be a right of appeal is quite beside the mark, as any reference under ord. 14, r. 7, is made by consent. I think this case must be regarded as an ordinary reference. The phrase "that the action be referred" is a very old one, and was ordinarily understood as meaning that the action was to be dealt with by an arbitration. Why it should not have that meaning here I do not know. This view of the case was that taken by Cozens-Hardy, L.J., and apparently also by Mathew, L.J., in *Fraser* v. *Fraser*, [1904] 1 K. B. 56.

KENNEDY, J.—I agree. The phrase "that an order may be made referring the action to a master," had, I think, a well-understood meaning when this rule was framed, and I cannot for my part see any difficulty in supposing that it was intended to be treated in that well-recognized sense, viz.—that he was to be treated as an arbitrator, and no appeal lies from his decision. It is said that the words "without right of appeal" in the second limb of the rule exclude the idea that a decision of a master upon a reference under the first limb is also to be without appeal. I think there are two answers to that. In the first place, if the words "without right of appeal" were not in the second limb there would have been the ordinary right of appeal to the judge. In the second place, if our view is correct that the words "referring the action to a master" in themselves imported that there was no right of appeal, to have introduced the words "without right of appeal" in the first limb would have been misleading, as suggesting some new kind of reference with limitations not heard of before.

Appeal dismissed.

Solicitors for plaintiff, *Harratt & Pollock.*

Solicitors for defendant, *Williams & Neville.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) April 15, 1904.

POLLEY v. FORDHAM. (a.)

Justices — Illegal distress — Action against magistrate issuing warrant—Statutory limitation for commencement of action—Act from which time begins to run—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*a*).

In an action for illegal distress against a magistrate, the six months within which the action must be brought, as provided by the Public Authorities Protection Act, 1893, *begins to run from the date of the levy on the premises and not from the date of the conviction, the distress being the act complained of.*

Appeal from the Shoreditch County Court.

On the 11th of February, the plaintiff, John Polley, was summoned for not having two of his children vaccinated and was in each case fined 20s. and costs. Distress was levied on the 17th of April, and on the 27th of April the distress was paid out by the plaintiff under protest. On the 8th of July, 1903, the conviction was (by consent) quashed by this court on the ground that the summonses were issued more than eighteen months after the birth of the children. The plaintiff, on the 26th of August, brought an action in the County Court against the magistrate who had convicted him, for £50 for illegal distress. The county court judge gave judgment for the defendant, being of opinion that the plaintiff was barred by section 1 (*a*), of the Public Authorities Protection Act, 1893, as the injury was suffered by the plaintiff by reason of the conviction on the 11th of February, which was more than six months before action brought.

By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance of, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect. . . . (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in a case of a continuance of injury or damage within six months next after the ceasing thereof."

Kingsbury, for the plaintiff.—The county court judge was wrong. The injury to the plaintiff was the distress and not the conviction: *Brittain* v. *Kinnaird*, 1 B. & B. 432. Section 3 of the Justices' Protection Act, 1848 (11 & 12 Vict. c. 43), shows that the conviction and distress are quite separate acts.

Robertson, for the defendant.—The real injury to the plaintiff was the conviction. The distress was only a ministerial act. Section 3 of the Justices' Protection Act, 1848, supports this view.

Lord ALVERSTONE, L.C.J.—I express no opinion as to what may be the eventual result of this action. All we have to do is to see whether the plaintiff's right of action is barred by the Public Authorities Protection Act, 1893, s. 1 (*a*). That section provides a statutory limitation, and must therefore be construed strictly. The words on which the defendant relies are as follows: "(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." The act complained of here was not, in my opinion, the conviction. The act complained of was the trespass to the plaintiff's premises by the levying of the distress.

Section 3 of the Justices' Protection Act, 1848, is only for the purpose of protecting a justice who has issued a warrant upon a conviction apparently legal by some other justice which subsequently turns out to be without jurisdiction, and the Act provides that the action, if any, must be brought against the justice who made the original order. I think it would require clear and distinct words to say, with regard to a statutory limitation, that the period is to run, not from the date of the real cause of action, the entry on the premises, but from some order of anterior date under the authority of which that entry was made. I think, therefore, the case must go back to the county court judge.

WILLS, J.—I agree. I think the act complained of is distress and nothing else. No such action was ever heard of as an action for making an order without jurisdiction. If the order is not followed

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

by consequences against individuals it comes to nothing. Actions for illegal distress of one sort or another were at one time very common, but they were always actions of trespass. The form of the complaint used to be that the defendant had wrongfully entered the house or premises of the plaintiff and had done so and so. Then any question which arose about the warrant, conviction, or order on which the erroneous proceedings by way of distress and entry were founded, was raised on a defence setting up that it was justified because of the warrant and the conviction or order on which the warrant was founded. But the action itself was not for erroneous exercise of jurisdiction, but was for making a distress and breaking and entering a man's premises when there was no right to do so. No such action as that suggested by the respondent will be found in Bullen & Leake or Chitty on Pleading, or in any of the books of precedents.

KENNEDY, J.—I agree.

Appeal allowed.

Solicitor for plaintiff, *H. T. Nicholson.*

Solicitor for defendant, *Treasury Solicitor.*

Court of Appeal.

From K. B. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Nov. 11.

In re SOLOMONS.

Ex parte THE BANKRUPT. (*a.*)

Bankruptcy—Practice—Claim by bankrupt to inspect the record of minutes of committee of inspection—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 80—*Bankruptcy Rules,* 1886, *rr.* 12, 16, 285, 292.

Neither by the Bankruptcy Act nor the Bankruptcy Rules has a bankrupt the right to inspect the record book kept by his trustee under section 80 *and rule* 285; *and therefore the court will not give leave for such inspection, nor take notice of the circumstances on which the application is based.*

Decision of Bigham, J. (ante, *p.* 30, [1904] 2 *K. B.* 760), *affirmed.*

Appeal from a decision of Bigham, J. (reported *ante,* p. 30, [1904] 2 K. B. 760), refusing to make an order to permit the bankrupt to inspect the record book kept by the trustee in the bankruptcy, and containing minutes of the meetings of the committee of inspection and copies of letters and other papers, which the trustee, on obtaining his release, had handed over to the official receiver.

The bankrupt had been prosecuted and convicted for an offence under the Debtors Act, 1869, and was anxious to clear his character by taking proceedings against persons who, he alleged, had been guilty of perjury, as he hoped the inspection would enable him to prove.

The official receiver had allowed him as a favour to inspect the minutes of one meeting of the committee, but, on that proving insufficient, had denied him inspection of the whole series, and the learned judge had held that the circumstances did not warrant a departure from what appeared to be the established practice.

The following are extracts from the Bankruptcy Act and Rules:

Bankruptcy Act, 1883, s. 80: "The trustee shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt may, subject to the control of the court, personally or by his agent inspect any such books."

Bankruptcy Rules, 1886:

"Rule 12. All proceedings of the court shall remain of record in the court, so as to form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the officers of the court, or by special direction of the judge or registrar, but they may at all reasonable times be inspected by the trustee, the debtor, and any creditor who has proved, or any person on behalf of the trustee, debtor, or any such creditor."

"Rule 16. All office copies of petitions, proceedings, affidavits, books, papers, and writings, or any parts thereof required by any trustee or by any debtor, or by any creditor, or by the solicitor of any such trustee, debtor, or creditor, shall be provided in the High Court by the senior bankruptcy registrar, and in a county court by the registrar; and shall, except as to figures, be fairly written at length, and be sealed and delivered out without any unnecessary delay, and in the order in which they shall have been bespoken."

"Rule 285. The official receiver, until a trustee is appointed, and thereafter the trustee, shall keep a book to be called the 'record book,' in which he shall record all minutes, all proceedings had, and resolutions passed at any meeting of creditors, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the estate, but he shall not be bound to insert in the record any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors), nor need he exhibit such document to any person other than a member of the committee of inspection."

"Rule 292. Upon a trustee resigning, or being released or removed from his office, he shall deliver over to the official receiver, or, as the case may be, to the new trustee, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of trustee."

The bankrupt appeared in person in support of his appeal.

Muir Mackenzie, for the official receiver.

VAUGHAN WILLIAMS, L.J.—We have read the appellant's affidavit. It appears to raise questions of perjury which cannot be gone into here. When one looks at the Act of Parliament and the rules, it is manifest that the appellant has no right to inspect the record book, and that is the only matter before us; we cannot go into any of the circumstances. If the appellant wishes to inspect the records of the court he can apply for office copies under rule 16.

ROMER and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitor, *The Solicitor to the Board of Trade.*

(*a*) Reported by R. HILL, Esq., Barrister-at-Law.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — June 22, 1904.

ATTORNEY-GENERAL *v.* ASHTON GAS CO. (*a.*)

Company—Gas company—Statutory maximum dividend—Payment free of income tax.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Income tax payable by a company is payable out of its profits and is part of the profits. Where, therefore, a company is precluded from dividing its profits among its shareholders in excess of a statutory maximum rate, it cannot pay a dividend at that rate free of income tax.

Decision of Buckley, J. (52 *W. R.* 347), *affirmed.*

This was an appeal from a decision of Buckley, J. (reported 52 W. R. 347).

The facts are fully stated in the report of the case in the court below, and the following short statement is sufficient for the purposes of this report:

The action was brought by the Attorney-General at the relation of the Corporation of Ashton-under-Lyne, and by that corporation (the corporation being large consumers of the company's gas, and interested with other consumers in the price of gas in the borough being reduced), for "a declaration that, according to the true construction of the Ashton Gas Acts, 1847 (10 & 11 Vict. c. cci.) and 1877 (40 & 41 Vict. c. clxxxvi.), and in particular of sections 16 and 17 of the Act of 1877, the profits divisible in any year among the shareholders of the company ought to be calculated as inclusive and not exclusive of the amount payable for that year in respect of income tax on the profits to be divided."

By section 16 of the Act of 1877, "Except as in this Act provided, the profits of the company to be divided among the shareholders in any year shall not exceed the rate of £10 per cent. per annum (which rate is in this Act referred to as the 'standard rate of dividend') on the ordinary share capital or stock of the company authorized by Parliament and paid up."

By section 17, "The standard price to be charged by the company for gas supplied by them shall be 3s. 8d. per 1,000 cubic feet. Provided that the company may increase or diminish such standard price subject to a decrease or increase in the standard rate of dividend as defined by this Act, to be calculated as follows: For every penny charged in excess or in diminution of such standard price in any year the standard rate of dividend shall for such year be reduced or increased by 5s. in the £100 per annum."

Buckley, J., came to the conclusion that the dividend to be paid to the shareholders ought to be calculated as including the income-tax payable in respect thereof.

The gas company appealed.

Haldane, K.C., and *Cann*, for the appellants.

Danckwerts, K.C., and *R. J. Parker*, for the respondents, were not called upon.

The arguments used and cases cited on behalf of the appellants were similar to those used in the court below.

VAUGHAN WILLIAMS, L.J.—I think the judgment of Buckley, J., is quite right. The matter depends, as he points out, upon sections 16 and 17 of the Ashton Gas Act, 1877. Section 16 says: "Except as in this Act provided the profits of the company to be divided among the shareholders in any year shall not exceed the rate of £10 per cent. per annum (which rate is in this Act referred to as the standard rate of dividend) on the ordinary share capital or stock of the company authorized by Parliament and paid up." Then section 17 is "The standard price to be charged by the company for gas supplied by them shall be 3s. 8d. per 1,000 cubic feet. Provided that the company may increase or diminish such standard price subject to a decrease or increase in the standard rate of dividend as defined by this Act, to be calculated as follows." Then it gives the rates.

The real question that we have to determine in this case is whether in estimating what has been paid as the standard rate of dividend, the income tax which has been paid by the gas company must be included as part of that which goes to make up the 10 per cent. standard rate of dividend. It really was not denied in argument that that which has to be divided amongst the shareholders is the profits of the company, and it is not denied that the income tax is part of the profits of the company, and not something to be deducted before you arrive at the profits. Buckley, J., puts that so plainly that I cannot add anything to it. He says: "A sum which is an expense which must be borne whether profits are earned or not must no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of the profits themselves. I refer to Lord Blackburne's judgment in *Last* v. *The London Assurance Corporation.*"

No doubt it is quite true to say that if you have regard to the provisions of the Finance Acts with reference to income tax under Schedule D, the income tax in a case like this is assessed on the profits of the company, but still the fact that it is so, and that that is the mode of collecting the income tax, in no way negatives the proposition that the company is paying the income tax on behalf of the shareholders amongst whom the profits, as I have pointed out, after payment of income tax are distributed.

One or two suggestions have been made against this conclusion. Buckley, J., has pointed out that not only was there nothing outside the provisions of the Act preventing the company in such a case from deducting the rateable proportion of the income tax from the dividend paid to each shareholder, but he goes on to say that section 54 of the Act of 1842 makes a positive provision to that effect. I did not understand counsel for the appellant to deny that if you take section 54 by itself there are not included amongst the persons who are to allow the deduction members who are receiving the dividend, and Buckley, J., goes on, after pointing out that that is so, to deal with the provisions of section 60, the third clause of which was much relied on by counsel for the appellant, and he comes to the conclusion that there is nothing in that third clause which is inconsistent with the application of section 54. The thing that was relied on by counsel as entitling him to deal with section 60 as if it created a special code distinct from the provisions in section 54 was that in the enumeration of the persons who were to allow the reduction you had persons who had no interest in the profits of the company whatsoever, or persons who might have no interest—that is to say, creditors—and that you do not find in that section words which you find in section 54, which are "persons," "corporations," or "companies," having "any share, right, or title, in or to such profits or gains." But Buckley, J., came to the conclusion, and I agree with him, that there is nothing in section 60, clause 3, which is inconsistent with the application of section 54 to the present case. Counsel for the appellants called the two sections 54 and 60, both of them, indemnity sections. I do not think that section 54 is an indemnity section in the same sense that section 60 is. I think it does apply to the present case, and that the shareholders are bound by it to allow this deduction, and it necessarily follows from that that the income tax which is paid by the company is income tax paid on behalf of the shareholders. But it is not necessary to rest upon section 54 as showing conclusively that the income tax is paid by the company on behalf of the shareholders or to rely even on the practice which the receipt put in shows to my mind conclusively. The

certificate given by the officers of the company for the shareholder to use when he goes to ask for a repayment of amounts paid by him by way of income tax runs: "I hereby certify that income tax on the profits of the company of which this dividend forms a part has been or will be duly paid by me to the proper officer for the receipt of the taxes." That seems to me to be as plainly as possible a recognition that the money is to be paid on account of the shareholders. But, as I say, putting aside section 54 and putting aside the practice of this company, it still remains that there is nothing in the Act of Parliament which prohibits the company doing this—that is, prohibits the company treating the amount which they paid on account of income tax as paid on behalf of the shareholders. Under those circumstances it seems to me that by the general rule of law one ought so to treat the payments. The dividends are dividends on the profits, the sums paid for income tax are part of those profits, and it seems to me that apart, therefore, from any special provision in the special Act, and apart from any practice which may have existed, that if this came up as a new question immediately after the Act of Parliament had been passed one would equally have been justified in coming to the conclusion that the income tax was paid on behalf of the shareholders out of the profits. Under those circumstances I think that if the dividend is paid up to the full standard rate of 10 per cent. free of income tax the shareholders would be receiving more than the standard rate. I think, therefore, this appeal fails and ought to be dismissed with costs.

ROMER, L.J.—I agree with what my lord has said and with the judgment of Buckley, J. I will only add a very few words. I must say, speaking for myself, that the case appears to me to be a reasonably clear one on principle. If such a company as we have to deal with pays income tax on its profits, that income tax, as has been pointed out, is payable out of the profits, and is part of the profits, and if the profits after deducting the income tax have subsequently to be distributed among the members of the company, that income tax is not payable again by those members so far as they receive their share of the profits, because the income tax is to be taken as having been paid out of their profits and on their behalf. If, for example, a company such as this had preference shareholders as well as ordinary shareholders, and the preference shareholders were only entitled to receive out of the profits a fixed sum, say 5 per cent., then where income tax is paid by the company out of its profits it must be treated as paid in respect of so much of the profits going to the preference shareholders in respect of their 5 per cent., and, according to my mind, it is clear on principle in such a case that the preference shareholders would have to have deducted from the dividend warrants payable to them the income tax on the 5 per cent. which had been previously paid on their behalf by the company. The same principle of course applies to the shareholders in the present case, who are restricted by the provision of the Act so that they are only to share a limited amount of the profits. Section 16 of the special Act in this case makes perfectly clear what I should otherwise have gathered even without that section, that what the members of the company in respect of their maximum dividend are to receive is clearly so much of the profits of the company. Section 16 says that the profits of the company to be divided amongst the shareholders in any year shall not exceed a rate of 10 per cent. per annum, and so forth. That shows that what the shareholders have to receive are, in any point of view, profits. On those profits which they receive they would have had to pay income tax directly themselves if it had not been paid by the company. As a matter of fact the tax has been paid by the company, and therefore in that respect the shareholders are free from the obligation of paying income tax on the portion of their profits which they have received by reason of the payment in respect of those profits by the company generally. It appears to me that that simple view really decides this question, and I am clearly of opinion that the appeal entirely fails.

COZENS-HARDY, L.J.—I am of the same opinion. I so entirely agree with every word of the judgment of Buckley, J., as well as what has fallen from my lord and Romer, L.J., that I do not think I ought to add anything on my own behalf.

Solicitors, *Burgess, Cozens, & Co.*, for *Arthur Buckley*, Manchester; *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *F. W. Bromley*, Ashton-under-Lyme.

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) } June 7, 10, 1904.

In re HOARE & CO. (LIMITED AND REDUCED) AND *In re* COMPANIES ACTS, 1867 AND 1877. (*a*.)

Company—Reduction of capital—Deterioration in value of securities and assets—Reserve account—Proposed scheme—Part of preferred and deferred ordinary shares to be written off, and part also of the reserve account—Sanction of court—Jurisdiction—Discretion—Practice—Companies Acts, 1867 (30 & 31 *Vict. c.* 13) *and* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

The directors of a brewery company, incorporated as a limited company, acting under powers in that behalf contained in the articles, had for many years reserved, out of the profits of the company which they might have distributed in dividends, a reserve account, the amount of which, however, they did not keep separately invested, but treated as general assets of the company to be dealt with in the ordinary course of business; and this system of procedure was authorized by the articles. The company afterwards incurred a loss owing to depreciation in the value of its tied public-houses. The company thereupon resolved to reduce the share capital, and applied to the court to sanction, under the Companies Act, 1877, *a scheme for reduction of capital, whereby the company proposed to attribute the loss, between the reserve account and the capital account, though not in rateable proportions; the reserve account (although a small part of it was to be still retained) being debited with more than its rateable proportion of the loss, and the capital account with less than its rateable proportion of the loss.*

Held, that the court had jurisdiction to, and would, sanction such scheme.

Decision of Buckley, J., *reversed.*

In re Barrow Hæmatite Steel Co., [1900] 2 *Ch.* 846, 49 *W. R. Dig.* 24, 50 *W. R.* 71, [1901] 2 *Ch.* 746, *discussed.*

This was an appeal from a decision of Buckley, J., refusing to sanction a scheme for the reduction of the capital of the company, which it was alleged was necessary by reason of the profits of the company having greatly decreased, partly owing to the very heavy writings down for bad and doubtful debts incurred in consequence of the very heavy fall in the value of licensed property, and for depreciation in value of such securities and loss.

(*a*.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

The facts were as follows:

Hoare & Co. (Limited) was incorporated in the year 1894 under the Companies Acts, 1862 to 1890, as a limited company, the registered offices of which were by the memorandum of association of the company situated in England. The object of the company was to carry on the businesses of brewers, maltsters, and hop merchants, and other businesses connected with brewing and breweries, also to lend or advance money to such parties and on such terms as might seem expedient, and in particular to customers of and persons having dealings with the company, and other objects set forth in the memorandum of association.

The original capital of the company was by the memorandum and articles of association fixed at £1,000,000, divided into 60,000 preference shares of £10 each, 36,000 preferred ordinary shares of £10 each, and £4,000 deferred ordinary shares of £10 each.

Clause 12 of the articles of association provided as follows: "The 60,000 preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of £5 per cent. per annum on the amounts for the time being paid up or credited as paid up thereon, and shall rank both as to dividend and capital in priority to all other shares in the capital; nevertheless the company may at any time, as provided by clause 50 hereof, with the sanction of a general meeting, create and issue 20,000 additional preference shares of £10 each ranking in all respects *pari passu* with the said 60 000 preference shares. . . . The said 36,000 preferred ordinary shares shall confer the right to a fixed cumulative dividend at the rate of 5 per cent. per annum on the amounts for the time being paid up or credited as paid up thereon and shall rank both as regards dividend and capital in priority to the said deferred ordinary shares. The surplus profits from time to time available for dividend shall be applicable to the payment of dividend on the said deferred ordinary shares as hereinafter provided."

The rights in winding up were defined in clause 161 of the company's articles of association in the following terms: "In the event of a winding up, the surplus assets shall be applied (i.) In paying off the capital paid up on the preference shares at £120 per cent. and any arrears of dividend to the time of such payment; (ii.) in paying off the capital paid upon the preferred ordinary shares at £100 per cent., and any arrears of dividend to the time of such payment; and (iii.) the surplus shall belong to the holders of the deferred ordinary shares in proportion to the number of such shares held by them respectively." Provision was made in paragraph 8 of clause 119 for a reserve fund, whereby certain powers were conferred on the company's directors, and amongst other powers a power in the following terms: "(8) Before recommending any dividend to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies or for equalizing dividends, or for repairing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall in their absolute discretion think conducive to the interests of the company and (subject to clause 4 hereof) to invest the several sums so set aside upon such investments as they may think fit, and from time to time deal with and vary such investments and dispose of all or any part thereof for the benefit of the company; and to divide the reserve fund into such special funds as they think fit, and to employ the reserve fund or any part thereof in the business of the company and that without being bound to keep the same separate from the other assets."

In May, 1896, the capital of the company was, by a resolution of a general meeting of the company, increased to £1,200,000 by the creation of 20,000 new 5 per cent. cumulative preference shares of £10 each, to rank in all respects *pari passu* with the then existing preference shares.

In June, 1897, the capital of the company was further increased to £1,950,000 by the creation of 7,500 new shares of £10 each, to be called A cumulative preference shares, and in regard thereto it was resolved that the following provisions should have effect: (i.) "The said new shares shall carry a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital for the time being paid up thereon. . . . (ii.) The said new preference shares shall rank for dividend next after the 80,000 existing preference shares and in priority to the ordinary shares for the time being of the company, whether preferred ordinary or deferred ordinary. (iii.) The said new preference shares shall in a winding up be entitled to rank as regards repayment of capital next after the 80,000 existing preference shares and in priority to the ordinary shares, whether preferred ordinary or deferred ordinary, but the said new preference shares shall not be entitled to any further participation in surplus assets."

All the company's shares had been issued and fully paid up. Since its incorporation the company had out of profits paid considerable dividends, and it had built up, pursuant to paragraph 8 of clause 119 of its articles of association, a reserve fund of £292,612 18s. 1d., made up of the following items: (1) Premiums received for leases, £48,737 18s. 1d.; (2) premiums received on issue of preference shares, £252,000; (3) general reserve fund, £50,000; total on the last two items, £302,000; but less dividends paid to October 7th, 1903, viz.: Preference shares £30,000, "A" preference shares £28,125, equals £58,125. A sum of £292,612 was thus arrived at. The general reserve fund consisted of undistributed profits, which had accumulated since 1896. In addition to the above, £2,365 17s. 8d., part of the profits for the year ending the 7th of January, 1903, and £29,116 19s. 11d., the profits for the twelve months ending the 7th of January, 1904, had not been distributed. The assets of the company consisted to a large extent of tied public-houses, both freehold and leasehold, and loans advanced on the security of public-houses. It appeared from the balance-sheets of the company (copies of which were set forth in an affidavit of A. L. Wigan, one of the directors of the above-named company) that for some time past the profits of the brewery had gradually decreased, and there had been a long and continuous fall in the value of assets of this description. The company, therefore, had their breweries, licensed houses, &c., valued by experts, and in the result it was ascertained that such assets show a net depreciation of £591,707 13s. 10d., and that capital of that amount had been lost or was unrepresented by available assets. No appreciation of any other of the company's assets had occurred in any way to compensate for such loss. In the affidavits of one of the firms of experts on tied houses and loans thereon, and the said A. L. Wigan, it was deposed that to the best of their judgment and belief the loss was a permanent and not merely a temporary one. Advice of counsel was then taken, and as a result several meetings were held of the preference and A preference shareholders, and an extraordinary general meeting of the company was held, when it was determined by the directors that it was advisable in the interest of the company and of all the shareholders to deal with the loss as follows: '(i.) £396 000 to be written off by extinguishing a corresponding amount of the preferred ordinary shares and of the deferred ordinary shares; (ii.) £195,707 13s. 10d. to be met by writing off the like

amount part of the reserve funds of the company." The whole of the preferred ordinary and deferred ordinary shares were held by four shareholders. Clause 53 of the company's articles of association provided that the company might from time to time by special resolution reduce the capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets, or reducing the liability on the shares or otherwise as might seem expedient. By special resolution of the company unanimously passed and confirmed at these meetings it was resolved that the capital of the company be reduced to £1,554,000, and that such reduction be effected by cancelling the whole of the preferred ordinary shares and the capital paid up thereon as being capital lost or unrepresented by available assets, and by cancelling the sum of £9 per share in respect of each of the deferred ordinary shares as being capital lost or unrepresented by available assets and by reducing the nominal amount of such deferred ordinary shares to £1 per share, and also for altering the articles of association by making the same accord with the altered capital. This was unanimously agreed to by the preference and A preference shareholders. The form of the minute proposed to be registered was as follows: "The capital of Hoare & Co. (Limited) is £1,554,000, divided into 80,000 preference shares of £10 each, 7,500 A cumulative preference shares of £10 each, and 4,000 ordinary shares of £1 each, instead of the former capital of £1,950,000, divided into 80,000 preference shares of £10 and 7,500 A cumulative preference shares of £10 each, and 36,000 preferred ordinary shares of £10 each, and £4,000 deferred ordinary shares of £10 each."

The company presented a petition to the court, praying for the reduction of its capital on the terms and conditions set out above, and also that the words "and reduced" to the company's name might be dispensed with altogether.

Buckley, J., after stating that in his opinion the court could not sanction a reduction on the terms proposed, held that the decision of Cozens-Hardy, L.J., in *In re Barrow Hæmatite Steel Co.*, [1900] 2 Ch. 846, 49 W. R. Dig. 24 (and which went to the Court of Appeal, where the point was not touched on: 50 W. R. 71, [1901] 2 Ch. 746), was on an exactly similar point, and he agreed with the learned Lord Justice that sums of this kind, *i.e.*, the reserve fund, must be taken into consideration in order to find out the loss. He accordingly refused to sanction the scheme and dismissed the petition.

The company appealed.

Neville, K.C., *Eve, K.C.*, and *Martelli*, for the company.—The question is whether the Legislature has determined the matter and said that the capital could not be reduced unless the reserve fund was used. [ROMER, L.J.—The question is whether the loss ought to be distributed rateably between the reserve fund and the capital.] The learned judge said that so long as the company had assets available they could not reduce. [ROMER, L.J.—I do not think this is a question under the Act of 1877 at all, for the purposes of the Act as far as the reserve fund is concerned, the Act has nothing to do; for reserve fund is not capital, it is the balance only that must suffer loss.] [VAUGHAN WILLIAMS, L.J.—The real difficulty depends on the application of the fund.] Here the shareholders elected to reserve a part of the profits they might have divided, and they handed it over to the company. [ROMER, L.J.—Has there been any loss in trading?—No. Then it is all capital loss?—Yes.] Evidence was produced showing the resolutions, and the fact that every shareholder had been consulted and consented to the scheme.

They referred to *In re Hæmatite Steel Co.*, [1900] 2 Ch. 846, 49 W. R. Dig. 24, 50 W. R. 71, [1901] 2 Ch. 746; *In re Direct Spanish Telegraph Co.*, 35 W. R. 209, 34 Ch. D. 307.

ROMER, L.J.—The only question which we have to consider in this case is one of principle, or it may be called one of law—viz., whether the court has jurisdiction in such circumstances as arise here to sanction this scheme for the reduction of capital owing to the loss that has occurred on capital account. I think we have. The question arises in a case where there was a reserve fund properly set apart by the company under the provisions of its articles. Now, that reserve fund was one which was properly created—that is to say, it was a fund which at the time it was created arose from the fact that there were available assets, after deducting all liabilities of every kind, including the amount which is represented by the share capital, which might have been applied as the company thought fit without thereby doing any violence to the provisions of the Companies Acts, or to the articles of the company; in other words, the surplus which was carried to the reserve fund represented what might have been properly applied at the time, if the company had so thought fit, in paying further dividends to the shareholders, and no person could have complained if they had done so. It was therefore a reserve fund properly created, and that reserve fund could have been dealt with by the company in accordance with the provisions of its articles if they thought fit. They might have utilized it in payment of or in equalizing subsequent dividends, or if they had chosen they might have applied it in making good lost capital, or have applied it to any purpose they thought fit within the objects of the company. That was the condition of the reserve fund, and the circumstances under which it was created. Now what does such a fund as that represent? To my mind it in no wise represents the capital account properly so called. Let me test it in this way. In this case the company might, if they had thought fit, have taken assets and set them apart to represent the reserve fund, and might have kept those assets wholly apart from all the other accounts of the company. They might have kept the assets representing the reserve fund strictly to answer that reserve fund, and not have dealt with them in any way as part of the general assets of the company. So long as they did that, it is clear to my mind that the assets representing the reserve fund could not be properly called in itself a capital account or a capital asset. But in this case the company did what they had power to do, and what is often done in similar cases—namely, they did not set apart special assets to represent the reserve fund, but they allowed the matter to rest in account, and the assets generally to be dealt with by the company in the ordinary way of business, whether those assets might be said so far to represent the reserve fund, or whether they represented the capital account and the other liabilities of the company. Now, what happened in that state of things was this. After some subsequent trading it was found that there was a great loss of assets, so great that after taking the liabilities properly so called of the company apart from the reserve fund and the capital account, there was insufficient to pay the reserve fund and to meet the capital liability. In that case, what ought to be done with regard to the loss? Ought it to be attributed wholly to the capital account or wholly to the reserve fund, or ought it to be treated as apportioned? In my opinion, under the circumstances of the case, the loss ought to be treated as apportioned between the reserve fund and the capital account properly so

called—that is, the share capital. In the present case the company propose to do more than that. They propose to attribute more than its due proportion of the loss of assets to the reserve fund than they do to the capital account. In my opinion that was a matter they were not absolutely bound to have done, but certainly they had a right to do, and so far, I think, no complaint can be made of their not wiping out the whole of the reserve fund, but treating a certain part of the assets as representing the reserve fund as written down by them. That leaves a certain amount of assets to represent the share capital after deducting the ordinary liabilities of the company—that is to say, the current debts, and the debenture stocks and so forth. Then, when we see what assets there are to meet the share capital, it is clear there has been a great loss of the capital, and accordingly we are asked under the Acts of Parliament to sanction a scheme for the reduction of the share capital. In my opinion the court has undoubted jurisdiction to deal with a scheme so framed, and to sanction it if it thinks fit. I quite agree that the court is not bound in such a case as this to sanction the scheme. I can well understand cases in which the court will say: "No, we will not sanction any reduction of the capital so long as you keep anything by way of reserve fund." I can conceive circumstances under which the court might justly say: "This is a case where we think no reserve fund ought to be allowed to remain, and we will not sanction the scheme in so far as any reserve fund is allowed to remain." But the court undoubtedly, to my mind, has jurisdiction to sanction such a scheme, whereby a proper part, as indicated previously by me, of the reserve fund is allowed to exist, and in the circumstances of this case I think the court ought to allow the small proportion of the reserve fund, which according to the scheme is provided for, to remain as a reserve fund. I think, therefore, that in this case not only has the court jurisdiction to sanction the scheme, but that under the circumstances it ought to do so. I may only add that in this case there is no question as to the rights of creditors, and it is a case where all the shareholders are unanimous in approving of the scheme. Under these circumstances I think the court ought to approve of the scheme.

VAUGHAN WILLIAMS, L.J.—I am inclined to think that that is right. I asked Romer, L.J., to deliver judgment first because in a matter of this sort I knew that he would put it much more clearly than I could myself, but at the same time I consider it my duty to state for myself the principles upon which I understand we are acting in the present case.

Now, the particular statute under which we are acting is the Companies Act of 1877, and we have to see, before we can sanction the reduction of capital, whether the case comes within the words of the third section of this Act—that is to say, whether there is any lost capital, or any capital unrepresented by available assets. I regard those two things as alternatives, and not as if the latter were exegetical. We have to see whether there is any lost capital, and to what extent. The difficulty which Buckley, J., had in this case was that he was not satisfied that there was lost capital to the extent which was alleged in the petition, and his doubt arose from the existence of this reserve; I do not use the words "reserve fund" because it is not true in fact to say that there was any reserve fund at all. If there had been any reserve fund in this case, and if the reserve fund was a fund which appropriated this sum which might be paid in dividends, but which the company did not think it prudent to distribute in dividends at the moment, but would retain in hand ready to distribute in dividends if they thought fit, unless the company by a proper resolution determined to do otherwise with it, I should have said that, under such circumstances, if you have a loss, as you have a loss in this case, by the reduction in market value of the tied houses, the whole of that loss was a loss which for the purpose of this statute as to reduction of capital ought to be written off capital properly so called entirely. We really have not to decide that in this case, because the facts do not raise such a case, but I do want to say before leaving that point that, as I understand it, however much capital you have lost at any given date, if your profit and loss account shows a profit balance, then to the extent of that profit balance you are entitled to distribute that money as dividend, notwithstanding the fact that you have lost capital which you have not replaced. Under those circumstances, so far as this undistributed money is to be considered, I think that even if it had arisen after the loss of capital, you could have appropriated it to the payment of dividend, and the whole of that loss then would be properly written off capital. When I heard counsel for the appellants argument the other day, I thought he was arguing upon that basis, and I quite expected a resolution to have been produced relating to the action of the board, showing that there had been some such appropriation. That is not the case here. What has been done is this. No fund has really been created. There has been no investment of this fund which might have been distributed as dividends at all. What has been done is exactly the same as if the balance of profit and loss—that is to say, the profit balance—had existed in sovereigns, and the directors had met together and had said: "We have such a sum that we could distribute, if we chose, now in dividends, but we think it wiser not to do so at present, and therefore we will carry this sum to a reserve." That is, to my mind, precisely the same as if they had said: "We will pour these sovereigns into the till." Now you have got those sovereigns in the till. It is not to my mind a true way of looking at those sovereigns to say: "Here is a fund consisting partly of these sovereigns and partly of the other items appearing upon the asset side of the balance-sheet, and we will treat the capital and the reserve as being two funds which are charged upon one security, that one security being the total of the assets, including therein all the asset side of the balance-sheet and the money which has been poured into the till." I do not think it would be right to regard the capital and that reserve fund as two funds charged upon one security. If it were so, and there was a loss, you get at the rateable proportion of the loss without any difficulty at all. Then, if you cannot do that, what is the proper thing to do? I suppose one has to say that, although the sum undistributed has not been segregated from the circulating capital, but has been poured into the till, nevertheless the power of the directors has not yet gone to do with the money as they may think best in the interests of the company. Supposing, for instance, there had been no scheme for reduction at all, what could the company have done? Could they have distributed this sum as a dividend? Theoretically I think they could. But ought they to do so? I think not. Then, as I understand, our conclusion in the present case is that what, as commercial men managing a commercial undertaking, ought to be done is to distribute the loss in proportion to the figures of the share capital and the reserve fund. As I understand from the figures in the present case, although that has not been done, the departure has only been in the sense of attributing too large a proportion of loss to the reserve fund and too small a proportion of loss to the share capital. Under these

circumstances, there having been an undoubted loss of capital in this case, and as we think that loss has been properly allocated as a commercial matter between the share capital and the reserve fund, we may sanction this scheme.

COZENS-HARDY, L.J.—I agree; but I wish to add a few words of my own. I think the leading idea of Buckley, J.'s, judgment was that you cannot reduce capital unless you find that the capital has been lost and is not represented by any fund, whether it is in the nature of capital or income. I cannot read the Act in that sense. I think if you prove that capital has been lost, you do not really want to consider whether it is unrepresented by available assets. Although capital may not be lost, it may still be unrepresented by available assets, and in that case there is power to reduce.

Some difficulty has been caused here by, what I agree with Vaughan Williams, L.J., in calling, the unhappy use of language by accountants. They will talk of "reserve fund" when there is no reserve fund. I think in this balance-sheet there is an exceptional degree of error. The reserve fund has been treated as though it were on the same footing as representing premiums received on leases. As I understand, that is an item that never could have been applied in payment of dividends. It is not part of the profits of the company. It was a capital item that never ought to have been treated on that footing at all. The other two items are items which really have been dealt with on the footing of article 119, sub-section 8, which says: [His lordship read a portion.] I do not read that clause in full. It authorizes the directors either to apply it for the equalization of dividends or for repairing, improving, and maintaining any of the property of the company, or in any other way conducive to the interests of the company, including, of course, the payment of debts and liabilities of the company. Then it goes on to say that the directors may "employ the reserve fund or any part thereof in the business of the company, and that without being compelled to keep the same separate from the other assets." We now know that that is exactly what has been done. I think we now know that the other items mentioned in this balance-sheet as part of the profits of the company, which might have been applied in payment of dividend, have never by any act of the directors or of the company been turned to any other capital purpose. That being so, these two large items being employed in the business of the company, and not kept separate from the company, we have to deal with a large loss—that is to say, the assets which represent, as I will call them, the next assets after payment of debts which represent the share capital and the reserve fund, are insufficient. How ought that to be dealt with? I adopt the view of Romer, L.J., on that point. I think that if the assets ought to represent both the share capital and the reserve fund, and they are not sufficient to do so, the proper course is to attribute the loss rateably between them; or, in other words, that we should not be justified in saying that a larger amount of capital has been lost than would be the result of working out the proportion in that manner. No doubt the whole of this reserve fund might have been applied to make good this loss of capital. The directors propose to take more than its proportionate share, but to leave what I may call a moderate reserve fund. That being so, it seems to me that we are entitled to say that it has been established in this present case that capital has been lost, and lost to the extent it is proposed to be written off by this order. I desire to say one word about the case of *In re Barrow Hæmatite Steel Co.*, a decision of my own, which Buckley, J., referred to. In that case the reserve fund had not been taken into account at all. It was blended with the other assets, but not taken account of at all. I do not think that I meant to say more than that in considering the loss of capital you must have regard to the fact that the assets include a reserve fund, but not separately invested. If my language goes further than that, I certainly desire to qualify it in the sense I have now mentioned.

Scheme sanctioned and appeal allowed.

Solicitors, *Sandilands & Co.*

High Court of Justice.

Chan. Div. } March 10, 11, 12, 13, 14; June 14, 15,
Farwell, J. } 16, 25, 1904.

MERCER AND OTHERS *v.* DENNE. (*a.*)

Custom—Validity—Legal origin—Presumptions—Right of drying nets on seashore—Character of accreted land.

A custom affecting land is not bad for uncertainty because it is not invariable in every part, nor because the limits of the land affected by the custom are not defined more clearly than the limits of land comprised in a grant. So a custom is not unreasonable because it is prejudicial to the interests of a private individual if it is for the benefit of the commonwealth, for such benefit renders its lawful commencement reasonably probable; again, where the existence of a right for a long period has been proved, everything that is reasonably possible to be presumed in favour of that right should be presumed; and the party, seeking to defeat the right by reason of its inception within legal memory, has the onus of proving that it could not possibly have existed from time immemorial and have continued without interruption. Land accreted takes the character of the land to which it is added, and is subject to the same customs as affect such land: Thus, persons entitled by custom to dry nets on a piece of land adjoining the sea are, where gradual accretion has taken place, entitled to exercise that right on the land gained by accretion.

Action.

The plaintiffs were inhabitants of the parish of Walmer, and fishermen, the defendant being a landowner in the same parish. It was alleged in the statement of claim that there was in the parish of Walmer a piece of ground known as the "beach ground," which was covered with shingle, and was about eleven acres in extent, and was situate near the sea. It was further alleged that this beach ground had from time immemorial been open, and not enclosed, and that the inhabitants of Walmer who were fishermen were entitled by custom to dry their nets thereon by spreading their nets upon the surface thereof. The plaintiffs sought an injunction restraining the defendant from interfering in any way with the alleged custom. The defence was a denial of the custom and a plea that the alleged right was one only exercised by leave and license, and that for some considerable period the beach ground had not been suitable for drying nets on, that it was formed by gradual accretion, and was not any part of the foreshore, but that it formed part of some land of which the defendant was the owner and upon which

(*a.*) Reported by H. STEPHEN, Esq., Barrister-at-Law.

it abutted, and the defendant claimed a right to build thereon or to use it as he thought fit.

The facts are stated in the judgment.

Upjohn, K.C., and *R. J. Parker*, for the plaintiffs.

Eve, K.C., Jenkins, K.C., J. Gatey, and *Stuart A. Moore*, for the defendants.

June 25.—FARWELL, J.—The plaintiffs claim a declaration that the inhabitants of Walmer carrying on the trade or business of fishermen are entitled as of right at all times necessary or proper for the purposes of their trade or business to spread and dry their nets on a piece of shingle or beach lying just above high-water mark between Walmer-place and Walmer Castle, and an injunction restraining the defendant from building on the premises so as to interfere with their right. The piece of land in question in this action is about 11 acres in extent, and is of little value except to the fishermen for drying their nets or to the defendant for building purposes—objects which are unfortunately inconsistent with one another. During the whole of living memory extending over upwards of seventy years in the case of the plaintiffs' witnesses (who were a body of honest and straightforward seafaring men, whose evidence appeared to me to be deserving of entire credit) and by reputation for many years before their birth, the inhabitants of the parish of Walmer who are fishermen have used this piece of ground for the purposes of drying their nets. The practice has varied somewhat during the last seventy years. There are three fisheries now practised at Walmer—the mackerel, the herring, and the sprat fisheries. The mackerel season is from May to July and in September and October, the herring fishery from October to Christmas, and the sprat fishery from November to March. Down to some thirty or thirty-five years ago herring nets and mackerel nets were cutched or tanned at the commencement of and in preparation for the fishery season, and were then spread out to dry on the piece of ground in question, and at the end of the season the boats were brought up close to this piece of ground and the nets were taken directly to it and spread out on it, or if the weather did not permit of that the nets were landed nearer the town and were then brought in carts to this piece of ground and spread out to dry before being put away for the winter, and this practice still remains with regard to the mackerel nets. Down to the same period the sprat nets were not spread on this piece of ground at all. About thirty or thirty-five years ago, the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these nets were also spread on the same piece of ground to dry. The time required for drying after oiling is longer than was required for the earlier process, and sprat nets are now put on the land at a period during which no nets used to be put there so far as living memory goes. The fishermen have occasionally in former years dried their nets in different places along the beach, but this piece of ground in question is that which has always been used and to the extent of covering its whole area at times, and has been known to the fishermen and their forefathers and spoken of amongst them as their own ground. On these facts the plaintiffs claim to have established the existence of a custom for all inhabitants of Walmer being fishermen to dry their nets on this piece of ground at such periods as may from time to time be necessary for the due prosecution of their trade as fishermen according to the varying exigencies of the fishing industry and the requirements of improved nets. The defendant objects (1) that there is no reported case in which a custom for the fishermen of a parish to dry their nets on a particular piece of land has ever been decided, and that such a custom ought not now to be held good; and (2) that a custom for any variation from the ancient time or ancient kinds of nets is bad for uncertainty. I cannot find that the validity of a custom for the fishermen of a parish or town to dry their nets in a particular close has ever been expressly decided, but this is probably due to the fact that such validity has never been questioned. Although the case in the Year Book 8 Ed. 4, c. 18, which is translated by Holroyd, J., in *Blundell* v. *Catterall*, 5 B. & Ald. 295, is referred to as an authority on the point in several subsequent books, I think that the point was assumed, not decided, therein; and this is probably due to the fact stated by Professor Maitland in his admirable preface to the year-books now in course of publication by the Selden Society (vol. 17, p. xiv.), that the reports in year-books were "instructions for pleaders rather than the authoritative fixation of points of substantive law." The general law was announced, the point of interest to certain "sad and grave men" who reported what was the form of pleading. Thus Hale (de Portibus Maris, published by Mr. Hargrave in 1786), says at p. 86, "Look at the book of 8 Ed. 4, 18, for the custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men," referring to the year-book as stating the existence of a well-known custom. In the case of *Tanistry*, Davis Rep. 78, it was stated at p. 89, by counsel as an instance of well known custom, "so to turn the plough on the headland of another in favour of husbandry and to dry nets on the land of another in favour of fishery and navigation." This passage is set out *verbatim* in Rolle's Abr., "Custom," F. 2) as a correct statement of the law. In *Fitch* v. *Rawling*, 2 H. Bl. 393, 398, Buller, J., in 1795, says: "With respect to the case *Bro. Abr. Custom* (pl. 46), where the custom was holden to be bad, not because it was for the fishermen of Kent to dry their nets on the plaintiff's land (which the case in Cro. Car. shows to be good), but either because the digging in the soil in order to pitch stakes to hang nets on was unnecessary or it tended to the disturbance of the inheritance." Here again I am unable to verify the reference, for *Baker* v. *Brereman*, Cro. Car. 418, appears to state only that inhabitants cannot prescribe for a *profit à prendre in alieno solo* "for fishermen to dry their nets for the public benefit or for easement," and I can find no other case in Cro. Car. on the subject. In *Pain* v. *Patrick*, 3 Mod. 289, the court, in holding that the custom in that case was well alleged, said (p. 294): "This may be as well alleged as a custom to turn a plough upon another man's land or for a fisherman to mend his nets there." In Bacon's Abr., "Custom," p. 566 (the first edition of which was published in 1736) this custom is given as good, "so a custom to dry nets upon the land of another; for this is in favour of fishing and navigation." I have failed to find the marginal reference which he gives as his authority—5 Co. 84—and which is also given by Tindal, C.J., in *Lockwood* v. *Wood*, 6 Q. B. 64, but the Lord Chief Justice treats the custom as of known validity in 1844. He says: "A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law and is in effect the common law within that place to which it extends, though contrary to the general law of the realm. . . . Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom." In *Tyson* v. *Smith*, 9 A. & E. 421, the same Lord Chief Justice says: "Nor is a custom unreasonable because it is prejudicial to the interests of a private

man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another in favour of husbandry or to dry nets on the land of another in favour of fishing and for the benefit of navigation." In *Race* v. *Ward*, 4 E. & B. 702, Lord Campbell, at p. 710, in speaking of the right of the inhabitants of a district by custom to go on the soil of another and take water, says that in 15 Ed. 4, 29 A., Catesby, J., treats it as good and likens it to a custom for all the fishermen, inhabitants in a particular vill, to dry their nets on a particular close. Although, therefore, I have failed to find any express decision, there are so many opinions in favour of the validity of the custom expressed by so many eminent lawyers that it would be impossible for me to disregard them, and on principle the custom is, in my opinion, good. A custom must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. It is not unreasonable because it is prejudicial to the interests of a private individual if it is for the benefit of the commonwealth, because such benefit renders its lawful commencement reasonably probable. As Lord Cranworth says in *Salisbury* v. *Gladstone*, 9 H. L. Cas. 301: "In truth, I believe that, when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence and not from any right conferred in ancient times on the party setting up the custom." This has considerable bearing on Mr. Eve's argument that the custom alleged in this action is uncertain; his contention is, in effect, that the custom must be to dry nets not for the purposes of fishing generally, but at particular times and for particular fish. But this is to discard its kernel for its shell, and might result in making an arrangement that was in itself reasonable, because of public benefit, become actually injurious to public interests. If the fishermen of Walmer may dry their nets only on the condition of fishing for such fish and at such times and with such nets as the fishermen in the reign of Richard I. used, all improvements and progress are debarred. But there is neither authority nor principle for any such contention. A custom is not uncertain because it is not invariable in every part. Thus, a custom to pay a year's improved value for a fine on a copyhold is good, though the value is a thing uncertain, for the value may be at any time ascertained (Steph. Comm. 1, 66). Again, the very statement that a custom may be well laid in the inhabitants of a town shows that the number of persons entitled to enjoy it will vary from time to time. In *Abbot* v. *Weekly*, 1 Lev. 176, a custom for all the inhabitants of a vill to dance on the plaintiff's close at all times of the year was held good; and this was followed in *Hall* v. *Nottingham*, L. R. 1 Ex. D. 1, where it was held that a custom for the inhabitants of a parish to enter upon certain land of the plaintiff and erect a maypole thereon and dance round it and otherwise enjoy on the land any lawful and innocent recreation at any time of the year was held good. In *Dyce* v. *Hay*, 1 Macqueen, 312, Lord St. Leonards says that "there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles: Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles. Mr. Upjohn, in his ingenious reply, pointed out that this is fully borne out by the case of *Fitch* v. *Rawling*, 2 H. Bl. 393, where a custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes in the close of A. at all seasonable times of the year was held to justify the defendants in playing cricket there, although it was reasonably certain that cricket was unknown until long after the time of Richard I. (see Strutt's Pastimes, ed. 1801, pp. 83-4), and that, if it came within the description of any of the newly imagined games in the reign of Edward IV., it was made illegal by the Act of 17 Ed. 4, c. 3, which was not repealed until the reign of Henry VIII. It is clear from that Act, and the Act of 12 Richard 2, c. 6, that the number and nature of the games that were lawful varied from time to time, but it has never yet been suggested that such variations rendered the custom to play all lawful games void for uncertainty, and I can see no reason for holding that a custom to dry nets at all times seasonable for fishing is bad, although the periods and numbers and sorts of nets may vary. During the trial the defendant desired to set up a plea that the beach in question, or a great part of it, had come into existence of late years and to contend that it followed therefrom that no custom to dry nets thereon could have existed for the requisite period. I accordingly allowed the trial to stand over, and gave both parties liberty to amend and to adduce further evidence. With regard to the plaintiffs' amendments, I am bound by and follow *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687, and *Mounsey* v. *Ismay*, 3 H. & C. 486. The defendant has amended by adding these allegations: "In and prior to the year 1799, and for many years subsequent thereto, the beach ground was below high-water mark, and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable, and in fact incapable, of being used for the purposes alleged by the plaintiffs, and was formed by gradual accretion and the receding of the sea, and is now above high-water mark and does not now form any part of the seashore or foreshore," and I have had a considerable amount of evidence relating thereto. I have rejected a number of plans as inadmissible; but, as I was told that the case was likely to go to the Court of Appeal, I have taken evidence concerning them as though I had not excluded them, and I can only say that if I had not rejected them as inadmissible, I should have discarded them as worthless. I find the facts to be as follows: The beach in question is a ridge, which from time immemorial has acted as a barrier against the sea for the protection of the land behind it. That land is so low and level that but for the beach it must have been submerged, but it has never been so during historic times. This appears by the nature of the subsoil, as proved by the contractor, who excavated part of it to a depth of five feet in making sewers, and by the discovery of a Roman-British burying-place in the grounds of Walmer Lodge. I find also that the coast in this neighbourhood has, for the last century at any rate, been subject to fluctuations by way of increase by accretion and of decrease by demolition owing to the action of the winds. When the prevailing wind blows on shore for a cycle of years, the process of accretion goes on, but the prevailing winds alternate over long series of years, and consequently the actual line of high water varies according to the duration of such prevailing winds and their aggregate action. The actual ascertainment with certainty of high-water mark at a given date is a matter of

difficulty and time, and cannot be effected by a mere survey. No ancient plans or maps can be relied on as showing high-water mark, and no charts prior to 1795. The two charts which have been put in are Spencer's of 1795 and Bullock's of 1844, both of which are trustworthy. Adopting these two charts, I find that in 1795 high-water mark was approximately in the same place as at present, that in 1844 the sea had advanced fifty or sixty yards, and that at the present time this amount of beach has been regained. The defendant has therefore proved that in 1844 a considerable portion of the beach in question (say, three acres) was below high-water mark and was, therefore, inappropriate for drying nets, and he argues that he has thereby shown that to the extent of that portion the custom must have commenced since the time of Richard I. A defendant may no doubt defeat a custom by showing that it could not have existed in the time of Richard I., but he must demonstrate its impossibility, and the onus is on him to do so if the existence of the custom has been proved for a long period, as was done, for instance, in *Simpson* v. *Wells*, L. R. 7 Q. B. 214, 20 W. R. Dig. 27, where the claim of a custom to set up stalls at the statute sessions for the hiring of servants was defeated by showing that such sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III. But no such impossibility is shown in the present case. If the beach was of its present extent in 1795, why am I bound to infer that it cannot have been the same in 1186 from the mere fact that between 1795 and 1844 the extent diminished and has since again increased? The mere non-user during the period that the sea flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession, and "an interruption of possession only for ten or twenty years will not destroy the custom: 1 Bl Comm. 77; Co. Litt. 114*b*. Not only ought the courts to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present unless such inference is irresistible, but it ought to presume everything that it is reasonably possible to presume in favour of such a right: see *Goodman* v. *Corporation of Saltash*, 31 W. R. 293, 7 App. Cas. 633. I see no reason why I should not presume that this beach was in substantially the same state in 1186 as now. The inland limit is fixed by geological considerations and the Romano-British burying-place; in the reign of Henry VIII. the Castle of Walmer was built as a defence for the coast; it must have been near but safely above high-water limit; and I see no reason from which I can necessarily infer any substantial difference in this piece of beach in 1186. It was next argued that the variations in the beach shown by the two maps of 1795 and 1844 and the present state of things render it impossible to define with sufficient certainty the land affected by the custom, and therefore render the custom bad for uncertainty. But it cannot be necessary to define the limits of land affected by a custom more clearly than those of land comprised in a grant; for this purpose I think that the same principle must apply, the difference between custom and prescription being only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation, but the rules affecting the subject-matter are in each case the same, and I have no doubt that a grant of land which in fact adjoins the sea would be well defined by reference to high-water mark as one of its boundaries. It is said that it is uncertain whether this means high water as it was in 1186 or high water now, but I have evidence of usage and that the nets have been spread down to high-water mark for the time being. This is quite sufficient. Then it is said that it is unreasonable, because the sea may recede for a mile or more, as at Sandwich, and it is impossible to suppose that any such extent of ground could ever have been intended to be appropriated to such a custom. It is enough for me to say that as the event has not happened for upwards of 700 years I cannot see the unreasonableness. The period for ascertaining whether a custom is reasonable or not is its inception. The point is dealt with by Tindal, C.J., in 9 A. & E. 423: "But it is said that the number of these victuallers may be so large and the space occupied by each so great as that the whole portion of the common set out for the fair may be taken by them in exclusion of the rest. . . . But it is obvious that this is not an argument against the custom being reasonable in its commencement, or against the prescription of the fair being a reasonable prescription. It is an objection only as to the mode of exercising the right so claimed, whether under the custom or the prescription." I say in this case, as Lord Cranworth said in *Salisbury* v. *Gladstone*, "I find it impossible to say that such a custom as that here alleged might not have resulted from an agreement between the lord and his tenant before the time of living memory." But the plaintiffs have raised this further and interesting point—that, inasmuch as both sides agree that these three acres have arisen by small and imperceptible degrees these added acres are an accretion to the defendant's land and became subject to the same custom to which the land to which they were added was subject. There is no authority exactly in point, but I have come to the conclusion on principle and on the authority of an analogous case that this contention is well founded. Blackstone Comm. 2, p. 262, states the law to be that, "if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*, and besides these owners being often losers by the breaking in of the sea or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss." In *Attorney-General* v. *Chambers*, 4 D & J. 68, Lord Chelmsford quotes this passage and proceeds: "I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject, because, although the additions may be small and insignificant in their progress, yet after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and if the party who has the right to it can clearly show that it formerly belonged to him he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Alderson B., in the case of *The Hull and Selby Railway Co.*, 5 M. & W. 327, viz.—'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle as to gradual accretion is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule, for if the sea gradually steals upon the land he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore." This reasoning applies with equal force to the persons entitled to exercise rights over a piece of land adjoining the sea. If it is washed away their rights are gone. If it increases, their rights ought to extend over the increased area. It is said that it would be absurd to apply this to a case where the sea has receded for a mile or more; but that is not this case. It is sufficient for me to say (following Alderson,

B.) that this accretion is to be treated as though it had occurred in 1186. If there was now a mile or more of such accretion, it would hardly be possible to find evidence of actual user over more than the fringe near the sea, and the extent of the custom could be limited by such user; or, even if any such user could be shown, the landowner's right of free enjoyment would only be limited by a reasonable exercise of customary rights, or it would probably be held unreasonable to insist on drying nets over a large tract of land. Further, I have the authority of the analogous case of *Foster* v. *Wright*, 4 C. P. D. 438, 28 W. R. Dig. 94. In that case the River Lune had gradually changed its bed. The plaintiff had a free fishery in the ancient river. The defendant owned lands which originally did not abut on the river, but had, by means of the alteration in the river bed, become the river bank. The question was whether the plaintiff's exclusive right of fishing extended over so much of the water as flowed over land which was identified as formerly part of the defendant's property, and it was held that it did. Lindley, J., at p. 448, said, "I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose; nor is there any authority for holding them to be affected thereby." And Lord Coleridge held that the plaintiff was entitled to a several fishery, and said, p. 449, "And such a fishery, I think, would follow the slow and gradual changes of a river, such as the changes of the Lune in this case." Further, the opinion of text-writers, dealing with the analagous cases of accretion to copyholds and wastes of manors, are to the same effect. Thus, Hall on the Sea Shore, p. 113; p. 789 of Mr. Stuart Moore's edition, concludes that the land which has accreted to the lord as freehold must be subject to the copyhold interest of the tenant of the land to which it has been added, or, if waste, to the local customs, commons, &c., prescribed for by the tenants in respect of such waste. Mr. Phear (Rights of Water, p. 43*n*) conjectures that "the land which gradual accretion gives to adjoining lands assumes their character—*i.e.*, becomes freehold or copyhold—and in the latter case waste or tenanted accordingly." I hold, therefore, that the land which has been added by accretion takes the character of the land to which it has been added, and is subject to the same customs as affected such land. The result is that the plaintiffs succeed, and I grant the injunction as asked. The defendant must pay the costs of the action.

Solicitors, *Hare & Co.*, for *F. W. Hardman*, Deal; *Mowll & Mowll*, for *Mowll & Mowll*, Dover.

Chan. Div. }
Buckley, J. } July 9, 1904.

In re JONES & EVERETT. (*a*.)

Practice — Costs — Taxation—Bill paid by executor—Application for taxation by creditor of testator—"Party interested"—Solicitors Act, 1843 (6 & 7 *Vict.* c. 73), *s.* 39.

A creditor of a deceased person, out of whose personal estate an executor has paid, or is liable to pay, a bill of costs, is entitled to obtain taxation of such bill.

Adjourned summons.

This was an application under the Solicitors Act 1843, for the delivery and taxation of certain bills of costs.

Eliza Walters died on the 15th of November, 1902, having by her will, dated the 7th of June, 1886, appointed her husband, William Alfred Walters, sole executor. The will was proved on the 13th of December, 1902, by the said William Alfred Walters, who was then, and had been since 1885, an undischarged bankrupt.

The respondents to the present summons, Messrs. Roberts-Jones & Everett, acted for the executor in obtaining probate of the will, in the administration of the estate, and in the action next hereinafter mentioned.

On the 8th of May, 1903, the applicant, Henry Frazer, one of the creditors of the deceased, commenced an action against the executor for the administration of the estate.

On the 10th of July, 1903, a receiver was appointed in the action, and on the 25th of July, 1903, judgment for administration was pronounced.

In October, 1903, the defendant filed his accounts as executor in the administration proceedings. In his accounts of the disbursements allowances and payments made by him on account of the testatrix's funeral expenses end personal estate were three items mentioned as having been paid to the respondents, viz., (*a*) £98 11s. 10d., paid in December, 1902, for estate duty; (*b*) £93 13s. 8d., paid in April, 1903, for the costs of an attempted sale; and (*c*) £24 10s., paid in April, 1903, for the costs of conveyance of property.

On the vouching of these accounts, these items were referred to a master for taxation. The defendants failed to produce the bills of costs, and it subsequently appeared that none had been rendered.

On the 26th of November, 1903, the respondents informed the plaintiff's solicitors that they were no longer acting in the administration action. Their names, however, still, appear on the record as solicitors for the defendant.

The plaintiffs made several ineffectual attempts to obtain copies of the bills from the respondents. Under these circumstances, and in view of the fact that the defendant had in the meantime again been adjudicated bankrupt, the applicant, on the 23rd of April, 1904, obtained leave to issue the present summons.

The summons asked for the taxation of the bill of £93 13s. 8d. and for the delivery of the three bills of costs.

In an affidavit filed on behalf of the respondents it was stated that there had been an agreement in writing between the defendant and the respondents as to the amount of the costs, and that the sums in question had been paid more than twelve months before.

This point was not relied on at the hearing of the summons, and the only question argued was whether the applicant, as a creditor of the deceased, was a party interested under section 39 of the Solicitors Act, 1843, and as such entitled to tax the bills.

Peterson, for the applicant.—The respondents admit that they have received the amounts of these items, but there can be no "payment" under the Act, until bills of costs have been delivered: *In re Street*, 10 Eq. 165; *In re Stogdon*, 56 L. T. 355. A creditor of a deceased person, out of whose estate an executor has paid, or is entitled to pay, a bill of costs, is a "party interested in the property" within section 39, and as such is entitled to taxation. The reason is that he has rights against the property of the deceased. There is, however, no direct decision on the point. In *In re Blackmore*, 13 Beav. 154, 161, it was held that a residuary legatee was entitled to

(*a*.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

taxation under section 38 as being a party liable to pay. In *In re Leadbitter*, 27 W. R. 267, 10 Ch. D. 388, it was held that a bankrupt who has obtained his discharge, and who has become entitled to the surplus of his estate, all his creditors having been paid in full, is not entitled under section 39 to obtain the taxation of a bill of costs paid by his trustee in bankruptcy. The ground of that decision was that at the moment of payment the trustee in bankruptcy was not a trustee for the bankrupt. Thesiger, L.J., at p. 392, said that it was not necessary to determine exhaustively to what cases section 39 extends. The delivery of the three bills, apart from taxation, the applicant is entitled to obtain under section 40: *Duffet* v. *McEvoy*, 10 A. C. 300, 33 W. R. Dig. 238; *In re Baylis*, 44 W. R. 533, [1896] 2 Ch. 107.

Bailhache, for the respondents.—Apart from section 39 a third party, who is not liable to pay, has no right to tax a solicitor's bill: *In re Jackson*, 37 W. R. 282, 40 Ch. D. 495, 499. According to the interpretation of that section, given by Jessel, M.R., in *In re Leadbitter*, a creditor is not a "party interested" in the property; he is not "a party interested under the trust, deed, will, or intestacy." That case is cited as an authority on the present point in Poley on Solicitors, pp. 408, 409. The section must be construed strictly; a party interested, under a trust or deed is a beneficiary, under a will is a legatee, under an intestacy is a next-of-kin. A creditor is not in any of these categories. Provided the estate is solvent, he is not interested in the property at all; and in no case can he be said to have a greater interest in the property than the bankrupt had in *In re Leadbitter*; and yet in that case it was held that he was not a "party interested" within the section.

BUCKLEY, J.—The applicant in this case is a creditor for a person now deceased, whose estate is being administered under an order obtained by the applicant on the 25th of July, 1903. The application is for the delivery of three bills of costs of a firm of solicitors against the executor, who is the defendant in the administration action, and for the taxation of one of these bills. The question of the taxation of the other bills is left open.

The only point which I have to decide is whether the creditor is, within section 39 of the Solicitors Act, 1843, "a party interested in the property out of which" the executor has paid the bills. I think that he is a party interested. When a creditor is pursuing against the estate of a deceased debtor the remedies which he possesses for obtaining payment of his debts, he is enforcing against the executor a right which is enforceable in a court of equity—namely, to compel the executor to account for the property of the deceased, and to apply it in a due course of administration for the benefit of himself and others in a like case with him. He has no personal right against the executor, but he has a right against the property in the hands of the executor. He is, therefore, in my opinion, within section 39, as being interested in the property.

The argument on the other side is founded on some words which appear in the judgment of Jessel, M.R., in *In re Leadbitter*. It is common ground that the decision in that case has nothing to do with the point now under discussion. The question there was whether in a bankruptcy the trustee in bankruptcy is a trustee for the bankrupt, and it was held that he is not, and that he is in the same position as regards the bankrupt as the assignee in bankruptcy under the earlier Bankruptcy Acts. Towards the bankrupt the trustee in bankruptcy is only a person who is bound to account to him for any surplus that may exist after all the debts have been paid in full. But in the course of his judgment Sir George Jessel says: "It has always been held that the words 'party interested' mean a party interested under the trust, deed, will, or intestacy." I asked counsel for the respondents to refer me to the cases where this "has always been held," and he was unable to do so. I cannot think that Sir George Jessel in using those words was attaching to them the meaning which was imputed to him in the argument which has been addressed to me. He used them by way of contrast to the position of a trustee in bankruptcy.

The preceding sentences are: "The simple question is whether a bankrupt, after his discharge, where the creditors have been paid in full, and, therefore, the surplus, if any, belongs to the bankrupt, has the right under the 39th section of the Solicitors Act to apply for the taxation of a bill of costs paid by the trustee in bankruptcy to the solicitor of a mortgagee of the bankrupt on the occasion of paying off the mortgage debt, which was done during the pendency of the bankruptcy and before the discharge of the bankrupt. I agree with the Vice-Chancellor that the bankrupt has no such right. The supposed right is given by the 39th section of the Solicitors Act, which says . . ." The Master of the Rolls read the section and went on to use the words in question. I think he meant to say that those words had no application to a trustee in bankruptcy, but did not mean to say that a creditor who was putting into operation the rights which he possessed to enforce his debt was not a person interested, because he does not take under the testator's will. It appears to me that a creditor of a deceased person who is looking to the property of that deceased person for the repayment of his debt is a party interested in the property out of which the executor has paid solicitors' bills, and is, therefore, entitled to obtain taxation of those bills.

Solicitors, *Storey, Cowland, & Hill*, for *Merrils & Ede*, Cardiff; *J. T. Lewis*, for *Roberts-Jones & Everett*, Cardiff.

Chan. Div.
Swinfen Eady, J. } July 14, 15, 16, 1904.

HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER CO. (a.)

Highway—Bridges—Liability to repair—Statute—Construction—Statute of Bridges.

A statutory obligation to maintain a bridge which is part of a highway, imposed by a statute subsequent to the Statute of Bridges (22 Hen. 8, c. 5), is not necessarily a liability to repair the highway to the extent of three hundred feet from each end of the bridge, notwithstanding that the inhabitants of a county must repair to that extent where they are liable to repair at all, and notwithstanding that persons liable to repair by prescription or ratione tenuræ *are bound to repair to a similar extent.*

Action.

The plaintiffs, who were the County Council of Hertfordshire, asked for a declaration to the effect that the defendants, the New River Co., were bound to keep in repair certain bridges and approaches thereto, that carried the highway, and were situate within the county of Hertford, to the distance in every case of three hundred feet from the ends of each bridge. The defendants admitted a general liability to repair the bridges and their approaches, but did not admit a liability to repair in every case to the extent of

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

three hundred feet from each end of the bridge, and alleged that the approaches were not uniform in length, but that in no case was that as much as three hundred feet, and claimed that the distance to be repaired depended in every case upon the length of the approach.

Danckwerts, K.C., Micklem, K.C., and *Barnard Lailey,* for the plaintiffs.

Eve, K.C., and *Vaughan Hawkins,* for the defendants.

SWINFEN EADY, J.—The question to be decided is whether the liability of keeping in repair the highway adjacent to the ends of the bridges in question to the extent of three hundred feet from the ends of each bridge attaches to the defendant company; or whether the obligation under which the defendant company labours is only to keep the approaches to the bridges in repair, the extent of the approaches being in each case a question of fact which must be determined hereafter. The liability of the defendant company to repair the bridges and approaches is admitted, but that the liability extends to a distance of three hundred feet from the ends of each bridge is disputed. The plaintiffs' contention is founded on the Statute of Bridges (22 Hen. 8, c. 5), which by section 7 provides for the repair of the ways adjoining the ends of public bridges to the extent of three hundred feet.

The defendant company is under its charter bound to maintain and repair well and sufficiently all the bridges of and belonging to the New River, such bridges being provided by the defendants for the public passage over the river at places meet and convenient: 3 Jac. 1, c. 18; 4 Jac. 1, c. 12. The plaintiffs contended, that the common law making a person cutting through a highway for his own benefit liable to make a bridge and approach, and to maintain them for the use of the public, the proper construction of the Statute of Bridges was to render such person liable to maintain the highway carrying the bridge for a distance of three hundred feet from each end of the bridge.

The statute of the defendant company (3 Jac. 1, c. 18, s. 6) in terms does not so provide, but the contention is that this construction is within the intendment of the statute and that the rule is applicable to all persons liable to repair whether by prescription, *ratione tenuræ,* or otherwise. There have been many cases on the construction of the statute; these cases decide that where the inhabitants of a county are liable to repair a bridge, they are also liable to repair three hundred feet at the ends of the bridge, and the same rule is applicable where the liability to repair arises by prescription or *ratione tenuræ*: citing *R.* v. *West Riding of Yorks,* 7 East 588; *R.* v. *Inhabitants of Kent,* 13 East 220; *R.* v. *Kerrison,* 3 M. & S. 526; *R.* v. *Inhabitants of Isle of Ely,* 15 Q. B. 827; *R.* v. *Mayor of Lincoln,* 8 A. & E. 65. The question of whether the rule applies where the liability is imposed by statute has arisen in two cases. In *Nottinghamshire County Council* v. *Manchester, Sheffield, and Lincolnshire Railway Co.,* 71 L. T. 430, the question was raised by special case stated, and the question submitted was whether in the circumstances the defendants were liable to repair the raised approaches which were respectively of the length of 180 feet and 174 feet. The Divisional Court held that the defendants were liable and that the approaches were part of the bridge. This decision is rather against the plaintiffs in the case at bar than in their favour, for if the defendants in the cited case were liable to repair the approaches for a fixed limit from each end of the bridge, there was no necessity to ascertain what those approaches were. The point arose again in *Reg.* v. *Staffordshire and Worcestershire Canal Co.,* 65 J. P. 505, but there was no decision as to whether the Statute of Bridges applied, or whether the liability was for 300 feet on either side. In these circumstances the question must be determined by me. The case is not one of a common law, but of a statutory liability: 3 Jac. 1, c. 18, s. 6. In my judgment where a statute as modern as the reign of James I. empowers a company to cut a highway and imposes a liability on the company of making and maintaining a bridge, the word bridge is not necessarily a bridge as defined by the Statute of Bridges. It would be an extension of that statute for which there is no precedent if I were to hold that where a statute subsequent to that, has imposed an obligation to make and maintain a bridge it has *ipso facto* imposed an obligation to repair the roadway carrying the bridge for a distance of three hundred feet from each end. The declaration will be that the defendant company is bound to repair the bridges in question and the approaches thereto, including the roadways thereon, and in the latter so much of the highway at each end of the bridge as has been raised or otherwise interfered with by reason of the construction of the bridge, but not necessarily to the extent of three hundred feet from each end thereof.

Solicitors, *Read,* for *Longmore,* Hertford; *Thompson & Debenhams.*

K. B. Div. (Channell, J.) April 19, 1904.

UNDERGROUND ELECTRIC RAILWAYS CO. OF LONDON (LIMITED) v. COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue—Stamp—Conveyance on sale—Purchase-money partly in cash and partly by shares in new company—Part of share capital only issued—Estimated value of amount that might be raised by shares—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), *ss.* 56 (2), 57, 59 (1).

A company agreed to sell its undertaking to a new company in consideration of a definite sum payable partly in cash and partly in shares in the new company. It was further agreed that the profits of the new company in respect of each year should be applied, first, in paying a cumulative dividend of 5 per cent. upon any shares for the time being issued by the new company; and, secondly, in paying to the vendor company "as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital . . . in the new company as shall for the time being have been issued by the new company."

Held, that this latter sum, though forming part of the consideration, was of so uncertain a character that it could not be brought into account for the purpose of increasing the ad valorem *duty payable in respect of the consideration for the sale.*

Case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891.

On the 8th of July, 1902, an instrument was presented on behalf of the appellants, the Underground Electric Railways Co. of London (Limited), to the Commissioners of Inland Revenue for their opinion as to the duty with which it was chargeable.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The instrument was an agreement entered into on the 25th of June, 1902, between the Metropolitan District Electric Traction Co. (Limited) (hereinafter called the Traction Co.) and the Underground Electric Railways Co. of London (Limited), whereby the appellants were to acquire the whole of the undertakings of the Traction Co. The sum of £500,000 was to be paid in cash by the new company (the Underground Electric Railways Co.) to the Traction Co. on the completion of the purchase, and a further sum of £500,000 was to be paid in shares. The profits of the new company available for dividend in respect of each year were to be applied under clause 3 of the agreement (1) in payment of an accumulative dividend at the rate of 5 per cent. per annum on the amount for the time being paid up on any shares issued by the new company; and (2) in paying to the Traction Co. or its assigns, "as a further part of the consideration for the said sale, such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of £5 000,000 in the new company as shall for the time being have been issued by the new company."

In assessing the duty payable by reference to section 59 (i.) of the Stamp Act, 1891, the commissioners computed the consideration for the property agreed to be sold as £1,947,583 18s. 5d., which consideration for the purpose of assessing the duty payable upon the instrument in question was, after making the deductions in the same section authorized, computed at £1,527,357 17s. 11d. This sum and the apportionment thereof, made for the purposes of the assessment, were admitted to be correct if the commissioners were right in including therein £780,000 under clause 3 (2) of the agreement.

The commissioners were of opinion that the sum contingently payable out of profits in each year under clause 3 (2) was, as therein expressed, "part of the consideration for the sale," and that so far as such sum was capable of ascertainment at the date of the agreement it was liable to an *ad valorem* duty at the rate of 10s. per cent.

The appellant company contended that such sum was incapable of ascertainment by reason of the remoteness of the contingency upon which the payments must be made. At the date of the agreement the whole of the ordinary share capital of £5,000,000 in the new company had been issued—namely, 500,000 shares of £10 each; and on 100,000 of such shares £5 per share had been paid up, and on the remaining 400,000 shares £2 per share had been paid up, such payments amounting together to £1,300,000. Upon this sum of £1,300,000 a dividend of £3 per cent. for a year would equal £39,000.

As the annual sum specified in clause 3 (2) of the agreement was in the opinion of the commissioners contingently payable, according to the terms of the agreement, either in perpetuity or for an indefinite period within the meaning of section 56 (2) of the Stamp Act, 1891, the commissioners were of opinion that the duty fell to be charged upon the said annual amount multiplied by twenty in accordance with the provisions of that section, and accordingly assessed, together with other duty on the remaining part of the consideration, a duty of 10s. per cent. upon £39,000 multiplied by 20 = £780,000 = £3,900. The appellants, on the other hand, contended that this was not a periodical payment within the meaning of that section. With this part of the assessment the appellants expressed themselves dissatisfied and required the commissioners to state a case.

The question for the opinion of the court was whether this sum or, if not, any and what part of such sum was rightly included in the amount charged with duty as aforesaid, or, if not, whether any and what duty was assessable in respect of clause 3 (2) of the agreement.

Roskill, K.C., and *Austen Cartmell*, for the appellant company.—The additional consideration given by clause 3 (2) cannot, by reason of its uncertainty of amount, form a ground for *ad valorem* duty. Nor does it become liable to duty as falling within section 56 of the Stamp Act, 1891. That section deals only with definite ascertained sums payable periodically. Section 57 deals with money payable on a contingency, but it does not contemplate or provide for the contingency of the money itself. The sum to be paid is ascertained, although the payment is contingent on the happening of some uncertain event. The words in section 57 "either certainly or contingently" were inserted to prevent any such questions arising as were raised in *Mortimore* v. *Commissioners of Inland Revenue*, 2 H. & C. 838, 12 W. R. Dig. 126.

They cited also, on section 57, *Commissioners of Inland Revenue* v. *Liquidators of City of Glasgow Bank*, (1881) 8 R. 389; *Swayne* v. *Commissioners of Inland Revenue*, 48 W. R. 197, [1899] 1 Q. B. 335, [1900] 1 Q. B. 172; and referred to *Sheffield Waterworks Co.* v. *Bennett*, 21 W. R. 74, L. R. 7 Ex. 409; *Furness Railway Co.* v. *Commissioners of Inland Revenue*, 33 L. J. Ex. 173, 12 W. R. Dig. 127.

S. A. T. Rowlatt (*Sir E. Carson, S.G.*, with him), for the respondents, referred to *Canning* (*Lord*) v. *Raper*, (1852) 1 E. & B. 164, and *Onslow* v. *Commissioners of Inland Revenue*, 39 W. R. 373, [1891] 1 Q. B. 239.

Roskill, K.C., replied.

CHANNELL, J.—The question turns on a sale, by what may be called the old company, of its property and assets to the new company, and was in consideration partly of certain definite sums of money, about which no difficulty arises, and partly of such a sum as should be equal to a dividend of 3 per cent. in each year on the amount for the time being paid on such of the original ordinary share capital of £5 000,000 in the new company as should for the time being have been issued by the new company, as provided by clause 3 (2) of the agreement, which is in these terms: "Part of the consideration of the said sale shall be: (*a*) The sum of £500,000, which (subject to the provisions contained in sub-clause (*b*) of this clause) shall be paid in cash by the new company to the Traction Co. on completion of the purchase, together with interest at the rate of £5 per cent. per annum on £250,000, part of such sum, calculated from the 25th day of March, 1902, up to the date of the passing of the final resolution for the winding up of the Traction Co., but in any event for not more than one calendar month from the date thereof. (*b*) The sum of £500,000, which shall be satisfied by the issue to the Traction Co. or its nominees of 100,000 ordinary shares of £10 each in the new company . . . and shall for all purposes be deemed to be paid up to the extent of £5 per share. . . . (2) The profits of the new company available for dividend in respect of each year shall be applied in the following order and manner—that is to say, (i.) in payment of a cumulative dividend at the rate of £5 per cent. up to the end of such year on the amount for the time being paid on any shares for the time being issued by the new company; and (ii.) in paying to the Traction Co. or its assigns, as a further part of the consideration for the said sale, such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital

of £5,000,000 in the new company as shall, for the time being, have been issued by the new company." Now, it is with regard to the latter part of this clause that the question I have been asked to decide arises. The conclusion I have come to is that this sum, "equal to a dividend of 3 per cent.," is so uncertain as to be without any real basis of calculation. The sum is not payable on a mere contingency; there is not merely the uncertainty in respect to the amount of the earnings of the company, and therefore uncertainty as to the amount that would become payable by way of dividend, but there is what I may call a double contingency here, for there is the further uncertainty introduced as to the amount which might be paid up from time to time on the shares issued by the new company. This latter element of uncertainty comes in twice. It comes in under the first sub-clause of clause 3 of the agreement with regard to the payment of a cumulative dividend of £5 per cent. per annum on the amount for the time being paid up on the shares issued, and it comes in again under the second sub-clause of clause 3 as to the payment to the Traction Co. of a sum equal to a dividend of 3 per cent. on the amount for the time being paid up on the shares. Therefore this sum, which the new company has agreed to pay as part of the consideration, is too uncertain to be the subject of *ad valorem* stamp duty, and is incapable, if my view is right, of valuation within the class of cases that have been cited where an uncertain amount with a *maximum* is mentioned. There a *maximum* sum was mentioned, but it was uncertain whether the whole would become payable. I am inclined to think that in such a case that might possibly constitute a sum payable on a contingency within the meaning of section 57 of the Stamp Act, 1891. It might be possible also, if there is a certain sum mentioned, to take sections 56 and 57 together and to make the sum liable to this taxation, even though the amount was payable, not only periodically within section 56, but also on a contingency within section 57. Here, however, the whole transaction seemed to me to have been made up of uncertainties, both as regards the dividend which it was said might be earned and the total amount which might be raised in shares up to a certain period. I cannot see either, any foundation for the suggestion that one might take the share capital paid up at the date of the deed. That is not the basis upon which the consideration was calculated. The amount of the capital paid then was a mere accident. I fail to see what right the Crown would have to place the limit on the capital at that time and say that it was so much, and that if the company could earn the full amount upon that, then the 3 per cent. would be taxable. If it was once admitted that in the case which I put forward in the argument, of the sale of a business in consideration of an agreement to pay to the vendor a share of the profits to be thereafter made, the amount would be so uncertain that it could not be dealt with by imposing an *ad valorem* stamp duty in respect thereof, it follows that in the present case, the consideration being equally uncertain an *ad valorem* duty cannot be imposed. No doubt, it forms part of the consideration for the transfer, and if it had been, as in the case I put forward, the sole consideration, I suppose the stamp duty would have been 10s. But here there is a much larger stamp duty payable in respect of the other part of the consideration, and I fail to see how this sum can be brought in to increase the *ad valorem* duty.

For the reasons I have given I think the Crown is not entitled to say here "There is so much due and payable under clause 3 (2)," and to claim stamp duty on that hypothetical amount. Therefore this appeal must be allowed and judgment entered for the appellant company with costs.

Appeal allowed.

Solicitors for the appellants, *Bircham & Co.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Channell, JJ.) March 29, 1904.

WIELAND *v.* BUTLER-HOGAN. (*a.*)

Public health—Justices——Unsound meat—Exposed or deposited for sale—No evidence that, at the time of seizure on butcher's premises, meat would be sold for the food of man—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 116, 117.

The mere fact of unsound meat being found on premises where, in the ordinary course of business, it would be exposed for sale for the food of man is, in the absence of evidence that the unsound meat was in fact intended to be exposed and offered for sale, insufficient to constitute an offence within section 117 *of the Public Health Act,* 1875.

Mallinson *v.* Carr, 39 *W. R.* 270, [1891] 1 Q. *B.* 48, *considered and distinguished.*

Appeal from a decision of the justices sitting at Tottenham, before whom the appellant, a retail butcher, had been convicted and fined for having in his possession unsound meat intended for the food of man, contrary to the Public Health Act, 1875.

The special case stated under 20 & 21 Vict. c. 43, set out the following facts:

An inspector visited the appellant's shop at 194, Philip-lane at midday on Monday, the 12th of October, 1903. There was only one customer there, and the shop and premises were then undergoing the process of cleaning and being prepared for the business of the day. Upon an ice-safe being opened at the inspector's instance, it was found to contain a large quantity of meat perfectly sound, but part of a neck of mutton and some pieces of cooked meat, on separate dishes, showed signs of decomposition. The shop had been closed on the previous Saturday at midnight, when the unsold meat, which was all then sound and fit for the food of man, was put away in the ice safe. The appellant's ordinary course of business was to devote the whole of every Monday morning to the cleansing his shop, and then to open the ice-safe and examine the meat, when, if any was found to be unsound it was at once removed.

The justices were of opinion that the facts as above stated constituted an offence against the Public Health Act, 1875, ss. 116, 117, and convicted the appellant.

The question for the opinion of the court was whether the decision of the justices was right in law.

W. Clarke Hall, for the appellant.—The conviction is wrong because the facts do not show here either that the meat was exposed for sale when seized, nor deposited in any place for the purpose of sale, nor was it intended for the food of man. To constitute an offence there must be evidence showing that the meat was intended for the food of man at the time that it was seized. When the meat was placed in the safe on the Saturday night it was sound. It was to remain there until the shop had been cleaned on the following Monday, and would have been examined

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

before it was placed for sale, and such as was unfit would have been removed. These facts distinguish this case from that of *Mallinson* v. *Carr*, 39 W. R. 270, [1891] 1 Q. B. 48, as in that case there was evidence of the vendor's knowledge of the state of the meat.

R. Cunningham Glen. — The fact of having unsound meat on premises where meat is sold for human food is of itself an offence. Therefore the onus of satisfying the justices that in the present case the unsound meat found in the ice safe was not intended for sale as food rests on the appellant. The justices having convicted the appellant, must be taken as finding that fact against the appellant.

Lord ALVERSTONE, L.C.J.—I do not think that the justices, in stating the case as they have, intended it to be understood that they disbelieved the evidence adduced on behalf of the appellant. That was shortly the case put forward by the respondent, and if it was open for me on the case as stated to accept that argument the conviction would have to stand. I think that the justices meant to state as a proved fact that the meat had not been dealt with on the Monday, and that while accepting the appellant's evidence as truly stating the facts, they had come to the conclusion that an offence under the section in question had been committed. On the facts there is no evidence that the appellant intended to sell the meat in the safe which had turned off, or that the meat which was unsound was deposited in the safe for sale at the time of seizure. I am clearly of opinion that on the facts there is no evidence that the meat was intended for sale. I quite agree with Mr. Clarke Hall that the decision in *Mallinson* v. *Carr*, which at first sight would seem to be against the appellant, proceeded in fact on the assumption that the butcher had retained the meat after he had knowledge that it had gone bad. That distinguishes that case from the present and there being no evidence here that the appellant knew that any of the meat in the safe was bad, the decision is in his favour and not against him.

For this reason I think the justices have come to a wrong decision on a point of law and the appeal must be allowed.

DARLING and CHANNELL, JJ., agreed.

Appeal allowed; conviction quashed.

Solicitors for the appellant, *W. T. Ricketts & Son.*

Solicitor for the respondent, *F. Shelton.*

K. B. Div. (Channell, J.) March 8, 9, 1904.

GOERTZ & CO. (LIMITED) v. BELL. (a.)

Inland Revenue—Income tax—Person resident in the United Kingdom — Company registered abroad — Business carried on from London—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

A company, registered abroad, but not registered in the United Kingdom, which in fact carries on its business through a board of directors from a head office in London is resident within the United Kingdom, and is assessable to income tax under section 2, Schedule D, paragraph 1, *of the Income Tax Act,* 1853, *upon the whole of the profits of its business, wheresoever those profits are made.*

This was an appeal upon a case stated against the decision of the Commissioners of Income Tax for the City of London, raising the question whether a foreign company registered abroad, but not registered as a joint stock company in the United Kingdom, and having an office in London from whence the business of the company was directed and controlled by a board of directors, could be held to be resident within this country for the purpose of the Income Tax Acts.

The case stated the following facts:

The appellant company was registered as a joint stock company at Pretoria, in the South African Republic, in December, 1897, according to the laws then subsisting in that republic. The company had never been registered in the United Kingdom as a joint stock company. The head office of the company was to be either in London or elsewhere on the continent or in Johannesburg, or at such other place elsewhere with such branch or branches in the republic and elsewhere as the directors may from time to time determine. The objects for which the company was formed were (*inter alia*) to take over the business of a German company, to carry on the business of merchants, dealers in stocks, financial and general agents, and to acquire mining and other properties, real and personal, in South Africa. By the articles of association the head office of the company was to be either in London, or elsewhere in Europe, or in the South African Republic as the directors thought fit to determine. All the meetings of the company were to be held in Johannesburg, but the directors might meet in Berlin, London, Johannesburg, Paris, or elsewhere. The business of the appellant company consisted in the purchase and prospecting of lands with mining possibilities, or the obtaining of options over such lands with the view to the formation and flotation of companies for the purpose of working the same and the making of a market for the shares of the subsidiary companies in London, Berlin, Paris, and Johannesburg, and dealing in and selling such shares and other shares, principally of South African companies. The working capital of the subsidiary companies was found by the appellant company either alone or in conjunction with others as a syndicate, in agreed proportions. The nominal share capital of the subsidiary companies was either taken as a whole by the appellant company or distributed *pro rata* among the members of the syndicate. The working capital of the subsidiary companies was almost invariably subscribed by a syndicate which usually consisted of capitalists and financiers carrying on business in Europe and South Africa. No prospectuses were issued by the subsidiary companies, but a market was made and the shares then distributed and dealt in and gradually realized on the stock markets of London, Paris, Berlin, and Johannesburg. The profits made by the appellant company were directly obtained (*inter alia*) by the sale and realization of shares in such subsidiary companies. Some additional sources of profit by the company were interest on money lent, dividends on shares held by it, agency fees from other companies, and the like. The bulk of the company's capital was invested in South African shares and in mining properties in South Africa. The company's interest outside South Africa only stood at about £5,000, and half of that amount was invested in America and Western Australia. On the 31st of December, 1899, the value of the shares and debentures in other companies held by the defendant company amounted to £719,365. The value of claim holdings, participations, and interests amounted to £224,395. The value of the temporary advances against securities amounted to the sum of £144,520. Such advances were made in London to the extent of £37,900, and in Paris to the extent of £106,619. The amount of cash on deposit accounts

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

and in hand amounted to £326,884, and was held in London to the extent of £171,819, in Berlin to the extent of £123,301, in Paris to the extent of £9,205, and in Johannesburg to the extent of £22,557. The evidence produced showed that with regard to the purchase and sale of shares by the company, 56¾ per cent. of the purchases of shares, and 49 per cent. of the sale of shares by the company were carried out in London during the years in question.

The transactions of the affairs of the company were effected as follows: With regard to the general meetings of the company, the first general meeting of the company was held in 1899, in Johannesburg. No other general meeting was held till the end of the year of assessment by reason of the South African war. The second general meeting was held in London in June, 1901, subsequent to the year of assessment. With regard to the directors' meetings, the directors' minute-book kept in London, which was the only minute-book of the company, was produced in evidence, and contained a number of items and minutes of resolutions relating to the affairs of the company which, in the opinion of the commissioners, showed that almost every transaction of importance affecting the management, control, and direction of the company was dealt with, controlled, and decided at the board meetings of the directors in London. A considerable number of important matters requiring local management was carried out by the managing director in Johannesburg on behalf of the board under powers delegated by the board in London, and in some instances such matters, though reported to the managing director in London, were not formally reported to the board until settled. A copy of the minutes of the board meetings in London were forwarded after each meeting to Johannesburg. No other minute-book was kept at Johannesburg.

With regard to the staff, the chairman and three of the mine directors were present in England, four directors were resident in England. One director was resident in Paris and one director in the South African Republic. The directors resident in Germany and Paris attended the board meetings in London. In 1899, being the year of assessment, the managing director was resident in London. The managing director was appointed for, and resided in, Johannesburg. The board appointed also two managers in London, two in Johannesburg, and one in Paris, and one in Berlin. The Johannesburg staff of the company numbered twenty-five, including surveyors and engineers. The London staff numbered twenty-six, the Berlin thirteen, and the Paris nine. The directors held monthly meetings at the company's office in London. Only one meeting was held out of England. The accounts of the Johannesburg, Paris, and Berlin offices were brought to London, where the balance-sheets and accounts of the company were made up and audited. The Berlin and Johannesburg office accounts were respectively audited in Berlin and Paris before being sent to England. The dividends were fixed and authorized by resolutions of the directors at meetings held in London for that purpose, and the dividend warrants in respect of 801,524 registered shares were also issued in London. The coupons on bearer shares were paid in 1899 as to 52,294 shares in Berlin and Paris and as to 11,182 shares in London, and eventually were brought to account in London.

On behalf of the company it was contended that the appellant company should be assessed as a person not resident within the United Kingdom drawing profit from a trade exercised in the United Kingdom and on such profits only.

The commissioners having heard argument and having taken evidence, found as facts—(1) That the trade and business of the company constituted one trade or business and was carried on and exercised by the appellants within the United Kingdom at their London office; (2) that the head and seat and directing power of the affairs of the appellant company were at the office of the company in London, from whence the whole of the operations of the company, both in the United Kingdom and elsewhere, were controlled and directed. And they held that the appellant company was a person residing in the United Kingdom and liable as such to be assessed under section 2 of the Income Tax Act, 1853, Schedule D, first paragraph, on the whole of the annual profits or gains arising or accruing from any trade, whether the same shall be respectively carried on in the United Kingdom or elsewhere; and they accordingly confirmed the assessment, but stated this case for the opinion of the court.

By paragraph 1 of Schedule D of section 2 of the Income Tax Act, 1853, income tax is payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere and to be charged for every twenty shillings of the annual amount of such profits and gains." By the second paragraph of the same schedule income tax is payable "for and in respect of the annual profits and gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains."

Asquith, K.C. (*Scrutton, K.C.*, and *J. R. Atkin* with him), for the company, referred to *Attorney-General* v. *Alexander*, 23 W. R. 255, L. R. 10 Ex. 20; *Wingate* v. *Webber*, 24 Rettie 939; *Cesena Sulphur Co.* v. *Nicholson*, 25 W. R. 71, 1 Ex. D. 428, and the judgments referred to in the judgment of Phillimore, J., in *Kodak* (*Limited*) v. *Clark*, 51 W. R. 459, [1903] 1 K. B. 505; *Calcutta Jute Mills Co.* v. *Nicholson*, 1 Ex. D. 428; *San Paulo Brazilian Railway Co.* v. *Carter*, 44 W. R. 336, [1896] A. C. 31, and submitted that on the facts viewed in the light of these decisions it was impossible to say that the business of the company was carried on in the United Kingdom so as to bring it within section 2 of the Schedule D of the Act of 1853. It was the first time that an attempt had been made to render liable the profits of a company registered abroad, not registered in the United Kingdom. The statute contemplated that a trade might be carried on in this country notwithstanding the fact that there was no residence in this country. Therefore, the finding of fact that the trade of the company was directed from this country was not conclusive on the question of residence.

Sir Robert Finlay, A.G. (*Rowlatt* with him), for the Crown.—The commissioners have found as a fact that the company is resident in this country. The place of residence does not depend upon the place of registration. A company started and registered in one place may migrate and carry on business in another. It may, so to speak, change its domicil. The only true test is "from what place is its business managed." There is no other test, and the question has been answered by the findings of the commissioners in favour of the contention of the Crown. Therefore the company is liable to pay income tax on the whole of its profits under section 2 of Schedule D.

Asquith, K.C., replied.

CHANNELL, J.—Although it is not likely that this case will stop here, and perhaps, having regard to the fact that its decision must affect a very great number of similar companies, and for that reason it might be said that I ought to have considered my judgment, yet I think that I can explain my view sufficiently and meet the requirements of the judges in the Court of Appeal, who, I understand, desire that a judge should express his reasons for the grounds for his decision rather than merely state the bare result he had arrived at. For this reason I think it would be convenient if I first of all disposed of a preliminary point as to the mode in which the case was stated, as the point has been taken by the appellants that the commissioners have gone farther in the stated case than they did when they first gave their decision. [His lordship then dealt with the objection, and continuing, said:] I think that any tribunal who, having stated its determination, is afterwards required to put that determination into writing, may amplify and explain its decision. That is all that, in my opinion, the commissioners have done in this case. The commissioners had found on the stated case that the defendant company was a person residing in the United Kingdom. They do not appear to have stated that finding when they first gave their decision. I think, however, that they must have intended to have found that fact as that was really the question raised by the case. It seems to me, therefore, that the appellants' objection on this point fails.

Now, the question I have to decide is one of mixed fact and law, and it is open to me, therefore, to deal with the question of fact, whatever the commissioners' findings might have been. The difficulty arises from the findings of the commissioners. [His lordship reads the findings.] Mr. Asquith started his argument by pointing to an observation of James, L.J., in *Ex parte Bruell*, 16 Ch. D., at p. 486, to the effect that the word resident must not be construed for taxation purposes by reference to definitions given to that word when used in connection with other branches of the law. I think that is true, and that one ought to look at the Act and see with what object the Legislature there used the word. I think it means that if a person is resident in this country, so that he takes the benefit of the government of the country with regard to the security of his life and property, and has had the opportunity of doing business under the protection of the government, he is placed under an obligation to contribute to the expenses of the country by a tax on all the profits of his business. If he is not so resident, he does not benefit by the expenses paid in governing the country and is not called upon to contribute. I think that is the policy of the Act. It is a conclusion that assists one in deciding the question when it is raised in the case of an individual, but in the case of a company the matter is more difficult, because in one sense a company cannot be said to live in the ordinary sense of the word in any place. Nevertheless a company does get protection to its business under laws provided by the government of the country where its business is registered and carried on.

For that reason the appellants contended that, as the company was registered in South Africa, their residence was taken to be in that country. On the other hand it was said that the company, having its head office and its board of directors in this country, did benefit by the law and order provided by the government of this country. The registration of the company was advanced on the one side, and the head office and board of directors were advanced on the other side, as tests in deciding residence. To a great extent the question before me is, which of these contentions is to prevail. Perhaps the question better stated was whether registration in Africa prevented the company from having a residence in England. It is quite possible that the company might have two residences. In fact the possibility of two residences was recognized for taxing purposes. If the fact of registration in South Africa does not prevent the company from being resident in this country a further question arises—Do the facts show a residence in this country? What is one to attribute as a residence to a body which in the ordinary sense has no residence? It must have some local habitation. The law of England provides one, because it provides that a company must have a registered office. So far as I can judge, the law of the South African Republic does not provide that a company must have a registered office as is the case in this country. At anyrate by reference to the articles of association of the company it did not appear that a registered office is necessary. The articles of association provides a head office where service on the company should be made, the effect of which is to make the head office a place of local habitation. The meetings of the company were to be in Johannesburg until otherwise determined, but the head office was to be in London, Paris, or elsewhere on the continent, or in South Africa, as determined. There is a finding of fact by the commissioners that the head office was in London, and there is, I think, evidence to support that finding. So far as the articles of association, which is the constitution of the company, throw any light on this question, they seem to point to London as the place where the company is to be found. It undoubtedly contemplated the company doing business all over the world. It contemplated a head office and branch offices, although, from the company being incorporated in the South African Republic, it would be thought its principal place of business would be there. Apart from that document the facts show that the control of the business proceeded from the board in London. Under these circumstances did the fact of the incorporation of the company in South Africa show that it had its residence there and not elsewhere? As to cases, no case was reported in which it had been held that a company incorporated in one country had a residence in another. On the other hand, in none of the reported cases does it appear that a company was resident in one country and incorporated in another. In *Attorney-General* v. *Alexander* the two matters were on the same side. In *Wingate* v. *Webber* the Scotch case which is perhaps the nearest to the present case, the company, besides being registered in Norway, had its registered office in that country, and its company business was conducted there, while its trading business was done by an agent in Glasgow. I think, moreover, in that case that there was a distinction between the officers of a company and mere agents of the company, and in considering the question within which branch in the Income Tax Act the company fell, the question was of some importance. Therefore none of the cases cited exactly cover the present case, and I am bound to give an independent decision to the best of my ability.

Turning to the Act, the first paragraph of the schedule refers to residence in this country, and the second to a resident abroad carrying on a business by agency in this country. What was held in *Wingate* v. *Webster* was that the Glasgow agent was accountable for income tax in respect of all the profits of the company made in England. In the present case all the directors and heads of the company who were officers of the company, were in England, and the conclusion I draw from that fact is that the company was in England, and not the agency, and that the

company was resident in England. The considerations which go to show the habitation of the company go more to show that the company was here and the agency in South Africa.

The cases did not throw much light on the question. I cannot bring myself to find that the company by being registered in South Africa, and desiring, no doubt, to take the advantages of the laws of the South African Republic, are prevented from becoming resident elsewhere. My view is that it has been shown that it was originally intended that the operations of the company should be outside the republic and were in fact outside. It is not necessary for me to say anything with regard to whether the case falls within the second paragraph of the schedule. But in approaching that question the view which I have tried to explain as the one I have taken on the first question is confirmed, because in looking to see who should be made liable under the second paragraph it would be necessary to look for the agent, and the agent of the company could not be found without finding the company itself.

Therefore, for these reasons, I think the appeal fails and must be dismissed with costs.

Solicitors, *Herbert Smith, Goss, King, & Gregory; The Solicitor of Inland Revenue.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling, L J.) } Aug. 8, 1904.

BOLLAND *v.* YOUNG. (*a.*)

Practice—Judgment—Charging order—Interest of judgment debtor in stock—Stock vested in trustees—Trustees to divide capital at end of six years—Power to change investments—Judgments Acts, 1838 (1 & 2 *Vict. c.* 110), *s.* 14; *and* 1840 (3 & 4 *Vict. c.* 82), *s.* 1.

A testatrix, who was domiciled in America, by her will, which extended only to her property in England, appointed two persons to be executors and trustees thereof, and directed them to collect all her estate in England, both capital and income, and to invest and re-invest the same as from time to time might be prudent, and to manage the whole fund, and to invest all interest or income accumulating after her death as well as the capital; and she directed them at the end of six years after her death to divide the accumulated interest and income among certain persons, and to divide the capital of her estate then in their custody and control into three equal parts, one of such parts to be paid to and to become the sole property of the defendant, with remainder in case of his death before the expiration of the six years. The testatrix died in August, 1903, *and her will was duly proved. Her property in England was invested by the trustees of the will in the purchase of* £4,442 *Transvaal Government Guaranteed Stock, and this stock stood in the books of the Bank of England in their names. The plaintiff subsequently recovered judgment against the defendant for* £216, *and applied for an order under* 1 & 2 *Vict. c.* 110, *s.* 14, *and* 3 & 4 *Vict. c.* 82, *s.* 1, *charging the defendant's interest in the said stock with the payment of the amount of the judgment debt.*

Held, that the will imposed no obligation on the trustees to sell the stock or to change the investment, and that the defendant had an interest in the stock which could be charged under the Acts.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from an order of Phillimore, J., in chambers.

On the 23th of June, 1904, the plaintiff recovered judgment against the defendant for £208 0s. 2d., with costs, which were taxed at £8, making in all £216 0s. 2d. The plaintiff, being unable to obtain payment of this sum, obtained an order *nisi* charging the defendant's interest in a sum of £4,442 14s. 6d. Transvaal Government £3 per cent. Guaranteed Stock standing in the books of the Bank of England in the names of Percy Howell Cathcart and Henry Isaacs, trustees of the will of Jean M. Lauder, deceased, with the payment of the amount due on the judgment debt.

The above-mentioned will of the testatrix, who was an American, domiciled in America, was as follows: "As to all moneys, bonds, bankers' balances, securities, and property of every description that may be carried on account or held in custody on my behalf by Baring Brothers & Co., or any other bankers or attorneys in England at my death, I hereby constitute and appoint my two friends, Percy Howell Cathcart and Henry R. Isaacs, both of London, England, and the survivor of them, to be executors and trustees for the said portion of my estate in England, and I direct them and the survivor of them, with such advice from Baring Brothers & Co. as they may find expedient, to collect and gather together all such residue of my estate in England at my death, both principal and interest, capital and income, and to invest and reinvest as from time to time may be prudent, and to manage the whole fund. And I direct them to invest all interest or income accumulating after my death as well as the capital thereof. At the end of six years after my death I direct my said executors and trustees, or the survivor of them, to divide the total accumulated dividends, income, and interest of said period into two equal and distinct parts, one equal part thereof to be paid to my third cousin and adopted son Frederick Charles Lauder, and the other equal part thereof to be paid to Charles Oram Lauder Young — the defendant in the action — known as Charles Lauder, my second cousin, to be used by him for the benefit and education of his children. And furthermore, at the end of six years after my death I direct my said executors and trustees, or the survivor of them, to divide all the capital of my estate then in their custody and control into three equal and distinct parts, one third to be paid to and to become the sole property of my said adopted son Frederick Charles Lauder, and one third to be paid to and to become the sole property of the said Charles Oram Lauder Young, known as Charles Lauder, but the remaining equal third part, I direct to be further kept invested and reinvested by my said executors and trustees or the survivor of them together with its accumulations thenceforth until the expiration of ten years from my death, at the end of which period the whole of the said fund shall be paid to and become the sole property of the then surviving children of the said Charles Oram Lauder Young, known as Charles Lauder, and of his wife, Emily Penruddock Lauder, the said fund with capital, income, and all accumulations, to be then equally divided among the said children then surviving. In case of the death of either or both the said Frederick Charles Lauder or Charles Oram Lauder Young before the expiration of six years from my death I direct that the lawful issue then living shall take the parent's share; otherwise and in case of either's death before the said expiration of six years from my decease leaving no lawful issue then surviving, I direct that his share shall vest in the survivor of the two, or if both be dead in such lawful issue of either as may then exist in the nearest degree.

This is expressly confined in operation to such property of mine as may be in England at the time of my death as expressed in the first paragraph, and does not extend to any other part of my estate controlled, situated, or held in custody elsewhere."

The testatrix died on the 2nd of August, 1903, and her will was proved in England on the 1st of December, 1903. Her property in England was invested by the trustees of the will in the purchase of £4,442 14s. 6d. Transvaal Government 3 per cent. Guaranteed Stock. At the date of the charging order *nisi* this stock was standing in the books of the Bank of England in the names of the trustees. The plaintiff having obtained the above charging order *nisi*, Phillimore, J., at chambers, upon the authority of *Dixon* v. *Wrench*, 17 W. R. 591, L. R. 4 Ex. 154, discharged it.

The plaintiff appealed.

Firminger (*Montague Lush, K.C.*, with him), for the plaintiff.—The defendant is entitled at the end of six years from the death of the testatrix to one third share in the £4,442 14s. 6d. stock which is standing in the names of trustees in trust for him, and a charging order can therefore be made under 1 & 2 Vict. c. 110, s. 14, as amended by 3 & 4 Vict. c. 82, s. 1. The case of *Cragg* v. *Taylor*, L. R. 2 Ex. 131, 15 W. R. O. L. Dig. 106, is in point. In *Dixon* v. *Wrench*, 17 W. R. 591, L. R. 4 Ex. 154, there was a positive direction to the trustees to sell the shares not later than twelve months after the testatrix's death, and there was also a trust to pay debts and legacies. The judgment debtor therefore in that case had no interest in the shares, but only in the proceeds arising from their sale. In the present case there is no trust for sale or for payment of debts and legacies. The interest of the defendant in the stock is merely postponed for six years, and it is contingent upon the trustees not changing the investment. The fact that the stock is held upon trust for more than one person does not prevent a charging order being made: *South-Western Loan and Discount Co.* v. *Robertson*, 30 W. R. 102, 8 Q. B. D. 17. There is, therefore, power under the above Acts to make the charging order.

T. W. Wheeler, K.C., and *R. C. Saunders*, for the defendant.—The order of the learned judge was right. It is admitted that the stock in question comes within the Acts, but it is submitted that the defendant has no interest in the stock which can be charged. The trustees have power to vary the investment, and the defendant has no interest in the stock now. He may never receive any of the stock, as it may be sold and reinvested in other securities. Further, there is an implied obligation on the trustees to convert the stock. The trustees are also executors, and they may have to sell in order to pay debts. Again, the whole will shows that there is an implied obligation to convert at the end of the six years, when the division has to be made. *Dixon* v. *Wrench* is therefore in point.

They also referred to Lewin on Trusts (10th ed.), pp. 988, 989.

STIRLING, L.J.—In this case the judgment creditor applied for a charging upon the judgment debtor's interest in certain stock standing in the names of trustees in the books of the Bank of England. The application was made under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1. It is admitted that the stock in question is of a kind which falls within section 14 of the earlier Act. That section provides that "if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon." That section applies to all stock standing in the name of a judgment debtor in his own right or in the name of a person in trust for him. That Act was extended by the later Act, 3 & 4 Vict. c. 82, s. 1 of which provides that "the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares."

Now, the question arises here as to the interest of the judgment debtor under the will of an American lady, which she made disposing of her property in England. The will, after appointing certain persons to be executors and trustees, directed them to collect and gather together the testatrix's property in England, and to invest and reinvest the same as might be prudent; and to invest all interest or income accumulating after her death as well as the capital, and at the end of six years after her death to divide the accumulated dividends, income, and interest into two equal parts, one part to be paid to Frederick Charles Lauder, and the other part to the judgment debtor to be used by him for the benefit and education of his children. It is not material to consider the effect of this gift of the accumulated income. The will then goes on to direct the trustees at the end of six years after her death to divide the capital of her estate into three equal parts, one part to be paid to and to become the sole property of Frederick Charles Lauder, and one other part to be paid to and to become the sole property of the judgment debtor, with remainders over in case of either dying before the expiration of the six years.

The question is whether the interest of the judgment debtor in that one third part constitutes an interest, whether in possession, remainder, or reversion, or whether vested or contingent, which can be charged under the above Acts. The estate consists of £4,442 14s. 2d. Transvaal Government Stock. It is clear that the judgment debtor has not got the stock standing in his name. But the stock is standing in the names of the two gentlemen who are executors and trustees under the will, and at the end of six years from the testatrix's death the capital is to be divided into three equal parts, one of which parts is to become the absolute property of the judgment debtor. The question is whether he has not an interest in one third of the stock which can be charged under the Acts. It is said that he has not, because the executors and trustees may come under an obligation to convert the stock into money, and that therefore the only interest which the judgment debtor has is in the proceeds of the sale of the stock, as was the case in *Dixon* v. *Wrench*. That depends upon the effect of the will. It is said that the trustees are also executors, and that there may be debts, and that they may come under an obligation to pay those debts, and for that purpose to sell the stock or part of it. That is no doubt true, and the judgment debtor takes subject to that; but all that it will be necessary for the executors to do, if any debts exist, will be to sell so much of the stock as is necessary to pay those debts. That does not prevent the debtor

from having an interest in the balance of the stock. If that is so, the only obligation is to accumulate the income during the six years, and at the end of that period to divide the stock into three equal parts, one part going to the judgment debtor. It is then said that there is an obligation at the end of the six years to convert the stock. I can see none. The only obligation is to divide the stock into three equal parts. Does that involve a sale? It is not like a particular kind of chattel which it is necessary to sell before a division can be made. Stock can be divided without a sale. There is no express obligation to convert, and there is nothing which impliedly imposes any such obligation. There is no imperative trust for sale. The judgment debtor may hereafter acquire an absolute title to a portion of the stock in specie, and so long as the stock remains unsold he has, in my judgment, an interest in it. At the end of the six years the judgment debtor may ask to have one third of the stock handed over to him. The judgment debtor therefore has an interest in one third of the stock which can be made the subject of a charging order. With regard to the authorities, in *Dixon* v. *Wrench* there was an imperative obligation on the trustees to convert the shares into cash, and the only interest which the judgment debtor had was in the proceeds of the sale and not in the shares themselves. In *Cragg* v. *Taylor* it was held that the judgment debtor had an interest in the shares which could be charged, though the very first trust specified in the deed was a trust to sell the shares and then to hold the produce of the sale upon trust, first, to repay a loan; secondly, to maintain the debtor and his wife, and their children; and then upon certain other trusts under which the judgment debtor took no interest.

In my opinion, therefore, the order ought to have been made absolute charging the interest of the judgment debtor, whatever it may be, in the stock.

MATHEW, L.J.—I am of the same opinion. It is clear that there is no obligation under the will on the trustees to sell the stock, and in my opinion the judgment debtor has an interest in this stock which can be charged under the Acts.

STIRLING, L.J.—I ought to have noticed the point with regard to the power of the trustees to change the investments. There is no imperative obligation upon them to alter the mode of investment, though they have a discretion to do so if occasion arises calling for such a change. If a change is made in the mode of investment, then the charging order will cease to have effect with regard to stock which the trustees may have transferred in order to make the change of investment. The discretion of the trustees is in no way affected by the charging order, which only extends to the interest of one of the *cestuis que trust*, an interest which is subject to the exercise of that discretion.

Appeal allowed.

Solicitor for the plaintiff, *R. Chapman.*

Solicitor for the defendant, *H. W. Henniker Rance.*

Appeal.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) June 1, 1904.

In re STRAND WOOD CO. (LIMITED). (a.)

Company—Winding up—Liquidator—Security for costs—Practice—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

According to the practice of the court the liquidator of a company is not bound to give security for costs in respect of a misfeasance summons taken out by him.

In 1902 the Strand Wood Co. (Limited) went into voluntary liquidation for the purposes of reconstruction, and Mr. Harry Wren was appointed liquidator in the winding up.

The assets and undertaking of the company were to be transferred to a new company, subsequently incorporated under the name of the Murman Coast Co. (Limited), upon the terms of an agreement whereby the new company undertook as part of the consideration for the transfer to satisfy the debts and liabilities of the old company and to keep the old company, its liquidator and contributories, indemnified against all proceedings in respect thereof, and against the costs and expenses of and incident to the winding up.

On the 19th of April, 1904, the liquidator took out a misfeasance summons under section 10 of the Companies Act, 1890, against certain officers of the old company. Two of the respondents to this summons were Messrs. A. & H. J. Gane. The claims against these respondents amounted in the aggregate to about £15,000, besides a further unascertained sum, as the alleged misfeasances extended over a number of years.

On the 28th of April the Messrs. Gane took out a summons asking that the liquidator might be ordered to give security for their costs of the misfeasance summons. The ground of the application was that the liquidator was a person of no financial position. The registrar declined to order the liquidator to give security.

The Messrs. Gane appealed.

Jessel, for the appellants.—The court has jurisdiction to order a liquidator to give security for the costs of a misfeasance summons.

He referred to *In re Wedgewood Co. and Western Counties Bakeries, &c., Co.*, cited in Palmer's Company Precedents, vol. 2, pp. 632, 633; *In re W. Powell & Sons*, 44 W. R. 618, [1896] 1 Ch. 681; *Cowell* v. *Taylor*, 34 W. R. 24, 31 Ch. D. 34.

Romer, for the liquidator, was not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I am afraid that the practice of the court is against the appellants and the appeal fails. I wish to say for myself that I personally, whilst acting as the judge in company matters, have seen many instances of an abuse of the present state of the law, and if this were a new matter I should not be sorry if the court had power to order security in cases in which it thought that the circumstances were such that security ought to be ordered. The authorities are, however, too strong for me, and I must be content with the practice as it stands.

ROMER, L.J.—I also think that this appeal ought to be dismissed. The liquidator is coming here under a power expressly conferred upon him by Act of

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Parliament, and in the exercise of his statutory duties. It is not suggested that these proceedings by the liquidator are frivolous or improperly taken, and in that state of things, according to the practice of this court the liquidator is not bound to give security for costs.

COZENS-HARDY, L.J.—I agree. I think it clear that this case does not come within section 69 of the Companies Act, 1862. This is not a case of an action by the company; but it is argued that by analogy where the liquidator comes to the court under the express provisions of section 10 of the Companies Act, 1890, we ought to treat him as being in the same position as a plaintiff company. I cannot follow that. The general rule is settled by *Cowell* v. *Taylor* and other cases. It seems to me that we should be going contrary to authority if we required the liquidator to give security for costs in this case. I desire to emphasize what was said by Romer, L.J., in *In re W. Powell & Sons*, that the court will not have the slightest hesitation in making a personal order for costs against the liquidator on a misfeasance summons if the circumstances require it.

Appeal dismissed.

Solicitors, *Arthur J. Benjamin; Visgood & Marshall.*

From K. B. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } May 6, 7, 1904.

HUBBACK *v.* BRITISH NORTH BORNEO CO. (*a.*)

Practice—Payment into court—Admission of liability as to part of a claim—Denial of liability as to rest of claim—Costs—Issues on which defendants fail—R. S. C., 1883, *ord.* 22, *rr*, 1, 6; *ord.* 65, *r.* 1.

Payment into court—with an admission of liability as to part of a claim but denial of liability as to the rest—of a sum larger than is eventually recovered by the plaintiff in the action, does not relieve the defendant so paying in from the necessity of paying the costs of issues on which he fails.

This was an application by the defendants for judgment or a new trial on appeal from verdict and judgment at the trial of the action before Lawrance, J., and a special jury.

The plaintiff entered into the service of the defendants on the terms of an agreement under which he was to have a salary of 325 dollars a month. If he took no leave between the date of joining and the date of going on leave, he was to be allowed three months' vacation leave on full pay and six months on half pay in November, 1902, his salary when on such leave to be calculated at 3s. to the dollar.

In October, 1902, the defendants dismissed the plaintiff from their service.

The plaintiff then brought the present action. He claimed that he was entitled to reasonable notice to determine the agreement, and that six months' notice would have been reasonable. He claimed as damages three months' full pay whilst on leave, nine months' half pay whilst on leave, certain fares between Singapore and London, and six months' pay in lieu of notice. He also claimed damages for wrongful dismissal. The claim for nine months' half pay was based on an allegation that "six months" in the agreement was a clerical error for nine months.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The defendant company, by paragraph 2 of their defence, admitted that the plaintiff was entitled for the first three months of the period of his leave of absence to full pay, and alleged tender of this amount to the plaintiff before action and refusal by him to accept such tender. The defendant company, for the purposes of the action only, was willing to admit liability to pay to the plaintiff a further sum of money equal to six months' half pay.

Paragraph 4 of the defence was as follows: "Whilst denying any liability to pay to the plaintiff by way of compensation or damages, or under the said agreement, any money beyond the sums of money admitted in paragraph 2 of this defence, the defendant company, for the sake of peace, brings into court the sum of £500 and says that such sum is enough to satisfy the plaintiff's claim in this action."

On the trial before Lawrance, J., the jury found a verdict for the plaintiff, and awarded him £781, and judgment was entered for that amount. They awarded him three months' full pay, nine months' half pay, six months' salary in lieu of notice at 3s. to the dollar, and fares between Singapore and London.

On appeal the Court of Appeal held that the plaintiff was only entitled to the three months' full pay and nine months' half pay, and that the rest of his claim failed. The result was that the plaintiff recovered less than the £500 paid into court by the defendant company.

It was now contended by the defendant company that they were entitled, under the provisions of order 22, to have all the costs of the action, including the costs of the issue as to six months' or nine months' half pay, on which they had failed.

Scrutton, K.C., and *Muir Mackenzie*, for the defendants, referred to *Wagstaffe* v. *Bentley*, [1902] 1 K. B. 125; 50 W. R. Dig. 134; *Wheeler* v. *United Telephone Co.*, 33 W. R. 295, 13 Q. B. D. 157; *Dunn* v. *South-Eastern and Chatham Railway*, 51 W. R. 427, [1903] 1 K. B. 358; *Wood* v. *Leetham*, 61 L. J. Q. B. 215, 40 W. R. Dig. 64.

McCall, K.C., and *Rose-Innes*, for the plaintiff, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—The defendants here have purported to avail themselves of order 22, and in particular of the provisions of rule 6 of that order. The result of the trial is that the money paid into court is larger than the sum which the plaintiff has recovered in the action, and we have to see what ought to be done about the costs. It is contended on behalf of the defendants that if they are given their full rights under order 22 they ought to have all their costs of the action, and ought not to be ordered to pay the costs even of the issue on which they have failed. They distinguish the decision in *Wagstaffe* v. *Bentley* upon the ground that in *Wagstaffe* v. *Bentley* the issues as to which the defendant failed were issues going to the whole cause of action, and in those circumstances it was right that the defendant, though he had paid more than was due into court, should have to pay the costs of those issues; but in the present case the defendants contend that they have not been defeated as to any issue going to the whole cause of action; and therefore they say they have not been defeated as to any defence and ought to have all their costs of the action. I see nothing in the authorities to compel us to this conclusion. Apart from authority, I think it would be good sense that a defendant should bear the costs of an issue on which he has failed. Far from there being anything in the Judicature Acts to prevent us from coming to this conclusion, I think order 65 is in point and assists us.

I have only to add this, that I doubt whether the

defendants can have the benefit of the defence which they have raised. In my judgment order 22 makes provision for payment into court in two different cases—first, where the liability is admitted; secondly, where it is denied. If the payment in is made with an admission of liability, the plaintiff may, in respect of that cause of action, take out the sum so paid in at any time. If, on the other hand, money is paid into court with a denial of liability, it remains in court until the action has been tried. What is sought to be done here is to make a payment in on both the bases, which would prevent the plaintiff taking out the money, as he would be entitled to do if it were paid in in respect of a particular liability with an admission. The Judicature Acts and rules do not sanction that.

STIRLING, L.J.—I agree.

COZENS-HARDY, L.J.—I also agree.

Solicitors, *Stephenson, Harwood, & Co.; Brandon & Nicholson.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — April 28, 29, 1904.

OGDENS (LIMITED) *v.* NELSON.
SAME *v.* TELFORD. (*a.*)

Contract — Construction — Agreement to participate in profits of business for a specific period—Sale of business within such period—Implied stipulation not to so sell.

By a contract made between the plaintiffs, wholesale tobacconists, and the defendants, retail tobacconists, in consideration of a promise by the defendants to become customers of the plaintiffs, and not to sign any agreement with any company or firm which would prevent them from buying or selling the goods of the plaintiffs, and to continue to buy and sell the plaintiffs' goods, the plaintiffs agreed that the defendants should for four years share in a distribution by the plaintiffs of an annual bonus among such of their customers as should purchase direct from them, the distribution to be made according to the purchases for the year.

Before the four years had expired the plaintiffs sold their business to third persons and went into liquidation. In an action for the price of goods sold to them, the defendants counterclaimed against the plaintiffs for damages for breach of the contract.

Held, that upon the true construction of the contract there was implied an undertaking on the part of the plaintiffs that they would not discontinue to carry on business during the term of four years, so as to prevent the defendants from earning their share of the bonus and that the defendants were, therefore, entitled to damages for breach of the contract.

Judgment of Lord Alverstone, L.C.J. (51 *W. R.* 696, [1903] 2 *K. B.* 287), *affirmed.*

Appeal by the plaintiffs from the considered judgment of Lord Alverstone, L.C.J., at the trial of the two actions without a jury: 51 W. R. 696, [1903] 2 K. B. 287.

The actions were brought by Ogdens (Limited), a company in liquidation, to recover the price of goods sold and delivered to the defendants, who were retail tobacconists.

The defendants admitted the plaintiffs' claim, but counterclaimed for damages for breach of agreement under the following circumstances.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Prior to the month of March, 1902, there had been considerable agitation in the retail tobacco trade respecting an alleged attempt by the plaintiffs to obtain control of the retail tobacco trade in the United Kingdom.

This agitation led to the formation of a company called the Imperial Tobacco Co. of Great Britain and Ireland (Limited), which had offered to various tobacco dealers, including the defendants, in consideration of their selling the goods of the company and undertaking not to buy any goods of the plaintiffs and certain other companies, a share in a bonus of £50,000 and a share of certain expected profits in the Imperial Tobacco Co.

The offers of the Imperial Tobacco Co. led to a counter-offer by the plaintiffs, which was accepted by the defendants, and the offer and acceptance constituted the agreement in respect of which the defendants counterclaimed.

The plaintiffs' offer was sent out as a circular, in March, 1902, to retail tobacconists as follows:

"Bonus Distribution.—Our entire net profits and £200,000 per year for the next four years. Commencing the 2nd of April, 1902, we will for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us our entire net profits on the goods sold by us in the United Kingdom. In addition to the above, we will, commencing the 2nd of April, 1902, for the next four years distribute to such of our customers as purchase direct from us the sum of £200,000 per year. Distribution of net profits will be made as soon after the 2nd of April, 1903, and annually thereafter, as the accounts can be audited, and will be in proportion to the purchases made during the year. Distribution as to the £200,000 will be made every three months, the first distribution to take place as soon after the 2nd of July, 1902, as accounts can be audited, and will be in proportion to the purchases during the three months' period. To participate in this offer we do not ask you to boycott the goods of any other manufacturer."

Accompanying this circular there was a form of contract, as follows:

"Messrs. Ogdens (Limited), Liverpool.—Dear Sirs,—I beg to inform you that I have not signed the agreement with the Imperial Tobacco Co. (Limited), dated March, 1902, and in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom, and £200,000 per year, for the next four years, as set out in your particulars, I hereby agree not to sign it or any similar agreement with the Imperial Tobacco Co. (Limited), or any other company or firm, containing any conditions which would prevent me from buying, displaying, selling, or distributing your goods or the goods of any other manufacturer, and I also undertake to continue to buy, display, and sell your goods."

The defendant signed this contract and sent it to the plaintiffs.

Pursuant to the bargain so made, the defendants dealt with the plaintiffs, and in July, 1902, they each received a share of £50,000, being one-quarter of the £200,000, for the three months ending the 2nd of July, 1902; and they also received credit in account for their share of that bonus for the three months ending the 2nd of October, 1902; but they did not receive any share of the entire net profits on the goods sold by the plaintiffs in the United Kingdom.

In September, 1902, the plaintiffs sold their business in the United Kingdom to the Imperial Tobacco Co., and they informed the defendants and their other customers of that fact; they ceased to carry on any business in the United Kingdom, and went into voluntary liquidation.

The defendants admitted the claim for the price of goods sold. By their counterclaim the defendants alleged that the plaintiffs had broken the contract by ceasing to carry on business, and they claimed damages for that breach. It was agreed that the plaintiffs had not made any net profits during the period from the 2nd of April to the 2nd of October, 1902.

Lord Alverstone, L.C.J., in giving judgment in favour of the defendants on their counterclaim, held that it was an implied term of the contract that the plaintiffs would continue to carry on their business during the full period of four years, and would not during that period do any act disabling themselves from earning profits or preventing the defendants from being their customers, and that the defendants were entitled to damages.

From this judgment the plaintiffs now appealed.

Asquith, K.C., and *Duke, K.C.* (*F. E. Smith* with them), for the appellants.

Bankes, K.C. (*J. R. Randolph* with him), for the respondents.

The arguments of counsel sufficiently appear in the judgment of the court.

The following cases were referred to: *Rhodes* v. *Forwood*, 24 W. R. 1078, 1 A. C. 256; *The Moorcock*, 37 W. R. 439, 14 P. D. 64; *McIntyre* v. *Belcher*, 11 W. R. 889, 14 C. B. N. S. 654; *Stirling* v. *Maitland*, 13 W. R. 76, 5 B. & S. 840; *Inchbald* v. *Western Neilgherry Coffee Co.*, 13 W. R. 95, 17 C. B. N. S. 733; *Telegraph Dispatch and Intelligence Co.* v. *McLean*, L. R. 8 Ch. 658; *Turner* v. *Goldsmith*, 39 W. R. 547, [1891] 1 Q. B. 544; *Hamlyn* v. *Wood*, 40 W. R. 24, [1891] 2 Q. B. 488; *Brace* v. *Calder*, [1895] 2 Q. B. 253; and *Northey* v. *Trevillion*, 7 Com. Cas. 201.

COLLINS, M.R.—This appeal raises the question whether, upon the true construction of the agreement, the plaintiffs are emancipated from the obligation of paying certain sums of money which would be payable by them if they carried on their business, and whether they have emancipated themselves from that obligation by selling their business. Now, the question arises in this way: Ogdens (Limited) had formed a scheme for what is called "capturing the tobacco trade." They were confronted by a very powerful opposition to that scheme by a counter-scheme on somewhat similar lines by the Imperial Tobacco Co. In the throes of this competition each of these competitors kept offering better and better terms to customers. It was exceedingly important from the point of view of each of them to counterwork the machinations of the other, and Ogdens, in view of the competition of the Imperial Co., which had it been persisted in might have thwarted their scheme, thought it worth their while to make the arrangement which I will presently read. Accordingly they sent a a circular round in which they invite the attention of customers to the terms that were offered by the Imperial Co. and pointed out how much better the terms were which they themselves were prepared to offer. [His lordship here read the circular above set out.] Then comes the draft letter which the would-be customer was invited to sign, and which, in point of fact, was signed by the defendants in this case, and which accompanied the circular. [His lordship here read the letter as set out above.] Now, when the would-be customer signs that document Ogdens procure by his signature an undertaking which absolutely severs him from the opposing scheme and obliges him to abstain from making or signing any agreement which would prevent him from dealing with Ogdens. So that they secure at once and on the spot without anything further his secession from the opposing combination and his obligation and undertaking not to join it. That in itself is the most essential part of the whole thing from their point of view, having regard to the internecine contest which was then being waged. But are they entitled to give no return for that? Are they entitled to receive that benefit and at the same time hold in their own hands the power of destroying the conditions which make it impossible for them to return that which they are bound to return for the consideration which has been exacted to the extent I have described? What do they propose to give in return and what do they undertake with him that he is to get? The contract seems to me, on the face of it, a contract whereby a present advantage is secured absolutely and unconditionally by the secession of this customer from the opposing camp and his undertaking to give his custom to them, and there is an absolute undertaking on their part in return for that, during a period, which is to extend for four years, to do two things—viz., to make an absolute distribution of their net profits, and to distribute also as bonus the sum of £200,000 per annum. It is said that notwithstanding the fact that the consideration on the part of the customer was, to the extent that I have named, executed, and notwithstanding that according to the distinct terms of the contract, Ogdens have undertaken to give in return this fixed sum of money, yet it is in their power the next day, or as soon afterwards as convenient, to dispose of their business, and then to turn round to the would-be customer and say that inasmuch as they have disposed of their business they cannot make any profits, and therefore they have no bonus to distribute; that they have not undertaken anywhere in the terms of their contract to go on with their business, and that unless they go on with their business there cannot be a customer, and unless there is a customer they are under no obligation to pay a bonus. I think counsel for the appellants has himself furnished a strong argument upon this matter. He says that the weakness of the opposing party is that they are obliged to rely upon an implication and not upon an actual contract, that they are obliged to rely upon an implied undertaking to carry on the business. That goes too far, for it would follow that even when the business was still being carried on by Ogdens, if the customer had come and said to them: "Give me so much tobacco; I propose buying so much tobacco from you!" Ogdens might say in return: "No; we are not going to sell you any tobacco," and properly refuse to do so. That would have defeated the position of the would-be customer, because if he could not get them to sell any to him he was not a customer, and they would have been entitled to avail themselves of the same argument which is now put forward on their behalf: "We come under no obligation to pay anybody who is not a customer, and inasmuch as we have no intention of dealing with you, you cannot make yourself a customer; and, therefore, although we have got from you what you promised to give us, we are absolved from the obligation of admitting you to deal with us, and therefore from the obligation of paying you anything on the footing that you are our customer." The argument would be exactly the same, and just as strong, if they superadded the breach of an implied understanding that he was to be served when he asked for tobacco. It seems to me that, *à fortiori*, if the customer is entitled to read into the contract an implied promise by Ogdens while they are carrying on business to sell tobacco to the person who signs the contract, so that they are not entitled by any act of theirs to keep him out of the category of customers, they are equally

responsible if by any act of theirs they prevent him from continuing to be a customer.

There is a long line of authorities upon questions of this kind; and there is a distinct line of demarcation running through those authorities, some falling on one side of the line and some on the other side of the line; most of them fall on this side of the line. The broad general principle to be deduced from those cases is, that a person cannot receive the consideration for a contract, when that consideration implies that he will continue to do something, without being subject to an implied obligation to continue to keep in existence the conditions which make it possible. There are many authorities for that proposition. For instance, in cases where a business is sold and is to be paid for out of the profits of that business, there is a clear obligation on the purchaser to continue to carry on the business so that profits can be made, out of which the purchase-money may be paid. That is the broad general principle, and it is applicable to the present case. In this case the consideration was executed in a great part, the defendant Nelson having signed the undertaking not to join the opposition. Having got that executed consideration, Ogdens were in the same position as a person who has bought a business and has contracted to pay for it out of the profits; that is, there is the same obligation upon them not to make it impossible to pay out of profits. It is contended on behalf of Ogdens that there is the authority of a case in the House of Lords to the contrary, *Rhodes* v. *Forwood*. When that case is carefully considered, it appears to have been a peculiar case depending upon the special circumstances. The substance of that case was that the defendants had appointed the plaintiff as their sole agent at a particular place for the sale of their coals for seven years, and there was no agreement obliging the defendants to sell any coals at all through that agent at that place; they were free to sell all their coals elsewhere. The defendants afterward sold their business, and it was held that the plaintiff was not entitled to say that the defendants were bound to carry on their business for the seven years because there was no special agreement to furnish him as their agent with any coals at all. In was held that on the true construction of the contract in that case there was no obligation to sell any coals at all through that agent. That case was decided upon the special terms of the contract. When that case had been criticized and distinguished in later cases, it had been said that it was decided upon the ground that there was no absolute contract to employ the plaintiff as agent at all. It was so distinguished in *Turner* v. *Goldsmith* by Lindley, L.J., from whose judgment I will read a short passage. He said: "It was contended that the point was settled by authority. I will refer to three cases on the subject. In *Rhodes* v. *Forwood* it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him." For the reasons which I have given, I think that the present case falls outside the narrow line laid down in *Rhodes* v. *Forwood*. The consideration was executed, and there was a contract absolute in its terms to pay the bonus for a period of four years. It seems to me that, therefore, the circumstances necessarily imply that the party giving the undertaking to pay cannot free himself from the obligation before the end of the term by getting rid of the business. I think, therefore, that the judgment of the Lord Chief Justice was right, and that this appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. After what the Master of the Rolls has said about the authorities, in which I entirely concur, I do not think that it is necessary for me to discuss them. Those authorities, so far as they lay down any principle upon which the courts should act, show that in a case like this the question is, What is the true construction of the contract itself? As to this contract, it is to be noticed that, for the benefit of the plaintiffs, the defendants at once gave valuable consideration, for they contracted with the plaintiffs in the first place not to sign the agreement of the Imperial Co., and also further contracted not to sign any similar agreement with the Imperial Co., or with any other firm or company containing any conditions which would prevent them from buying, displaying, selling, or distributing the plaintiffs' goods. For present purposes I need not pause to consider the extent of the obligation upon the defendants under the last condition of the contract. What do we find in the contract entered into by the plaintiffs? It appears to me that the plaintiffs made certain absolute terms with the defendants. In the first place, they absolutely contracted for the period of four years to distribute to their customers their entire net profits on the goods sold by them in the United Kingdom; they further contracted, and this is even more important for this purpose, for the period of four years to distribute to their customers the sum of £200,000 a year; and then followed the conditions as to distribution. That agreement by the plaintiffs is absolute in form, and I think that it is absolute in substance. The obligations undertaken by Ogdens were intended to bind them for the term of four years. It appears to me that, in this contract, when fairly construed, there cannot be implied in favour of Ogdens that after it was made they should be at liberty, as against the defendants, at their own free will to stop selling their goods in the United Kingdom during the four years, or to do any voluntary act which would make it impossible to distribute the sums which they had so contracted to distribute. That really determines this case, for in consequence there has been a breach of contract by Ogdens. Their assignment of their business was clearly a voluntary act, which prevented the defendants from obtaining any part of the sums contracted to be paid by Ogdens. Therefore there was clearly a breach of contract for which the defendants are entitled to recover substantial damages. This appeal, therefore, fails, and must be dismissed.

MATHEW, L.J.—I am of the same opinion. We must ascertain what was the common intent of the parties. It is said on behalf of the plaintiffs that the true implication is that the contract was optional, and was only binding so long as they chose to carry on business. On behalf of the defendants it is contended that there was an absolute contract to carry on business for four years, and that that was the intention of the parties. Upon considering the terms of the contract, it seems to me to be clear that the latter contention is the right one. The true meaning of the contract is that, if the defendants will deal with the plaintiffs and sign the proposed agreement, the plaintiffs will for four years distribute this money among their customers, and that they bind themselves to do so. I think that that is the contract between the parties, and that the plaintiffs cannot get out of it by parting with their business. By parting with their business they have committed a breach of contract, and the defendants are entitled to damages. Counsel for the plaintiffs have tried to bring this case within the authority of *Rhodes* v. *Forwood* and *Hamlyn* v. *Wood*. In those cases it was held upon the terms of the particular contract in question that they were purely optional.

Those two cases stand alone, and are quite different from the present case. The alleged inconsistency in the authorities is, in my opinion, more apparent than real. I think that the judgment of the Lord Chief Justice was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *George Thatcher*, for *Grace, Hood, Smith, & Hood*, Liverpool.

Solicitors for the respondents, *Bell, Brodrick, & Gray*, for *Cousins, Botsford, & Phœnix*, Cardiff.

High Court of Justice.

Chan. Div. Farwell, J. — July 20, 1904.

WILLS v. TOZER AND OTHERS. (a.)

Statute—Interpretation—Teignmouth Harbour Act, 1853 (16 *Vict. c. xxxvi.*)

The word "person," when used in a statute, does not include corporation where the statute contains expressions that are repugnant to that construction: Thus, under a statute providing that the persons present at a meeting may vote, but that a proxy shall not be admitted, a corporation, though a person in law, is debarred from voting.

Action.

The Teignmouth Harbour Act, 1853 (16 Vict. c. xxxvi.), provides that a certain number of the harbour commissioners are to be elected by the harbour ratepayers; that is to say, by persons who reside in specified parishes and who pay harbour rates and dues. Both the plaintiff and the defendants were harbour ratepayers, one of the defendants being a joint stock company, and the plaintiff asked that the harbour commissioners should be restrained from placing on the voting list of harbour ratepayers the name of any corporate body or of any member or officer thereof as representing the corporate body, and also for a declaration negativing the right of a corporate body, or of any member or officer thereof as representing the corporate body, to vote at an election of harbour commissioners.

The Harbour Act (*inter alia*) provides by the incorporation of the Commissioners Clauses Act, 1847, that the word "person" when used in the Act was to include a corporation unless the context was repugnant to that construction; and also that the harbour commissioners should be elected at a meeting of the harbour ratepayers by a majority of the votes of the persons present" at the meeting for election, and that the votes might be given in writing under the hands of the voters, but that no proxy was to be admitted.

Butcher, K.C., and *S. G. Lushington*.—A corporation cannot be present at an election, cannot give a vote in writing, and the Act bars voting by proxy.

They cited *Pharmaceutical Society* v. *London and Provincial Supply Association* (*Limited*), 5 App. Cas. 857.

Upjohn, K.C., Wright Taylor, and *Rayner Goddard*.—A corporation may vote under its corporate seal and appoint an agent to hand in the vote; that would not be by "proxy." The "persons" present referred only to "natural" persons who could fulfil the proviso of the section.

They cited *Corts* v. *Kent Waterworks Co.*, 7 B. & C. 314.

FARWELL, J.—The language of section 6 of the principal Act precludes me from construing "persons" as including corporate bodies. Voting by proxy is therein expressly barred, and this excludes any method by which a corporation can vote. From the language used in sections 20 and 25 of the Public Health Act of 1848 it must be inferred that a proxy is the appropriate means by which a corporation may vote, but the language of the principal Act seems to show that the voters must be natural persons who, after hearing a discussion, may exercise the right of voting. I am supported in this conclusion by Lord Selborne's words in *Pharmaceutical Society* v. *The London and Provincial Supply Association* (*Limited*), 5 App. Cas., at p. 862. I can only declare that a corporate body or an officer or member thereof as representing such body is not entitled to vote at an election of harbour commissioners.

Solicitors, *Peacock & Goddard*, for *Tozer, Whidborne, & Dell*, Teignmouth.

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

Chan. Div. Buckley, J. — July 5, 1904.

In re PRETORIA-PIETERSBURG RAILWAY CO. (LIMITED) (NO. 2). (a.)

Company— Winding up— Claim for debt— Creditor resident abroad — Security for costs — Companies (Winding-up) Rules, 1903, *r.* 201.

A person resident abroad claiming by summons as creditor in the voluntary winding up of a company must give security for costs, the ordinary practice of the High Court, and not that of bankruptcy, being applicable under rule 201 *of the Companies (Winding-up) Rules*, 1903.

Motion.

The above company, being in course of voluntary winding up, Mr. Jan Volker, of Haarlem, in Holland, on the 16th of April, 1904, applied by originating summons under section 138 of the Companies Act, 1900, against the liquidators for a declaration that he was entitled to prove for £120 in respect of an alleged debt due to him.

On the 30th of April, 1904, the liquidators took out a summons asking that Mr. Volker might be ordered to give security for costs in the sum of £25, upon the ground that he was resident abroad. The registrar before whom the matter came refused to make the order.

This was a motion on the part of the liquidators that the order of the registrar might be discharged, and that the security for costs should be ordered to be given.

Younger, K.C., and *H. C. Bischoff*, for the liquidators.—Rule 201 of the Companies (Winding-up) Rules, 1903, directs that where no special provision is made by the Act or rules, the practice of the High Court shall be followed. No special provision is made by this Act or rules as to security for costs, and the practice of the High Court is to order security for costs in all but exceptional cases where the plaintiff is resident abroad: *Crozat* v. *Brogden*, 42 W. R. 353, [1894] 2 Q. B. 30; *Fontaine's case, In re Howe Machine Co.*, 37

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

W. R. 680, 41 Ch. D. 118, which latter was a case of a claim made in the winding up of a company. The cases decided in bankruptcy proceedings, such as *In re Semenza*, 42 W. R. 241, [1894] 1 Q. B. 15, do not apply, as the Bankruptcy Rules deal specially with the question.

W. R. Bisschop, for the claiming creditor.—The rule in bankruptcy is that the court has a discretion, and does not necessarily order security for costs to be given where the plaintiff is abroad, except in extreme cases. The practice in bankruptcy should be followed, as bankruptcy is analogous to winding up. There are no special circumstances in this case to justify the order asked for.

BUCKLEY, J.—Section 138 of the Companies Act, 1862, as amended by section 25 of the Companies Act, 1900, has provided a creditor in a voluntary winding up with a short and speedy method of establishing his claim by summons. The claimant has availed himself of this method, instead of proceeding by action. In the latter case he would have been required to give security for costs, as he is resident out of the jurisdiction. It would seem strange if, that being so, he should not have to give security when proceeding by summons. The general rule of practice in the High Court as to ordering security for costs is that if there are not special circumstances—*e.g.*, where the action is a cross-action, or where the defendant has money of the plaintiff or actor in his hands, or where the plaintiff or actor has substantial means within the jurisdiction which can be reached, the order for security will be made. Rule 201 of the Companies (Winding-up) Rules, 1903, has provided that "in all proceedings in or before the court, or any judge, registrar, or officer thereof, or over which the court has jurisdiction under the Acts and rules, where no other provision is made by the Acts or rules, the practice, procedure, and regulations shall, unless the court otherwise in any special case directs, in the High Court be in accordance with the rules of the Supreme Court and practice of the High Court." No special provision is made in these rules as to giving security for costs, and the ordinary practice of the High Court therefore seems to apply. But it is said that the claim in this case is analogous to a claim in bankruptcy, and that the rules of bankruptcy as to security for costs should be followed. In bankruptcy, however, there are special rules dealing with the matter, rules 131 and 148, and in *In re Semenza* the Court of Appeal refused to make the order because it considered that the existence of these rules showed that in cases which did not fall within them the order for security should not be made. But there are no rules in companies' winding up equivalent to those in bankruptcy. I think, then, that the ordinary rules of the High Court apply, and that Mr. Volker must give security for costs to the amount of £25.

Solicitors, *Bompas, Bischoff, Dodgson, Cox, & Bompas; Cayley & Cayley.*

Chan. Div.
Swinfen Eady, J. } July 6, 7, 8, 1904.

PEASE v. COURTNEY. (*a.*)

Settled land—Powers of tenant for life—Restrictions—Agreement for lease—Park—"Usually occupied" with principal mansion-house — Easement — Damages—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7, 31, 54; *and* 1890 (53 & 54 *Vict. c.* 69), *s.* 10.

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

The word "park" is not used in the Settled Land Acts in a legal or technical sense, but with the meaning attached to it in common parlance.

The words "usually occupied therewith" in section 10 *of the Act of* 1890 *do not qualify the preceding words, "pleasure-grounds and park," but only the words "and lands (if any)," which they immediately follow.*

A tenant for life agreed in writing not under seal to let a farm of 309 *acres, of which fifty-five acres adjoined the principal mansion-house on the estate, and was called a park, and to supply the tenants gratuitously with water from a tower erected for supplying the mansion. No consent of trustees or order of court had been obtained. The tenants had not investigated the title of the intending lessor, who had since died, nor had they applied for a formal lease, but they had gone into occupation.*

Held, that the park was within section 10 *of the Settled Land Act,* 1890, *whether it was or was not usually occupied with the principal mansion-house; that, consequently, the agreement, in the absence of consent of trustees or order of the court, was invalid; and that the tenants were not entitled to damages against the executrix of the deceased tenant for life.*

Held, also (following Sutherland *v.* Sutherland, 42 *W. R.* 12, [1893] 3 *Ch.* 169), *that the instrument was invalid as being an agreement to grant an easement over the principal mansion-house.*

This was the trial of an action by a tenant for life and infant remainderman to set aside, as invalid under section 10 of the Settled Land Act, 1890, an agreement for a lease entered into by a former tenant for life under the settlement, and purporting to be in exercise of the powers of section 6 of the Settled Land Act, 1882.

By his will, dated the 9th of May, 1893, John B. Barkworth devised the South Leigh Estate and other lands in the parish of Warblington to the use of his wife, Martha D. Barkworth, for life without impeachment of waste, with remainder to his grandson, Joseph Robinson Pease (one of the plaintiffs), for life without impeachment of waste, remainder to the first and every other son of the said J. R. Pease successively in tail, with remainders over. Mr. Barkworth died the 19th of October, 1893.

The South Leigh Estate had been purchased by J. B. Barkworth, the settlor—the greater part in March, 1890, and the rest in January, 1891. It comprised a mansion-house, which, apart from the questions raised in this action, was a "principal mansion-house" within the meaning of the Settled Land Acts, and a farm called South Leigh Farm, and the total acreage of the estate was about 356 acres, part of which was described in the particulars of sale as a beautifully timbered park of about 55 acres. At the time of the purchase a fence or hedge divided the upper park (being that part of the 55 acres nearest to the mansion and measuring about 13 acres) from the lower park, which was then occupied by one Gill as tenant on a yearly agreement. Mr. Barkworth determined this tenancy as from Lady-day, 1892, and caused the hedge to be grubbed up. After this several persons appeared to have paid money for the use of the park, but the evidence was conflicting as to whether they had exclusive possession or only the right of grazing.

By an instrument not under seal dated the 30th of September, 1902, Mrs. Martha Barkworth, then tenant for life in possession, agreed to let South Leigh Farm, with 309 acres of land (including the above-mentioned 55 acres), to the defendants for seven or fourteen years, from the 29th of September, 1902, the tenancy to be determinable at the end of the seventh year by twelve months' previous notice. The agreement contained a proviso that the supply of

water to the farm from a tower erected for supplying the mansion should be continued without charge to the tenants, except that they were to keep the taps, joints, and pipes in repair above ground.

The agreement contained no provisions for the showing or investigation of the lessor's title. The defendants entered upon the farm, and paid various sums for the goodwill and for the stock and tillages on a valuation. No consent of the trustees of the settlement or order of the court in respect of the letting had been obtained. Mrs. Barkworth died on the 25th of October, 1902, without having executed or been asked to execute a formal lease.

The plaintiff, J. R. Pease, thereupon entered into possession of the estate as tenant for life, and served a notice on the defendants to deliver up possession; and on their refusal he commenced this action, in which his infant son was also a plaintiff, to recover possession of the premises comprised in the agreement.

The plaintiffs' contention was that the agreement was void, since, without the formalities required by section 10 of the Settled Land Act, 1890, it purported to be a contract for a lease of (*inter alia*) a park usually occupied with the principal mansion-house, and also to grant an easement over the principal mansion-house in respect of the supply of water.

The defendants denied that the park or any part of it was usually occupied with the mansion-house; but, even if it were, they submitted that the agreement was good in part. They pleaded that they had entered into the agreement in reliance on the description of the premises as a farm, and in good faith, and they claimed the benefit of sections 7, 31, and 54 of the Settled Land Act, 1882. They counterclaimed against the plaintiff tenant for life for specific performance by the execution of a lease, either for the the whole of the premises or of part, with an allowance of rent in respect of such part as to which the agreement might be held invalid; and they also counterclaimed against the executrix of the late tenant for life for damages in case of dispossession.

Micklem, K.C., and *E. Ff. Ball*, for the plaintiffs.

J. Rolt (*Cave, K.C.*, with him), for the defendants.—The reasonable interpretation of section 10 is to read the words "pleasure grounds and park and lands (if any) usually occupied therewith" as one sentence. When Mr. Barkworth bought this property there was no park, but two fields divided by a fence. The "finely-timbered park" of the particulars of sale must have been the 13 acres; the land on the other side of the fence was let to Gill. If the contention on the part of the plaintiffs is right it comes to this: that any piece of grass land near a principal mansion-house and with a few trees on it may be within the prohibition, unless the court is to distinguish field from field and determine, without a guide, what field is to be called a park. If it was the intention of the Act that a park *per se* was to be excluded there would have been a definition of the word; but there is nothing to show what the "park" is that is excluded. It could not be the intention to leave the court to decide in each case. As to the other point, the utmost that could be said to be occupied with the mansion-house when Barkworth bought was the north part, the 13 acres, and of this he let the grazing. The rest was in the occupation of Gill, and when he left and Mr. Barkworth grubbed up the fence he treated the whole in the way the lower park had been treated, and let it on a yearly tenancy to Hoare. It is true that Hoare used it for grazing, but that was because it suited his purpose to do so; he had exclusive possession and was under no restrictions, and when Mr. Barkworth wanted to drive through in his pony carriage he sent and asked leave of Hoare. He would not have done this in the case of a mere agister. I submit, then, that at the death of the settlor—which is the critical time—he had thrown the two portions into one, thus changing the character of the upper park previously kept in hand; and had shewn by the way he let to Hoare that he did not intend to occupy any part with the mansion-house. This is sufficient to exclude the park from section 10 (2). If the court is against me on that, I submit that the upper park alone was occupied with the mansion at the settlor's death, and that we are entitled to the rest, in the same way that where a person with power to lease for twenty-one years grants a lease for forty, the lease has been held invalid only as regards the excess: *Campbell* v. *Leach*, Ambl. 740; *Alexander* v. *Alexander*, 2 Ves. sen., at p. 644. As to the waterworks, the supply of water is an authorized improvement under section 25 of the Act of 1882, and there is nothing in that section to limit the authorized improvements to land not occupied with the mansion-house. Suppose in making the improvement the pipes were carried through land occupied with the mansion-house, would that be a contravention of section 10, so that the whole work would be thrown away? This is not like the case of *Sutherland* v. *Sutherland*, 42 W. R. 12, [1893] 3 Ch. 169, where the easement consisted of a right in the lessee to drive all over the park and land usually occupied with the principal mansion-house, and the lease was held bad altogether as having been granted *mala fide*, that is not the case here. A strong argument in our favour is that the farm is useless without the supply of water. If the agreement is held invalid we are entitled to compensation. An agreement to grant a lease is an agreement to grant a valid lease: *Stranks* v. *St. John*, 15 W. R. 678, L. R. 2 C. P. 376. Mrs. Barkworth committed a breach of contract in not obtaining the consent of the trustees, which it was her duty and not that of the defendants to do, and the defendants are therefore entitled to substantial damages (*Day* v. *Singleton*, 48 W. R. 18, [1899] 2 Ch. 320), or at all events to damages in respect of the expenses incurred: *Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L. 158.

Clauson (*Eve, K.C.*, with him), for Mrs. Barkworth's executrix.—If the defendants had applied for a lease it would only have contained a qualified covenant for quiet enjoyment, and they could have claimed no damages when the lease came to an end. They went into possession without investigating the title and impliedly accepted it.

Micklem, K.C., for J. R. Pease, on the counterclaim.

Rolt replied on the counterclaim.

Cur. adv. vult.

SWINFEN EADY, J., after stating the circumstances, said: Assuming that the property comprises a mansion-house, pleasure grounds, park and other lands, the plaintiffs object to the validity of the contract on the ground that, having regard to section 10 of the Act of 1890, the tenant for life could not validly contract to grant the lease in question without the consent of the trustees or an order of the court. Neither of these has been obtained; but the contention is raised on behalf of the defendants that the lease is not forbidden by the section, because the park is not usually occupied with the mansion-house, and it is said that to bring the case within the section it would be necessary that the pleasure grounds and park and other lands all ought to be usually occupied with the mansion-house. On the other hand it is contended that "usually occupied therewith" in

section 10 (2) applies only to "lands (if any)" and not to pleasure grounds and park. In my opinion the latter is the true construction, and I think this appears from the language used: "Notwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) and the pleasure grounds *and* park"—and then "*and* lands (if any) usually occupied therewith . . ." It is to be observed that the conjunction occurs between the first and second as well as between the second and third of the nouns, and in my opinion, having regard to the grammatical context, "usually occupied therewith" applies only to "lands (if any)." This is in accordance with the repealed section 15 of the Act of 1882, which provides that "Notwithstanding anything in this Act the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court." The words "demesnes thereof" were in section 10 of the Act of 1890 expanded into the phrase "pleasure grounds and park." Under the circumstances, and apart from any question of fact as to whether the park was or was not usually occupied with the mansion-house, I am of opinion that the tenant for life had no right to let it without the consent of the trustees or an order of the court.

Then it was contended on behalf of the defendant lessees that the park in question is not a park at all, and that the word as used in the Settled Land Acts means the ancient legal park known to the common law. It was said, and truly said, that such a park required at all events three things—vert, venison, and enclosure—and it was said that a grant of the Crown or prescription was also necessary. Without considering the last assertion, it is certainly clear that vert, venison, and enclosure are necessary to a legal park.

In *Sir Charles Howard's case*, Cro. Car. 59, where the king, being seised in fee of a park, granted *officium custodis* to Sir Charles, and afterwards by letters patent under the Great Seal granted away all the deer in the park, all the judges and the barons of the Exchequer met together to determine the question (*inter alia*) "whether those letters patent be a dissolving of the park," and they all agreed "That the park is well dissolved, and shall be no more accounted a park, all the deer being destroyed; for a park consisteth of vert and venison and enclosure, and if it be determined in any of them it is a total disparking; and notwithstanding the grant of the office the owner may well dispark it." But it seems to me abundantly clear that "park" in the Settled Land Acts is not used in the legal or technical sense, but according to its meaning in common parlance. In the Imperial Dictionary, after defining "park" in the legal sense, a second meaning is given, viz., "a considerable extent of pasture and woodland surrounding or adjoining a mansion-house, devoted to purposes of recreation or enjoyment, but chiefly to the support of a herd of deer, though sometimes to cattle and sheep." There is also a third meaning given, viz., "any piece of public ground, generally in or near a large town, laid out and cultivated for the sole purpose of pleasure and recreation, without any regard to the size of the ground or the style of the arrangement."

It is in the second sense that the word is used in the Settled Land Acts. The land here in question consists of a piece of ancient pasture of over fifty acres with a considerable quantity of ornamental timber, and with forest trees of an ornamental character standing out in the open and not confined to the hedgerows and of great size according to the photographs and the evidence. I have therefore no doubt that this is a park within the meaning of the Settled Land Acts.

It will be observed that sub-section 3 of section 10 could not have the effect of excluding property under twenty-five acres from being called a park unless the site of the house and the pleasure grounds and park and lands usually occupied therewith did not together exceed twenty-five acres; anything where that limit is exceeded is, as regards area, entitled to be called a park.

If it were necessary to determine whether the upper and lower park were occupied with the mansion-house I should say that they were. [His lordship reviewed the evidence on this point, and came to the conclusion that the settlor never let either the upper or the lower park, but merely allowed the grass to be fed off.]

The agreement is said to be invalid on another ground—namely, that there is no power to grant an easement over the mansion-house, and that according to the contract the water supply from the tower to the farm and buildings is to be continued free of any cost to the tenants except that they shall keep all taps, joints, and pipes in repair above ground.

Now, it appears that when the settlor died the farm and lands were supplied with water from wells and a pond. After his death the widow, then tenant for life, laid on a water supply, from the water supply to the mansion, to a small farmhouse and other parts of the land. The mansion is supplied by a large reservoir, the water being pumped by an engine to the top of the tower. When the mansion is not occupied the engine is not at work, but it would be necessary to work it if this obligation to supply the farm were to have effect. In my opinion this provision binding successive owners to keep the engine working is one that a tenant for life is not entitled to insert in an agreement. It is true that section 10 of the Act of 1890 does not prohibit the granting of an easement, but it was decided by Romer, J., in *Sutherland* v. *Sutherland*, 42 W. R. 12, [1893], 3 Ch. 169, 194, that "although section 10 does not repeat the words in section 6 (the leasing section) of the Act of 1882 'or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same,' it has the same operation and effect as if those words had been repeated." "It would indeed," said Romer, J., "be absurd if a tenant for life could not, without the consent of the trustees of the settlement or an order of the court, sell or lease the mansion-house, but could nevertheless, without such consent or order, sell or lease a part of it or an easement over it." On that additional ground it appears to me that the agreement for a lease is invalid.

On these grounds it follows that the plaintiffs are entitled to a declaration that the agreement for a lease is invalid as against them, and to an order for delivery of possession, and for mesne profits on the footing of the existing rent.

Then as to the counterclaim. That part of it which asks for specific performance against the plaintiffs by the granting of a lease of course fails. In the alternative there is a claim for damages against the executrix of the late tenant for life. It is said that an agreement to grant a lease means an agreement to grant a valid lease, and that as by reason of the objections upon which the plaintiffs have succeeded no valid lease can now be granted, the estate of the late tenant for life is liable. The agreement contains no provisions for showing a good title by the lessor or for allowing investigation of title, and it was said that the tenant for life ought to have applied to the trustees for their consent to the agreement, and that because this was not done her estate is liable in

damages, and *Day* v. *Singleton*, 48 W. R. 18, [1899] 2 Ch. 328, was relied on. Now in *Day* v. *Singleton* what happened was that the defendant induced the lessors to refuse their consent to the assignment, and the plaintiff, the purchaser, thus lost his bargain. Lindley, L.J., said (p. 328), "But if Singleton could have got the lessor's consent, and would not—still more if the refusal of that consent was procured by Singleton—Day would have had a right of action for damages against Singleton for a breach of his duty to obtain the lessors' consent, it being in his power to obtain it."

Of course if the consent could not have been obtained the case would come within *Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L. 158, where it was held that the damages must be confined to the expenses actually incurred.

Now, in the present case it does not appear that the defendants ever asked for a lease. The tenant for life died twenty-five days after signing the agreement without any application having been made to her for the lease. If it is a case in which, as is suggested, the trustees would have given their consent if applied to for it, why should they not give it to a lease by the next tenant for lif? There was no breach of contract whatever by the tenant for life in her lifetime. The defendants never stipulated for the right to investigate her title, and if a lease had been granted they would only have had a qualified covenant for quiet enjoyment on which they could not have recovered damages when the lease came to an end. In my opinion, the defendant, executrix of the late tenant for life, is under no liability whatever in regard to the lease. It is not a case of total failure of consideraton, for the tenants have entered under the agreement and have been in occupation for nearly two years. The counterclaim wholly fails and must be dismissed with costs.

Solicitors, *Hughes, Hooker, & Co.; Powell & Rogers*, for *E. R. Longcroft*, Havant; *Collyer-Bristow & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) March 3, 1904.

BEARDSLEY v. GIDDINGS. (*a*.)

Food and drugs—Practice—Institution of prosecution—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 54), *s.* 19 (1).

By section 19 (1) *of the Food and Drugs Act*, 1899, *it is provided: "Where any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Act in respect of the sale thereof shall not be instituted after the expiration of twenty-eight days from the time of purchase."*

*Held, that the laying of the information was the institution of the prosecution, and not the service of the summons.**

On the 18th of July, 1903, an information was laid by the appellant, who is an inspector under the Sale of Food and Drugs Act, 1899, against the respondent, who is a farmer at Chalfont.

The information charged the respondent that on the 23rd of June, 1903, he unlawfully sold to the appellant milk which was not of the nature, substance, and quality of the article demanded by the appellant, being deficient in milk to the extent of 15 per cent.

The summons on this information was issued the same day, but it was not served on the respondent until the 22nd of July, 1903.

The summons was returnable on the 18th of August, and on that day the objection was taken that the prosecution had not been instituted within the time specified by section 19, sub-section 1, of the Sale of Food and Drugs Act, 1899.

The respondent contended that the service of the summons was the institution of the prosecution, and that as the summons was not served until after the expiration of more than twenty-eight days from the time of purchase the summons must be dismissed.

The appellant contended that the laying of the information was the institution of the prosecution, and that as that had been done within twenty-eight days, the prosecution was instituted within due time.

The magistrates upheld the respondent's contention and dismissed the summons, but stated this case for the opinion of the court.

Section 19, sub-section 1, of the Sale of Food and Drugs Act, 1899, is as follows: "Where any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Act in respect of the sale thereof, notwithstanding anything contained in section 2 of the Sale of Food and Drugs Act, 1875, shall not be instituted after the expiration of twenty-eight days from the time of purchase."

Randolph, for the appellant.—The laying of the information is the institution of the prosecution. That was clearly laid down in *Thorpe* v. *Priestnall*, 45 W. R. 223, [1897] 1 Q. B. 159, and that decision there governs this case.

J. A. Simon, for the respondent.—I agree that as a general rule the prosecution is instituted by laying an information, but before you can say that, you have to look at the general scheme of the Act. The object of the Act was to give the seller a chance of submitting the incriminated article to his own analysis if there was to be a prosecution. If the service was to be delayed the sample might have become unfit for analysis.

He referred to *Ditcher* v. *Dennison*, 11 Moo. P. C. Cas. 324; and *Yates* v. *Reg.*, 33 W. R. 432, 14 Q. B. D. 648, at p. 661.

Lord ALVERSTONE, L.C.J.—In spite of Mr. Simons' able argument, I think this appeal must be allowed. We are asked to put a limited construction on section 19 of the Act of 1899 and to say that because section 10 of the Act of 1879, which was replaced by the section now under consideration, required the service of the summons within a reasonable time, it ought to be looked at in order to see what was the intention of the Legislature in passing the section; and that as it refers explicitly to the service of the summons, the present section when it speaks of the institution of the prosecution must mean that the service of the summons is the institution of the prosecution. That is a dangerous argument, because it is open to the answer that by the alteration in the language used it was intended to repeal the old section, and to alter the time from which the period is to run from the service to the issue of the summons. Now, the words used in this section are general words, viz., a "prosecution shall not be instituted after the expiration of twenty-eight days from the time of purchase." Now, the laying of an information and the issue of a summons is the well-known way of commencing a prosecution, and it would require direct language to enable us to hold that the

* See also *Brooks* v. *Bradshaw*, *ante*, p. 13.

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

words institution of a prosecution did not mean the laying of an information. I think this appeal must therefore be allowed.

WILLS, J.—I agree. I think it impossible to collect from the language of section 19 whether it was really meant to continue the old proceeding or not, and that being so we have nothing to do but to follow the words of the present Act, which are quite clear. The commencement of a prosecution means the commencement of the proceedings by which a person is brought before the court, and there is nothing in this section which indicates a contrary intention. The case of *Ditcher* v. *Dennison*, which has been referred to, depended on the peculiarity of the proceedings in the ecclesiastical court.

KENNEDY, J.—I agree. Nothing that has been urged upon us seems to me to justify us in treating the words of this section differently from the sense which has been given to them more than once before. The institution of a prosecution has always been taken as regards criminal law to mean the commencement of the proceedings, and not the service of the summons. In the cases on the Criminal Law Act, 1885, it has been clearly laid down that it is sufficient if the information is laid within the specified time, and the laying of the information, therefore, is the institution of the prosecution.

Appeal allowed.

Solicitors for appellant, *R. B. Wheatley, Son, & Daniel*, for *Cruttwell, Daniel, & Cruttwells*, Frome.

Solicitor for respondent, *T. J. Rossiter*, for *E. B. Tilley*, Bath.

K. B. Div. (Channell, J.) } Feb. 22, 23, 1904.

WALKERS, WINSER, & HANSON v. SHAW & CO. (*a*.)

Sale of goods—Quality not in accordance with sample—Right of buyer to reject—Custom limiting right—Validity of custom—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 76), *ss.* 15, 55.

A custom limiting the right of the buyer in a sale by sample to reject the goods on the ground that the bulk is not in accordance with the sample, to cases where the difference is excessive and unreasonable, and was so found by arbitration under the contract, is good in law, and is not void for unreasonableness or uncertainty, or on the ground that it contradicts the written contract.

Award stated in the form of a special case pursuant to section 7 (*b*) of the Arbitration Act, 1899, between the plaintiffs, who are grain merchants, carrying on business in London, and the defendants, who are grain merchants, carrying on business in Hull.

By a contract in writing dated the 1st of October, 1902, the plaintiffs agreed to sell, and the defendants agreed to buy, a quantity of about 500 tons of St. Malo barley, at time of shipment to be about as per sample 373 for shipment in October, 1902, at 23s. per cwt. free on board including freight and assurance to Hull, Grimsby, or Goole, the destination to be given when the ship was ready to sail.

Amongst the further terms of the contract it was provided that any shipment in partial execution of the contract is to be deemed and accepted as if made under a separate contract, that there should be no implied condition that the goods were free from latent defect, that any payment should be by net cash in London for invoice amount on presentation of, and in exchange for, bill of lading and policy of insurance, and that any dispute should be left to arbitration in London in the usual way.

The plaintiffs chartered the steamship *Formby* for the execution of the contract, and in pursuance of and in partial execution of the contract caused to be shipped from St. Malo 414 tons, 17cwt., 2qrs., and 4lbs. by the steamship *Formby*, and duly appropriated such shipment to the contract.

On the 8th of October, after the vessel was partially loaded, the defendants, having previously requested and received from St. Malo a bulk sample of the barley shipped by telegram, requested the plaintiffs to stop the shipment, alleging that the bulk sample differed from the selling sample, to which telegram the plaintiffs replied that they were unable to stop the shipment.

The Formby arrived at Hull on the 13th of October, 1902, but the defendants refused to accept the barley, and the matter was thereupon submitted to arbitration.

The arbitrator, after hearing the evidence on both sides, found that by the custom and usage of the London corn trade applicable to the sale of barley or other grain on contracts employed in the form employed in this case, a buyer was not entitled to reject for difference or variation in quality unless the same is excessive or unreasonable, and is so found by arbitration under the contract. This had been the custom in the corn trade in London for a very long period, and it has been adopted as one of terms of the forms of contract for sale of barley and other grain since its incorporation in 1886, which forms were now largely used not only in the United Kingdom but also throughout the British colonies or possessions and on the continent of Europe and in America and elsewhere. The words inserted in the said forms of contract are "difference in quality shall not entitle the buyers to reject except under the award of arbitrators or the committee of appeal as the case may be"; a similar rule has been adopted by the Corn Trade Associations of Liverpool and Hull, as a rule in forms of contract issued by the associations.

He also found that the barley shipped per *Formby*, although somewhat inferior to the sale sample in quality, and in this respect not "as about as per sample," so as to entitle the sellers to insist on payment of the full contract price without any allowance, was commercially within the contract and the inferiority was not excessive or unreasonable, nor was it so great as to amount to a difference in description.

The question for the opinion of the court was whether the above-named custom was good in law.

Scrutton, K.C., and *Loehnis* for the plaintiffs.

Carver, K.C., and *Leck*, for the defendants.

The arguments sufficiently appear from the judgment.

CHANNELL, J.—I think the points of difficulty that arise in this case are mainly those which always arise when one tribunal has to review the decision of another tribunal, and has not the same jurisdiction to go into the whole matter as it was gone into below. I, sitting here, have merely power to review the decisions of these arbitrators so far as they deal with questions of law; questions of fact are still for the arbitrators, notwithstanding the alteration, so far as it is an alteration, in the recent Arbitration

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Act. The form in which the custom has been found by the arbitrator also raises a little difficulty. The custom that he finds is that in the London corn trade—the custom and usage of the London corn trade applicable to the sale of barley or other grain products in the form employed in this case. The form employed in this case is a contract to purchase barley to be shipped in Havre at a cost, freight and insurance price, with a clause providing that all disputes shall be settled by arbitration, without any clause, such as is stated to be put into the forms of contract settled by the Corn Trade Association, that the difference in quality shall not entitle the buyers to reject except under the award of arbitrators or the committee of appeal. Now, the arbitrator says that in such a contract there is a custom that the buyer is not entitled to reject for difference or variation in quality unless the same is excessive or unreasonable, and is so found under the contract. Now I should have come to the conclusion that this custom was unreasonable but for the qualification "unless the same is excessive or unreasonable." I think the true view is what I put in argument—viz., that you have not a right to reject merely for difference or variation in quality provided that difference or variation in quality can be met by an allowance in the price, but if the variation is such that the goods tendered are not available for the purpose for which in fact they were bought, then that variation would be an unreasonable variation, and one which a buyer would not be compelled to take merely at an allowance in the price. If that is the custom I do not see why it should not be given effect to in law. The law upon sale under such contracts is, of course, stereotyped in the Sale of Goods Act, and the two sections I have referred to deal with the matter, the 15th and 55th. Section 15, sub-section 2, says that in the case of a contract for sale by sample there is an implied condition; that there is not merely a warranty, but there is a condition, and therefore the buyer may reject if the thing tendered is not in accordance with the quality. But then the 55th section says that where any right, duty, or liability would arise under a contract of sale by implication of law—that, I think, clearly includes this case—it may be negatived (*inter alia*) by the usage if the usage be such as to bind both parties to the contract. Consequently there may be a usage which would prevent this implied condition arising, and alter it from being a condition into being a mere warranty. Upon that if there were no arbitration clause, damages could be recovered. If there is an arbitration clause, of course the matter would be settled by the arbitrator giving an allowance. Therefore, provided that there is a valid and effective usage in law, this implied condition as a condition is gone. It is then said that this custom is bad, firstly, because it contradicts the written contract. If it did, of course effect would not be given to it. But I think that that is answered by what was pointed out by counsel—viz., that this custom is in fact imported into a large number of contracts in this trade, and that when it is, then nobody contends that the contract cannot be given effect to, or that it makes the contract insensible. Therefore I do not think that it can be said that this custom is so inconsistent with the terms of the contract that it cannot be given effect to. If it went the length of saying "You shall have no remedy for any variation in the quality contracted for," that would be unreasonable, and would absolutely alter the nature of the contract. But that is not the custom. The custom simply is that you may take it with a variation in the price, and provided there is a limit to the custom in the way that I think there is by the words "unless the same is excessive or unreasonable," I do not see that that is inconsistent with the written contract.

The point whether it is reasonable is very nearly the same as that which I have been dealing with already. The suggestion is—and it is obvious—that if you have not got something of this sort in writing it is not fair between the parties, because one party has the option to reject when it is to his interest to do so by the market price having fallen, and he has also got the option to keep it when the price has gone the other way, notwithstanding the variation. It is said, and I think with some truth, that it is reasonable to have a custom which will prevent the rejection being claimed on the ground of a variation which does not affect the purpose for which the buyer wants to use the goods but only justly affects the price which he is to pay for it. If the custom is so limited it seems to me it cannot be said to be unreasonable. It is also said that it is unreasonable because it is uncertain, because it is a custom which may depend upon the idiosyncrasies of the arbitrator. But reasonableness, as was pointed out by counsel, is a thing which has to be considered in very many points arising in law, and there is no standard of reasonableness except that which a jury, which is the usual tribunal dealing with such matters, may think to be reasonable, and juries certainly have idiosyncrasies, sometimes very remarkable ones, quite as much as arbitrators, and I think it very likely that judges have also; so that when the reasonableness, as in the case of a custom, is for the judge and not for the jury, there may be a great variation of opinion according to what may be called the idiosyncrasies of the judge. I think, therefore, that the fact that this custom in its operation depends upon what the tribunal which has to deal with it thinks to be reasonable, does not make it uncertain in law so that it cannot have any effect given to it. That, therefore, disposes of the three points upon which it was contended by counsel that this custom cannot be given effect to.

[His lordship then considered the question whether the custom existed in fact, and held that, though he would not have come to the same conclusion himself, he could not see his way to interfere with the finding by the arbitrator that the custom did exist.]

Judgment for plaintiff; leave to appeal.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendants, *Lowless & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 10.

EVANS v. COOK.

LANCASHIRE AND YORKSHIRE INSURANCE CO. (LIMITED). THIRD PARTIES. (a.)

Master and servant—Employers' liability—Accident—Compensation—Indemnity—Contractor and sub-contractor—Right to sue—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 3; *s.* 4.

A contractor for the construction of a building entered into a contract with a sub-contractor whereby the latter agreed to execute part of the work. A workman in the employment of the sub-contractor was injured by an accident while at work on the building, and became entitled to compensation under the Workmen's Compensation Act, 1897. *He claimed compensation under section* 4 *of the Act from the contractor, who agreed to pay him a certain weekly sum during incapacity. The sub-contractor was no party to this agreement. The contractor claimed to be indemnified by the sub-contractor under section* 4 *in respect of his liability to the workman, and brought an action in the High Court to enforce the indemnity. The sub-contractor contended that the indemnity could only be enforced by means of an arbitration under the Act.*

Held, that, as the amount of the weekly payment to the workman had been settled by agreement, and there had been no arbitration proceedings to settle the amount, the action was maintainable.

Appeal from the judgment of Wills, J., at the trial of the action.

The plaintiff was the contractor for the construction of a building, and he had made a sub-contract with the defendant whereby the latter undertook to execute the whole of the plastering work in the building. In July, 1901, a workman in the employment of the defendant, while engaged on the plastering work of the building, was injured by an accident, and became entitled to compensation under the Workmen's Compensation Act, 1897. Notice of the accident was given both to the plaintiff and to the defendant, and the plaintiff entered into an agreement with the workman—the defendant being no party to it—to pay him half his average weekly earnings as compensation during incapacity. A year afterwards, in consequence of the decision of the House of Lords in *Cooper* v. *Wright*, 51 W. R. 12, [1902] A. C 302, the plaintiff claimed indemnity from the defendant under section 4 of the Workmen's Compensation Act, 1897, and brought this action in the High Court claiming to recover the moneys already paid to the workman to the date of the writ, further sums which the plaintiff might pay to the date of the judgment, and a declaration that the defendant was liable to indemnify him in respect of future payments. The defendant, who had a policy of insurance with the Lancashire and Yorkshire Insurance Co. against liability to which he might be subject under the Workmen's Compensation Act, 1897, served a third-party notice upon the insurance company claiming to be indemnified by them in respect of the plaintiff's claim. The insurance company entered an appearance, and contended that the plaintiff was not entitled to sue the defendant upon the indemnity, but could only recover in respect thereof by taking proceedings for arbitration under the Workmen's Compensation Act, 1897. It was admitted that if the defendant was liable to the plaintiff, the insurance company were liable to indemnify the defendant.

Wills, J., held that the action was maintainable, and he gave judgment for the plaintiff against the defendant for the sums claimed, coming to the conclusion that the sum agreed upon was properly payable to the workman, and he made a declaration that the defendant was liable thenceforth to pay to the plaintiff such sums as the plaintiff might be liable to pay to the workman under the Act in respect of the accident, and he gave judgment for the defendant against the insurance company for the above sums.

The insurance company and the defendant at their request appealed.

Hugo Young, K.C., and *J. D. Crawford*, for the insurance company.—The plaintiff is not entitled to sue the defendant upon the indemnity given to him by section 4 of the Workmen's Compensation Act, 1897. The scheme of the Act is that every claim under it shall be settled by arbitration. By section 1, sub-section 3, "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, . . . or as to the amount or duration of compensation under this Act," it shall be settled by arbitration in accordance with the Act. The claim for indemnity arises under the Act, because it is given by section 4, and the proceedings to enforce that indemnity are proceedings under the Act. Rules 19, 20, and 23 of the Workmen's Compensation Rules, 1898, deal with the case of a person claiming indemnity under either section 4 or section 6 of the Act, and they require the indemnity to be claimed in the arbitration proceedings. Further, the agreement here is not such an agreement as is contemplated by section 1, sub-section 3, of the Act. The agreement there contemplated is an agreement to which all persons liable are parties or assent, so that all liabilities may be settled once for all, and it does not include an agreement to which the workman's employer is no party. The agreement not coming within the Act, the plaintiff cannot claim indemnity under section 4 in respect of payments made to the workman under it. Again, by clause 1 of Schedule I. to the Act, a weekly payment may be reviewed by an arbitration under the Act. It cannot have been intended to allow a sum fixed by a judge of the High Court or a jury to be reviewed by an arbitrator under the Act. An arbitrator can only review a sum fixed by arbitration. This shows that all questions as to liability to pay compensation and the amount thereof, including any question of indemnity under the Act, are intended to be settled by arbitration.

They referred upon this point to *Crossfield & Sons* v. *Tanian*, 48 W. R. 609, [1900] 2 Q B. 629.

COLLINS, M.R.—In my opinion these appeals fail. A great deal of ingenuity has been shown by the learned counsel who argued the case for the third parties to try and find out something in the Workman's Compensation Act, 1897, which is not there. By section 4 of the Act a workman who is injured by an accident arising out of and in the course of his employment may take his remedy against the undertakers, though he is employed by a sub-contractor and not directly by the undertakers; and the section gives the undertakers a right of indemnity over against any other person who would be liable independently of that section. The workman in the present case elected to claim against the plaintiff, who was the contractor for the erection of the building, and therefore came within the term "undertakers," and by agreement between the plaintiff and the workman the former paid to the latter a sum per week equal to half his average weekly earnings.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

That agreement was come to independently of the defendant. At that time it was not realized that a contractor had any right of indemnity under section 4 over against a sub-contractor, and accordingly no steps were taken by the plaintiff at that time to claim indemnity from the defendant. In May, 1902, the House of Lords, in *Cooper* v. *Wright*, decided that a sub-contractor might be an undertaker within the Act and liable as such, and that therefore the contractor would have a right to indemnity over against the sub-contractor in respect of the amount of compensation moneys. The plaintiff thereupon took steps to assert that liability in the defendant to indemnify him, and brought an action in the High Court, and the insurance company were brought in by the defendant as third parties upon the ground that they were liable to indemnify him under a policy of insurance. The whole matter was gone into before Wills, J., who considered every circumstance bearing upon the question, and he arrived at the amount of the indemnity to which the plaintiff was entitled as against the defendant. The third parties insist that the whole of the proceedings were misconceived, upon the ground that under the Workmen's Compensation Act, 1897, it is not competent for an undertaker, who has come under an obligation to pay compensation to a workman in respect of an accident for which another person is liable to pay compensation, to put in suit his right to indemnity over against that other person, except in accordance with the procedure provided by the Act. The onus of making that out rests upon the person who asserts it. In my opinion the insurance company are not within measurable distance of making that out. The provisions of the Act show that the scheme for the assessment of compensation to an injured workman is that the amount shall be fixed by arbitration where no agreement as to the amount is arrived at. But there is no provision which shows that the right of the undertaker as against the person who is liable to indemnify him must in all cases be settled by arbitration under the Act. The obvious reasons for providing that, in the absence of an agreement, the claim of a workman for compensation shall be settled by arbitration under the Act have no application to a claim for indemnity by an undertaker, where the persons concerned may be and probably are in a good pecuniary position. This latter inquiry begins after the workman is out of the case. The provisions of section 4 are for the benefit of the workman, in order to give him a right against the undertaker—the contractor—where he is in the employment of a sub-contractor. When the compensation payable to the man is agreed upon, the matter is done with, and the only question that remains is as to the right of the undertaker to indemnity over. There is no reason why this latter claim should be decided by arbitration. There is no provision in the Act to that effect. The main provision which has been relied upon is section 1, sub-section 3. That sub-section provides that "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration in accordance with the second schedule to this Act." That obliges me to see what is the meaning of the words "the liability to pay compensation under this Act." The meaning of those words is made clear by sub-section 1 of the same section, which makes an employer "liable to pay compensation in accordance with the first schedule to this Act" to a workman in his employment who is injured by an accident arising out of and in the course of the employment. Therefore sub-section 3 is dealing with the direct obligation of the employer to pay compensation to his workman. Then comes section 4, which contains nothing in its terms to show that the right of the contractor to an indemnity must be determined by arbitration. Various rules in the Workmen's Compensation Rules, 1898, have been relied upon. Rule 19 is first of all relied upon. That rule deals with a case in which arbitration proceedings to recover compensation are taken by a workman, and it provides that where the respondent claims to be entitled under section 4 or section 6 of the Act or otherwise to indemnity over against any person not a party to the arbitration, he must, five clear days before the day fixed for the arbitration, file a notice of his claim, and he must serve the notice on the person against whom the claim is made; and by rule 20 if the person so served desires to dispute the claim in the arbitration as against the respondent, he must appear on the day fixed for the arbitration; and in default of his doing so he shall be deemed to admit the validity of any award made against the respondent. Those provisions are applicable where proceedings are taken by a workman for the assessment of compensation by arbitration, and the respondent has a claim for indemnity over; and they are framed for the purpose of having those questions determined once for all between all parties in the arbitration, so that the person against whom indemnity is claimed shall not be allowed subsequently to dispute the right of the workman to be paid compensation. It does not, however, touch the case where there is an agreement, as in the present case, come to between the workman and the plaintiff to pay compensation, and where arbitration is not required. It would require an express provision in the Act to take away the right in such a case to sue at law for the indemnity. There is nothing in the Act to that effect. It is unnecessary to go through all the other arguments adduced, which are all founded upon the suggested construction of section 1, sub-section 3, which I have held to be untenable. In my opinion the appeals must be dismissed.

STIRLING, L.J.—I am of the same opinion. The plaintiff is an "undertaker" within the meaning of section 4 of the Workmen's Compensation Act, 1897. The defendant is a contractor with the plaintiff for the execution of part of the work which the plaintiff has contracted to carry out. While the work was being carried on a workman in the employment of the defendant met with an accident, and under section 4 of the Act he applied to the plaintiff for compensation. The amount of the compensation was agreed upon between the plaintiff and the workman, without any arbitration proceedings, the defendant being no party to the agreement. The plaintiff now brings an action in the High Court claiming an indemnity against the defendant in respect of the sums payable to the workman under the agreement. That indemnity is expressly given by section 4, because the defendant, in whose employment the workman was and who was a sub-contractor, would have been liable to pay compensation independently of the section. The right of indemnity, therefore, accrued to the plaintiff as against the defendant. There is nothing said in the section as to how that right of indemnity is to be enforced; and therefore, unless there is something in the Act to the contrary, the plaintiff is entitled to sue in the High Court. What is relied upon as excluding the right of the plaintiff to sue in the High Court is section 1, sub-section 3. It is said that the question has arisen as to the liability to pay or as to the amount of compensation under the Act. But there

is no question here between the workman and the undertaker, the plaintiff. That question has been settled by agreement between them. It is then said that this is not such an agreement as is contemplated by the Act. It is said that the agreement must be one which binds the workman, the undertaker, and the employer, and, I suppose, any other person who may be liable to indemnify the employer. I fail to see any such provision in the Act. The agreement was come to between the workman and the undertaker who was liable to pay him compensation. It would be hard upon a workman if he could not make an agreement with the undertaker, from whom he was claiming compensation, without getting his employer's sanction. There is no hardship or injustice upon the employer in this. His remedy is under Schedule I., clause 12, of the Act. If the defendant is dissatisfied with the amount of the compensation agreed upon, his remedy is to apply to have the amount agreed to be paid by the plaintiff to the workman reviewed under clause 12 of Schedule I., and then the only sum which he will be compelled to pay will be the sum so settled upon that arbitration. The judgment of the learned judge at the trial was framed upon that view of the Act, and it leaves the defendant free to take proceedings under clause 12 to have the amount reviewed, and if he is successful in that his liability would be as then settled.

MATHEW, L.J.—I am of the same opinion. It seems to me to be quite clear that the compensation mentioned in section 1, sub-section 3, of the Act refers to compensation payable to the workman, and does not touch the question of the indemnity to which the undertaker, who has paid the workman, is entitled to under section 4. Here the plaintiff became liable to pay compensation to the workman, and the amount of that compensation was arrived at by agreement between the plaintiff and the workman. Section 4 thereupon came into operation and the plaintiff became entitled under it to an indemnity from his sub-contractor. There is nothing in that section or in any other part of the Act which excludes the plaintiff from suing in the High Court to enforce that indemnity. The right to an indemnity is given by the Act, and the plaintiff can assert that right in the ordinary way. Further, I cannot agree with the contention that this agreement is not within the Act because the defendant either was not a party to it, or did not consent to it.

Appeal dismissed.

Solicitors for the plaintiff, *Wynne-Baxter & Keeble.*

Solicitors for the defendant, *Field, Roscoe, & Co.*, for *Dowson & Wright*, Nottingham.

Solicitors for the third parties, *Pritchard, Englefield, & Co.*

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 8.

In re RICHARD AND GREAT WESTERN RAILWAY CO. (*a.*)

Railway—Minerals—Lying under and near railway—Compensation for preventing working of minerals—Interest—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

Where a mine owner gives notice to a railway company, under section 78 *of the Railways Clauses Act*, 1845, *of his intention to work the minerals lying under or near the railway, and the railway company give a counter-notice to the mine owner that the working of the minerals will be likely to damage the works of the railway, and that they are willing to make compensation for preventing the working of the minerals, and the question of the amount of compensation is referred to arbitration, the arbitrator has no power to award interest upon the compensation money from the date of the counter-notice to the date of the award.*

Appeal from the judgment of Channell, J., upon an award of an umpire stated in the form of a special case.

Philip Richard was the lessee for a term of years of the veins and seams of coal extending under the railway of the Great Western Railway Co.

Richard having given to the railway company notice in writing of his intention to work the coal adjacent to and under the railway, the railway company gave a counter-notice to Richard stating that the working of the coal would be likely to damage the works of the railway, and that they were willing to make compensation for the preventing the working of the coal.

The matter of the compensation to be paid by the railway company was referred to arbitration.

The arbitrator made his award for the sum of £14,654 5s. 10d. as compensation, and he further awarded that the railway company should pay to Richard the sum of £2,795 13s. 3d. as and for interest upon the said sum of £14,654 5s. 10d. from the date of the counter-notice to the date of the award.

The question for the opinion of the court was whether the umpire had any jurisdiction to award interest as above.

Channell, J., said that he was inclined to think that interest could be awarded directly, but that even if it could not, the amount of the interest could be taken into consideration as entering into the calculation of the sum to be awarded as compensation for depriving the mine owner of his right to work the minerals as from the date of the counter notice. He therefore held that Richard was entitled to the sum of £2,795 13s. 3d.

The railway company appealed.

Cripps, K.C., and *Ernest Moon, K.C.* (*Howard Wright* with them), for the railway company.—The principle laid down in *Birch* v. *Joy*, 3 H. L. C. 565, that a purchaser in possession of an estate, receiving the rents, is liable to pay interest on the unpaid purchase-money, only applies to a case of vendor and purchaser. Where a mine owner is prevented from working his coal under or adjacent to a railway by a counter-notice given under section 78 of the Railways Clauses Act, 1845, there is no purchase of the coal by the railway company: *Great Northern Railway Co.* v. *Inland Revenue Commissioners*, 49 W. R. 261; [1901] 1 K. B. 416; *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.*, 52 W. R. 193, [1903] A. C. 426. The sum payable to the mine-owner under sections 78, 81, and 82 of the Act of 1845 is by way of compensation for preventing him from working his mines. Interest cannot be payable upon that compensation until the amount has been fixed and default has been made in payment. The decision of Buckley, J., in *Fletcher* v. *Lancashire and Yorkshire Railway Co.*, 50 W. R. 423, [1902] 1 Ch. 901, turned upon a special Act, which required the railway company to purchase the minerals within a certain distance of the railway, which the mine owner was prevented from working, and the minerals so paid for were to vest in the railway company. That case was not decided under the Railways Clauses Act, 1845, and has there-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

fore no application. Interest, therefore, is not payable on the amount awarded for compensation before the date of the award.

They also referred to *Caledonian Railway Co.* v. *Carmichael*, L. R. 2 H. L. Sc. 56.

Abel Thomas, K.C., and *S. T. Evans, K.C.* (*George Cave, K.C.*, with them), for the claimant.—Whether there has been a sale and purchase of the minerals or not, interest is payable on the amount of the compensation money from the date when the mine owner was prevented from working them, in accordance with the equitable principle laid down in *Birch* v. *Joy*. The principle applies where a body under statutory powers requires a landowner to abstain from using his land. *Fletcher* v. *Lancashire and Yorkshire Railway Co.* is a strong authority in support of this view. The arbitrator had, therefore, jurisdiction to award interest from the date of the counter-notice.

Moon, K.C., replied.

COLLINS, M.R.—The question in this appeal is whether the arbitrator is entitled to allow a sum for interest in addition to the sum allowed for compensation under section 78 and the following sections of the Railways Clauses Act, 1845. The case is susceptible of a comparatively short judgment, because, in my opinion, it is really concluded by two decisions in the House of Lords. The facts are that the mineral owner gave the railway company notice under section 78 of the Railways Clauses Act, 1845, of his intention to work the coal lying under or near the railway. That notice let in the right of the railway company to give a counter-notice, which had the effect of preventing the working of the coal subject to the payment of compensation for such prevention. That raised a question of compensation and nothing else, and the question is whether the arbitrator is entitled to award a sum for interest on the amount fixed as compensation. The counter-notice did not create the relation of vendor and purchaser. It merely gave rise to a claim for compensation under the machinery of the Act. The first of the two cases in the House of Lords is *Caledonian Railway Co.* v. *Carmichael*, the head-note in which, so far as material, is as follows: "A sheriff's jury, awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to £5,272, saying, however, nothing as to interest. The court below added to the principal sum twelve years' interest. Their order reversed. Per Lord Westbury: Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld." The other case is that of *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.*, and the head-note there is as follows: "Owners of coal mine under and near waterworks gave the undertakers notice under section 22 of the Waterworks Clauses Act, 1847, that they intended to work the coal. The undertakers replied by a counter-notice requiring the mine owners not to work and stating their willingness to make compensation. In an arbitration under the Act and the Lands Clauses Acts to assess the compensation, the mine owners gave evidence to prove that coal rose in value after the date of the counter-notice. Held, that there was no purchase of the coal or transfer of the property in the coal; that the inquiry was not what was the value of the coal at the date of the counter-notice, but what would the coal owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it; and that the evidence was admissible." Taking those two decisions together the case comes to this: The matter to be determined by the arbitrator is, not what is the price to be paid as upon a sale of the coal, but what is the sum to be paid as compensation for preventing the mine owner from working the coal, and there is no contract, express or implied, to pay interest, nor is there any breach of duty on the part of the railway company in not paying the compensation money over in a reasonable time. If any claim for interest can arise, it can only be after the amount of compensation had been ascertained. The case of *Fletcher* v. *Lancashire and Yorkshire Railway Co.*, before Buckley, J., which was relied upon by the claimant, turned upon a private Act of Parliament which constituted the transaction a sale of the minerals, the compensation being the price payable for them, and therefore it was held, on the ordinary principle with reference to vendor and purchaser, that the obligation to pay interest arose. In the present case neither of the circumstances mentioned by Lord Westbury in *Caledonian Railway Co.* v. *Carmichael* exist. There is no contract, express or implied, to pay interest, nor is there a wrongful withholding of the principal sum and non-payment of it on the day when it ought to have been paid. The arbitrator, therefore, had no jurisdiction to award interest, and the appeal of the railway company must succeed.

STIRLING, L.J.—I am of the same opinion, and have very little to add. It is contended on behalf of the claimant that the principle laid down in *Birch* v. *Joy* applies, and that interest on the amount of the compensation can be awarded as from the date of the counter-notice by the railway company. That case, however, was decided with reference to the rights of the vendor and purchaser of an estate under an ordinary contract of purchase and sale. The case of *Fletcher* v. *Lancashire and Yorkshire Railway Co.* was decided by Buckley, J., upon the terms of a special Act of Parliament, and not upon the Railways Clauses Act, 1845, and in that case the learned judge came to the conclusion, upon the terms of that special statute, that the relation of vendor and purchaser existed between the mine owner who was prevented from working the minerals and the railway company, and that therefore the principle of *Birch* v. *Joy* applied. In the present case the relation of vendor and purchaser does not exist. That was expressly decided in two cases, both of which are binding upon us. The first is *Great Northern Railway Co.* v. *Inland Revenue Commissioners*, in this court, and the other is the more recent case of *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.*, in the House of Lords. This latter case was a decision upon the Waterworks Clauses Act, 1847, which contains a provision identical with those in the Railways Clauses Act, 1845. The House of Lords held that those provisions did not establish the relation of vendor and purchaser between the mine owners and the waterworks company. The Lord Chancellor said: "It was not a purchase of the coal, nor is it analogous to a purchase of the coal." Lord Macnaghten said: "The counter-notice by the undertakers following a notice of the mine owners under section 22 does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mine owner is prohibited from working, and the undertakers are bound to make full compensation. That is all." For these reasons it seems to me that the ground upon which it sought to support the claim for interest fails, and the appeal must be allowed.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitor for the railway company, *R. R. Nelson.*

Solicitors for the claimant, *Pontifex, Hewitt, & Pitt.*

From K. B. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) July 28, 1904.

In re THE CHURCH PATRONAGE TRUST.
LAWRIE *v.* ATTORNEY-GENERAL. (*a.*)

Advowson—Charity— Will—Trust to present fit and pious person.

A charitable trust can be created of an advowson as of other civil property, but such a charitable trust must be for the benefit of the public or a class of the public, and cannot be implied from a direction to choose fit and proper persons, such being the duty imposed by law upon every owner of an advowson.

Decision of Buckley, J., 52 *W. R.* 106 [1904] 1 Ch. 41, *affirmed.*

This was an appeal from a decision of Buckley, J. (reported 52 W. R. 106, [1904] 1 Ch. 41).

The trustees of the Church Patronage Trust applied by summons under section 6 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), that the court might sanction their retaining the advowson of the vicarage of the church at Battesford, otherwise Battisford, coming to them under a codicil to the will of Louisa Woodcock and a subsequent deed of appointment. The application was made on the assumption that the advowson had been thereby assured "to or the benefit of a charitable use" within the meaning of section 5 of the Mortmain Act, 1891.

By the codicil in question, which was dated the 18th of April, 1902, the testatrix devised the advowson to such uses as her three sisters or the survivor of them "shall within twenty-one years from the date of my decease appoint for the purpose of carrying out the express wish of my late husband that the said advowson should be made over to and vested in the Church Patronage Trust Society by all lawful means, but if the said society decline to accept the said patronage, the said advowson and perpetual presentation shall belong to my said three sisters as joint tenants in fee simple."

The testatrix died on the 14th of May, 1902.

The sisters of the testatrix exercised the power of appointment given to them by the codicil by a deed dated the 14th of February, 1903, whereby the advowson was appointed and confirmed unto and to the use of the trustees of the Church Patronage Trust, their heirs and assigns. And it was thereby agreed that the trustees and the persons deriving title under them should stand possessed of the advowson upon the trusts and subject to the powers, so far as applicable, comprised in and forming the ninth schedule to an indenture of the 21st of December, 1871.

The last-mentioned indenture was the trust deed of the Church Patronage Trust.

The trusts contained in the ninth schedule were, so far as they are material, as follow:

"1. Upon trust that from time to time, as often as the said vicarage and parish church of —— shall become vacant by the death, resignation, deprivation, or cession of the incumbent or otherwise, the trustees for the time being of these presents do and shall nominate, appoint, and present to the same vicarage and parish church such fit and pious person of godly life and conversation, being in holy orders, capable of accepting and holding the same, as the trustees for the time being of these presents, or the major part in number of them, shall determine upon. . . ."

"2. Provided always that it shall not be any objection to the person who may be appointed at any time to supply the vacancy for the time being of the said vicarage and parish church that he is one of the trustees for the time being of these presents."

"3. . . . So that the number of five trustees, three of whom at least shall be clergymen of the Established Church, may from time to time, as far as circumstances will admit, be kept up."

"4. That only such persons shall be eligible for the office of trustees as shall be, or shall be well known or reputed to be, of godly life and conversation, and shall profess themselves members of the Established Church of England, and shall be known to be zealously attached to the great principles of the reformed faith contained in the Liturgy and Articles of the said Established Church."

Buckley, J., held that there was no trust expressed other than such as was involved in the duty of the owner of an advowson. Consequently the gift did not constitute a charitable trust and the summons failed, the case not coming within the Mortmain and Charitable Uses Act, 1891.

The trustees of the Church Patronage Trust appealed.

Levett, K.C., and *Barlow*, for the appellants.—This trust provides that suitable persons shall be presented to the advowson, and that a certain number of the persons who are to have the power of choice are to be clergymen, so that a good choice is doubly ensured. It is submitted that a trust of this kind is charitable as being for the benefit of religion. It is plain that an advowson may be given on a good charitable trust for the benefit of the inhabitants of a particular parish: *In re St. Stephen, Coleman-street*, 36 W. R. 837, 39 Ch. D. 492. But the only benefit that the inhabitants of the parish get in such a case is precisely what is given by this deed—viz., the ensuring of the choice of a proper person as their minister. The trust is also charitable within the decision of the Court of Appeal in *In re Hunter*, 45 W. R. 610, [1897] 2 Ch. 105, as being a trust to advance a particular set of doctrines. The persons to be presented under this trust must be "zealously attached to the great principles of the reformed faith." Though the judgment of Romer, J., in *In re Hunter*, 45 W. R. 344, [1897] 1 Ch. 518, was restored by the House of Lords in *Hunter* v. *Attorney-General*, 47 W. R. 673, [1899] A. C. 309, the decision of the Court of Appeal on this point was not affected.

Commissioners of Income Tax v. *Pemsel*, [1891] A. C. 531, 40 W. R. Dig. 217; *Attorney-General* v. *Scott*, 1 Ves. sen. 412; *Foley* v. *Attorney-General*, 7 Bro. P. C. 249, were also cited.

R. J. Parker (*Sir R. B. Finlay, A.G.*, with him), for the Attorney-General.—The Attorney-General is as a rule interested in supporting a charitable trust, but as there is no one here to argue the contrary, he feels it his duty to place this view before the court. So far as an advowson is civil property it can be made the subject of a trust, and the trust of an advowson for the benefit of the inhabitants of a parish is a good charitable trust. But it is a good charitable trust only so far as the advowson is civil property. The inhabitants of a parish in such a case get the benefit of something more than the common law duty which is imposed on trustees to appoint fit and proper persons. They get the benefit of the pecuniary value of the advowson. This is borne out by the Sale of Advowsons Act, 1856 (19 & 20 Vict. c. 50), which authorizes the sale of advowsons held on trust for inhabitants, ratepayers, freeholders, or other persons forming a numerous class. But there can be no charitable trust of the ecclesiastical duties attached to the advowson. It is the duty of all patrons to appoint fit and proper persons, and trusts which merely provide for the performance of that duty cannot be

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

said to be charitable: Lewis on Perpetuities (ed. 1843), pp. 695, 696. It is further submitted that a trust to be a good charitable trust must be for the benefit of some person or body of persons, but here there is no *cestui que trust* at all.

Vaughan Hawkins, for the Official Trustee of Charitable Lands.—There is no decision on this point which is binding on the court. If this trust is charitable, it can only be supported as a method of securing a better choice of incumbents.

He cited Duke on Charitable Uses (ed. 1805), p. 137.

Levett, K.C., replied.

VAUGHAN WILLIAMS, L.J.—I think that this appeal fails, and that the judgment of Buckley, J., must be affirmed. I suppose some people, cynically minded, take a positive pleasure in results of law which really are a little grotesque when looked at in relation to the history of the subject-matter with which one has to deal; but when you start with a constitutional arrangement which is part of the constitution of the nation, and which really lays down a rule that is not consistent with the origin of the subject-matter you have to deal with, one cannot be surprised that there is some little difficulty in coming to a conclusion with reference to the law; but I dare say that the outcome of all this is, as Mr. Parker has said, that practically you arrive at a better state of things than you would have done if you had made your constitutional law accord with the origin of the particular subject-matter. One cannot doubt that in its origin the church view of the right of presentation harmonized better with the particular subject-matter that was in view, than the property view which was afterwards adopted. Although this may lead to some difficulty in reference to cases which may arise at law, or even occasionally to some grotesque results, I dare say that this all works out for the best. At all events, what we have to decide in this case is this: We have a disposition in this case by will which clearly would be invalid as being against the law regarding perpetuities unless it can be brought within the exception in favour of charitable trusts; and, therefore, the whole question is whether in this particular case the dispositions by the will of the testatrix are such as to fall within the exception in favour of charitable trusts. I do not think it would serve any useful purpose in the judgment which I am now giving to repeat at length the provisions of the testatrix's will. They are all sufficiently set out in the report of this case in [1904] 1 Ch., p. 41; but I think it will be convenient to add to that a portion of clause 3, which is not set out in the report. [His lordship read clause 3, and continued:] The question arises whether there is a trust created which ought to be held not invalid as regards the law against perpetuity by reason of its coming within the exception in favour of charitable trusts. When Buckley, J., was dealing with this matter in his judgment as reported on p. 49 he said, speaking of this deed which was executed on the 21st of December, 1871: "So far, therefore, I have a deed of appointment which I must read into the codicil, and the joint effect of the two is that the testatrix has devised to the persons who thus become appointees. They are to hold upon the trusts set forth in the ninth schedule to the deed of 1871. I am unable to find in the first clause of that schedule any direction to do anything further or other than what the owner of any advowson is bound to do. He ought to present a fit and pious person of godly life, who is in holy orders, and capable of holding the living." There the learned judge is repeating the words as they appear in the clause which is supposed to create the trust: "There is no trust expressed other than such as is involved in the duty of any owner of an advowson." Then Buckley, J., says: "If I turn to clause 4 of the schedule I find there is a definition or indication of the class of persons who are to be trustees. Assuming, although I do not think it is the case, that I could evolve from that description of the character of the trusts that they are bound to appoint a person of the particular religious persuasion which is pointed out by that clause, I do not find that any class of thought in the Established Church of England is there defined or pointed to. The trustees are simply to be persons of godly life, members of the Established Church of England, and attached to the principles of the reformed faith contained in the Liturgy and Articles of the Established Church." So far I entirely agree with every word that Buckley, J., said. I want now at this point to say a word upon that part of clause 3 which I have already referred to, "So that the number of five trustees, three of whom at least shall be clergymen of the Established Church, may from time to time as far as circumstances will admit be kept up," because counsel for the appellants relied upon that also as being a provision which was put in for the express purpose, in the view of the testatrix, of bettering the choice of the parson to be presented, that is, bettering it according to her view as being more likely to result in the selection of a good parson because the majority of those who were to make the appointment were to be clergymen of the Church of England.

Now one has to consider whether this is a charitable trust within the meaning of the word when used with reference to the exception in favour of charitable trusts. The first thing to point out is that this is not a case where the testatrix, or the creator of a fund, has brought into the fund any property or money, as to which she declares new trusts. All that she is doing by means of her will is to declare the trusts in respect of the advowson—that is to say, to declare in respect of the advowson that the parson appointed shall have the qualifications which have been set forth, but when one looks at those qualifications to see what they are, one finds they are only the qualifications which are required, independently of the declaration of the trusts, to be observed by every patron when he is presenting to a living. Therefore, in the first instance, there seems to be, as Buckley, J., has pointed out, a very strong reason why this should not be held to be a charitable trust within the meaning of the words "charitable trust" with reference to the law of perpetuities. There is nothing voluntarily done by the testatrix at all to enhance or increase the obligations which exist on the patron for the time being, whoever he may be, in respect of the presentation to the living.

Now what is the next observation one can make in reference to this particular alleged charitable trust? It is that there is in this case no *cestui que trust* whatever. This is not like the case of a trust in favour of the parishioners of a particular parish; it is nothing of the sort. It is a trust without a *cestui que trust*, and it is a trust which really is only another mode of describing an existing duty which is cast by the law upon persons holding this class of property. I should like to say in passing that although in the course of the argument I asked the question whether the recognition of such a trust in favour of the parishioners of a parish was not an authority for the proposition that you might create a charitable trust, in a case where that which was provided for was a better choice of the incumbent, the answer given to me, I think, was a perfectly sound one; but although it may possibly be—I do not know about

that myself—that you would be likely to get a better choice if the parson was elected by the parishioners, that, at all events, is not the reason why the law has recognized such trusts in favour of the parishioners as charitable trusts. The reason why the law has recognized such trusts as charitable trusts is merely in reference to the property which is conveyed; and that is recognized in the decision of Kay, J., in *St. Stephen, Coleman-street*, where, quoting from the decision in *Goodman* v. *The Saltash Corporation*, 31 W. R. 293, 7 A. C. 633, the learned judge read these words of Lord Selborne: "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants is (as I understand the law) a charitable trust; and no charitable trust can be void on the ground of perpetuity." Then Kay, J., quotes what was said by Lord Cairns: "A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of any courts is called a charitable—that is to say, a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities." But one has not got such a case here. If there is a trust at all in this case it is a trust without a *cestui que trust*. It seems to me that these grounds are sufficient to show that in this particular case there is great difficulty in saying there is a charitable trust.

But what has been most strongly urged on behalf of the appellants is that this may be a charitable trust because it may tend to the better choice of an incumbent, and a passage was read from the opinion of Lord Macnaghten in *The Commissioners for Special Purposes of Income Tax* v. *Pemsel*, in which Lord Macnaghten defined the trusts which are charitable trusts: "'Charity' in its legal sense comprises four principal divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion" (they did not claim that this trust came within any of those words); "and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." They claimed that a trust which provided in a case like this for the better selection of the incumbent was a charitable trust. With regard to that, it is in the first place to be observed that if it is a charitable trust one would really be saying that the law of England which allows an advowson to be treated as private property is not a convenient law, and that it ought to be remedied, and that one way of remedying it would be to try as far as you can to prevent advowsons being vested in private individuals and to vest them in bodies of people specially qualified to make a selection of an incumbent. I cannot agree to that. Some people may think that is a good thing, and some people may not, but I think it is impossible to say that a trust, the real object of which is to remedy the law of England, can be treated as a charitable trust. I do not mean in any observations I am making to suggest that it is impossible that an advowson should be vested in trustees for a charity. Admittedly, in the case of an advowson which is appendant to the property the property may be conveyed to the trustees for the charity, and in that case the trustees for the charity will hold, as part of the property vested in them, the advowson. I do not know that it would militate against that that the same testator who left the property with the advowson appendant should express what his wishes were with regard to the presentation to the particular living; and also I wish to say I do not at all suggest that you might not, if you put it in a proper form, that is to say, put it as a mere transfer of property, transfer an advowson to a charitable society, like the case of the missionary society which was mentioned in the argument. All I say is, that I do not think the mere fact that the intention of the creator of the supposed charitable trust was to improve the choice of the parson to whom the living should be presented, is sufficient to constitute this a charitable trust. Under these circumstances I do not think I should be doing any good in adding to my judgment.

With regard to what was said about the views of the Lords Justices who were parties to the decision in the case of *Hunter* v. *The Attorney-General* in the Court of Appeal, that is a decision which, of course, binds us, and if that decision is to be treated as an express authority that you may create a charitable trust by a provision which limits the area of choice by saying that the parsons presented are all to be of a particular school of religious thought or view, I say two things: First I say that although that may seem to be laid down in the judgments of Lindley, L.J., Lopes, L.J., and Rigby, L.J., yet they do not give us any reasons which would guide one as to when such a limitation, for the purpose of improving the selection, is to be treated as a charitable trust. When that case went to the House of Lords the decision of the Court of Appeal was reversed, and, although this particular point was not expressly taken, yet I think that when one reads the opinions of the law lords, and having regard to the decision of Romer, J., which they were replacing, it is very difficult, if not impossible, to suppose that the law lords who were parties to that judgment could have approved of that part of the judgment of the Lords Justices in the Court of Appeal in which they are supposed to have sanctioned the proposition that a limitation of the area of choice in accordance with the view of the testatrix or creator of the alleged trust can be treated as falling within the term "charitable trust" for the purpose of the exception in the law against perpetuities, in favour of charitable trusts. I think, therefore, that this appeal must be dismissed.

With regard to the points upon the two sections, the 5th and the 8th, of the Mortmain Act, they do not arise in this case, and, therefore, I say nothing about them.

ROMER, L.J.—No doubt advowsons may be made the subject of good charitable trusts, for example, if they are held upon trust for a parish or its parishioners; but the question before us is in substance this: Can trusts be held good charitable trusts which have no *cestui que trust*, unless they be the public, by inference, and where the trusts are in substance merely that the legal owners of the advowsons, their heirs and assigns, shall take care to present fit and duly qualified persons as vacancies occur? For instance, would such a trust as I am about to mention be good? A case where the legal owner of an advowson for the time being by deed-poll declared that he, his heirs and assigns, should stand possessed of the advowson belonging to him upon trust that he and they, as vacancies should occur, would take care to present fit and duly qualified persons to fill the vacancies. I think not. Such trusts merely provide that the owners of the advowson for the time being shall properly discharge the duties cast upon them by the very nature of the property they hold. I cannot think that such trusts of advowsons can lawfully be made perpetual by construing them as being charitable. I do not think it can be said that expressly making the owner of an advowson for the time being for the purposes of the discharge of his duty,

a trustee instead of an ordinary owner, is intended so much for the benefit of the public, as leading to the probability of a better selection of the clergyman, as to justify the court in holding that in itself it is sufficient to create a charitable trust. The effect of holding otherwise would be that any owner of an advowson for the time being could for ever afterwards tie up and bind the administration of the duties of presentation, either by deed-poll, merely declaring himself and his heirs and assigns trustees in the appointing of clergymen to fill the vacancies of the living, or by conveying to another, his heirs and assigns, upon similar trusts. I think this would lead to results very far-reaching and much to be avoided. That view decides the present case, because on the facts I think that the trusts we have to consider cannot, in substance, but be classed as such trusts as I have before mentioned.

I need not make any further observations on the decision of the Court of Appeal in *Hunter* v. *The Attorney-General* beyond these. In and so far as the court in that case did decide that the trusts declared of an advowson merely directed to narrowing the choice of the clergymen to be appointed to vacancies by the owners for the time being were good charitable trusts, that case is distinguishable from the present. Whether, if the Court of Appeal did so decide, that decision was right it is not for me to say. That must be for another court.

COZENS-HARDY, L.J.—I agree. I have really very little to add. In approaching this case we must start with this proposition—that according to English law an advowson is regarded as property, property no doubt of a peculiar kind, to which certain ecclesiastical duties and obligations attach, and property which may be partially forfeited by the owner's delay or neglect to discharge those duties. If the owner of an advowson does not, on a vacancy occurring, within a certain time present a fit and proper clerk, the law makes provision for his losing the right of presentation, and that right is vested in some other authority. It being a species of property, there is, I think, no doubt whatever that it may be subject to a charitable trust. The books are full of such cases. I would only mention the case of *The Attorney-General* v. *Warr*, in 1829, where an advowson was given to certain specified charities by will. In the *St. Stephen, Coleman-street, case* Kay, J., gave a decision clearly in the same sense, and the statute of 19 & 20 Vict., to which our attention has been called, proceeds on the same footing. But the question we have to decide is not whether an advowson can be the subject of a charitable gift. In order to create a valid trust you must have not only a trustee, but a *cestui que trust*. That *cestui que trust* may be either an individual, or individuals, or the public, or a class of the public. But can you create a charitable trust by vesting an advowson in persons whom you call trustees, and imposing upon them expressly the duty of discharging the precise obligation which the law implies in them as the owners of the advowson? I think not. No authority to this effect has been cited, and if the contrary view to that which I have expressed were the law, I think it would be difficult to resist the conclusion that every owner of an advowson in this country holds it upon a charitable trust. I have been unable to see what difference it can make if an owner of an advowson who holds property subject to certain ecclesiastical obligations declares by deed that he does hold them upon trust to discharge those ecclesiastical obligations. In this case it seems to me all that the testatrix has really done is to secure that the advowson shall be vested in certain patrons as owners of the advowson. That, and nothing more, has been done, and that does not create a charitable trust.

One word more. I do not think it is necessary that we should consider what might have been the result if the trust had been to present only, say, members of the English Church Union, or members of the Church Association. I desire to keep an entirely open mind as to that point, and speaking for myself I think there is nothing in the case of *Hunter* v. *The Attorney-General* in the Court of Appeal which would prevent this court from considering and deciding that point whenever it arises.

Appeal dismissed.

Solicitors, *Bridges, Sawtell, & Co.; Solicitor to the Treasury.*

From K. B. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — April 12, 13, 1904.

MARKS v. SAMUEL. (a.)

Slander—Charge of bringing blackmailing action—No special damage—Imputation of criminal offence.

To accuse a man of having brought a blackmailing action is to use words which are capable of being understood by the hearers as imputing an indictable offence to the person so accused, and an action for slander is consequently maintainable, even though no special damage be alleged.

This was an application by the plaintiff for judgment or a new trial on appeal from a verdict and judgment at the trial of the action before Grantham, J., and a special jury in Middlesex.

The statement of claim alleged that prior to the matters complained of the plaintiff had recovered judgment in an action brought by him in the Mayor's Court against the defendant for certain sums of money and costs.

Paragraph 2: "On the 30th day of May, 1902, at a meeting of shareholders of the Elandsfontein (No. 2) Gold Mining Co., held on such date, at the Institute of Accountants, Moorgate-street, E.C., the defendant falsely and maliciously spoke and published of and concerning the plaintiff the following words: 'On that occasion (meaning upon the hearing of certain arbitration proceedings arising out of the said action in the Mayor's Court) Mr. Marks (meaning the plaintiff) was taxed with having brought a blackmailing action (meaning the said action in the Mayor's Court) against me. He was awfully indignant about it, and wanted to know if it was by instructions of mine that my counsel accused him (meaning the plaintiff) of having brought a blackmailing action. My counsel said it was upon his (meaning the plaintiff's) own evidence.'"

Paragraph 3: "The meaning of the said words was that the plaintiff was a blackmailer, and had brought an unfounded action against the defendant; had been guilty of an indictable offence or offences, and of endeavouring to obtain money by threats from defendant; and was further guilty of a misdemeanour in supporting his claim by giving false evidence, and had so admitted in his evidence given upon oath before the said court."

By paragraph 4 it was pleaded that by reason of the said defamatory matter the plaintiff was injured in his business, credit, and reputation, and suffered damage.

The defendant pleaded that the occasion on which the words were spoken was privileged, and that they were spoken *bonâ fide* and without malice.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

In the course of the trial the learned judge intimated that this was a case of the pot calling the kettle black, and, after hearing the plaintiff's case and his cross-examination, the jury stopped the case, and gave a verdict for the defendant, and judgment was entered accordingly.

The plaintiff appealed.

Bray, K.C., and *Rose-Innes*, for the plaintiff.

Rufus Isaacs, K.C., and *Neilson*, for the defendant.—The action is not maintainable. It is not a criminal offence to bring any action however unfounded. The words used, therefore, do not impute to the plaintiff any criminal offence, and no special damage is alleged.

Bray, K.C., replied.

Cotterell v. *Jones*, 11 C. B. 713; *Wren* v. *Wield*, L. R. 4 Q. B. 730, 17 W. R. Dig. 91; and *Hankinson* v. *Bilby*, 16 M. & W. 442, were cited in the course of the argument.

VAUGHAN WILLIAMS, L.J.—On the whole we think that there must be a new trial. I will first deal with the point last taken by Mr. Isaacs. He was, of course, right in his submission that unless the statement of claim alleged that the slander imputed or might impute a criminal offence, this action necessarily fails, because no special damage is alleged, and it is not a case in which there is any imputation of professional misconduct at all, or misconduct by a tradesman in his trade, or anything of that sort. It is one of those cases in which spoken words are not actionable unless they impute or might impute a crime, and in the opinion of the tribunal which ultimately deals with the matter appear to have been words not necessarily intended by the speaker to impute a crime but which the hearers might have understood as imputing a crime. The words in question are those set forth in paragraph 2 of the statement of claim. Paragraph 3 contains the innuendo, but I will first say a word on the matter without reference to the innuendo. I am not prepared to say that even without reference any innuendo it would be right to hold that these words, actually used, could not be reasonably understood by the hearers as imputing to the plaintiff a criminal offence. I mean by that the criminal offence of making a claim, supporting it in an action, and supporting it in that action by criminal means—that is to say, either by false evidence given by the plaintiff himself, or by false evidence obtained by him for the purposes of the action. If such an action were thus brought and thus supported it seems to me it would be a blackmailing action, and a blackmailing action brought by such means and in such a manner as to constitute a criminal offence. When one looks at paragraph 3 and sees what the innuendo is, that paragraph confirms this view, because the meaning which it is suggested these words conveyed to the hearers is very much the same as that which I have just stated, and, such as it seems to me, the words might have been reasonably understood to mean by the hearers. Take the last words of the paragraph: "and was further guilty of a misdemeanour in supporting his claim by giving false evidence, and had so admitted in his evidence given upon oath before the said court." I think that the hearers might well have understood that that was the imputation made by the defendant upon the plaintiff, especially when one has regard to the last words complained of—"my counsel said it was upon his own evidence." It is certainly suggested there that that evidence was untrue evidence given upon oath by the plaintiff. I have pointed out that we should not refuse a new trial upon this last point taken by counsel on behalf of the defendant; and I now proceed to deal with the reasons why I think there ought to be a new trial here. [His lordship then dealt with that part of the case.]

STIRLING, L.J.—I am of the same opinion. In the first place, it seems to me that no reliance can be placed on the point that was raised by counsel for the defendant that the action was not maintainable at all. It is impossible, I think, to come to the conclusion that the words set out in paragraph 2 of the statement of claim were not such as the persons hearing them might fairly interpret as imputing an indictable offence to the plaintiff. If that be so, the action is maintainable, and the question must be asked of the jury as to the sense and meaning which ought to have been put upon them. That being so, the question comes to this, whether there ought to be a new trial. [His lordship, on this part of the case, agreed with Vaughan-Williams, L.J., that in the circumstances there ought to be a new trial.]

COZENS-HARDY, L.J.—I agree, and I have nothing to add.

Solicitors, *Morris, Coote, & Co.; Dale, Newman, & Hood.*

High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 4, 10.

In re HANDCOCK.
HANDCOCK *v.* PAWSON. (*a.*)

Will—Election—Compensation—Time to ascertain compensation—Testator's death—Date of election.

The time to ascertain the amount due as compensation in consequence of election against a will is the date of the testator's death, not the time of election.

Summons to determine whether in case of an election not to take under a will the amount of compensation to the other beneficiaries was to be ascertained at the date of the death of the testator or at the time of election.

By a settlement dated August, 1887, Mortimer Hancock became the tenant for life of the Roxley Court estate in Hertfordshire, with power of appointment among any one or more of his issue, with remainder in default of appointment to his eldest son, the defendant Mortimer Pawson Hancock, in fee simple.

By his will, dated the 7th of July, 1901, Mortimer Hancock devised all his residuary real and personal estate to trustees upon trust for his three children in equal shares and he requested his trustees to allocate to his son Mortimer Pawson Hancock the Roxley Court estate as part of his share.

Mortimer Hancock died on the 13th of July, 1901. By an order dated the 26th of February, 1902, Kekewich, J., declared that the will was not an exercise of the power of appointment contained in the settlement, and that the defendant Mortimer Pawson Hancock, who in default of appointment became tenant in fee simple of the Roxley Court estate, was put to his election between the devise in his father's will and the estate under the settlement. At the time of his father's death Mortimer Pawson Hancock was abroad, and in consequence he did not make his election till 1903. On the 8th of July, 1903, he gave notice to the trustees of the will that he

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

elected to take under the settlement, and against the will. In consequence of this, compensation had to be made to the other beneficiaries for the benefits taken by them under the will, and the question arose as to whether the amount of such compensation was to be taken at the date of the death of the testator or at the time of election, and a summons was in consequence taken out to ascertain the date.

Timmins, for the summons.—The property should be valued at the date of election: Seton, vol. 2, p. 1590, form 7. This was the date for ascertaining the value in *Howells* v. *Jenkins*, 11 W. R. 1050, 1 De J. & S. 616: *Streatfield* v. *Streatfield*, Ca. temp. Talb. 176, 1 Swanst. 447. There is no right to compensation until the election is made, and the amount should be ascertained when the claim arises. It is more convenient that this should be the date.

C. A. Bennett, for an infant with the same interest.

W. H. Cozens-Hardy, for the defendant.—The election, when made, is retrospective, and the right to compensation is therefore also retrospective. This is according to the authorities and the forms in Seton: *Gretton* v. *Hayward*, 1 Swanst. 309; *Rogers* v. *Williams*, 24 W. R. 1039, 3 Ch. D. 688; *In re Lord Chesham, Cavendish* v. *Dacre*, 34 W. R. 321, 31 Ch. D. 466; Seton, vol. 2, p. 1579, form 6; *Douglas* v. *Douglas*, 20 W. R. 55, 12 Eq. 617; Ashburner's Principles of Equity, p. 673.

Timmins replied.

Nov. 10.—KEKEWICH, J.—Under the will of the testator, who died on the 13th of July, 1901, the defendant Mortimer Pawson Hancock takes a property called the Roxley Court estate, and other benefits. The Roxley Court estate was already his own, and by an order of the 26th of February, 1902, he was held bound to elect between the devise and bequest in his favour under the will, and this estate. On the 8th of July, 1903, he gave the trustees of the will notice of his election to take the estate under the provisions of a settlement which was his title to it, and against the will. Thereupon he became liable to make compensation to the disappointed legatees to the extent of the benefits which he takes under the will, and it has to be ascertained what they have lost. A question has been raised, and is submitted by the summons, whether the amount of compensation is to be ascertained at the date of the death of the testator, or as on the 8th of July, 1903, when the election was made.

Cases of election and consequent compensation are of such common occurrence that one is startled to find this question treated as unsettled at the present day. Really there is no doubt about it. The principle on which the rule of the court is founded has been stated again and again in plain language, but nowhere more clearly than by Talbot, L.C., in *Streatfield* v. *Streatfield* (Cases temp. Talbot, p. 188, of the 3rd edition, published in 1793): "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this court compels the devisee if he will take advantage of the will to take entirely but not partially under it, as was done in *Noys and Mordaunt's case*, there being a tacit condition annexed to all devises of this nature that the devisee do not disturb the disposition which the devisor hath made." The decree in that case is set out in a note, p. 447 of 1 Swanston Reports, and study of that decree will show that it was intended to work out the principle thus stated by the Lord Chancellor. It is also stated in equally clear language by Eldon, L.C., in *Gretton* v. *Howard*, 1 Swanst. 434, thus: "The only remaining question is on what terms must compensation be made? From what time is the estate at Nine Elms to be given up to the petitioner? The election is retrospective, reverting to the time of the will, the parties electing reject all that comes under it, consequently they have in the interval enjoyed the property of another; to retain the past rents and profits which they have received with no other title than that conferred by the will would be to claim under it, renouncing the will they admit that they have been in possession of an estate without title. There must be a retrospective account of rents and profits, and an account of sums expended for melioration of the estate which must be reimbursed." The injustice of proceeding on any other basis than this becomes obvious when one reflects that it often happens (as has happened here) that after the liability to elect has been declared a period is allowed for consideration and determination on the part of the persons affected by such liability, so that the actual election is frequently not made until some time after the testator's death. And according to a well settled rule an infant bound to elect is generally, though not invariably, allowed to declare election within six months after attaining majority.

The forms—see 2 Seton, p. 1579, No. 6, and p. 1590, No. 8—proceed on these lines, and if it be possible, as it may be, to find orders framed differently, this may fairly be accounted for by supposing that there were peculiar circumstances to take the case out of the general rule. The difficulty of valuing property, especially real estate, as of a date long since passed is always considerable, and the parties concerned might agree, and the court itself might be opinion that it would be more convenient to accept a valuation at a later date.

The question submitted by the summons must, however, be answered by directing that the amount of compensation must be ascertained as at the date of the testator's death.

Solicitors, *Nicholson, Patterson, & Freeland; Dimond & Son.*

Chan. Div. } June 21, 28, 1904.
Buckley, J. }

In re RANDT GOLD MINING CO. (LIMITED). (*a.*)

Company—Shares—Unpaid calls—Forfeiture—Payment by former holder—Liability of purchaser of forfeited shares—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38 (4), *Table A, art.* 22.

A company under their articles declared certain of their shares (which were 5s. shares, upon which 3s. 4d. had been paid up) to be forfeited for non-payment by A., their holder, of a further call of the remaining 1s. 8d., *and the company then sold these shares to N., with a certificate following the words of article* 22 *of Table A. The company after the sale made a further call upon N. of* 1s. 3d. *per share, which was paid, leaving* 5d. *of the nominal amount unpaid. Subsequently the liquidator of the company, which had gone into liquidation, obtained from A., the former holder, a sum equal to nearly* 5d. *per share in respect of his liability after forfeiture under the articles of the company which were substantially the same for this purpose as those of Table A. The liquidator of the company also claimed to place N. upon the list of contributories for a sum equal to* 5d. *per share held by them, notwithstanding the payment made by A.*

Held, that, although A. was not a contributory, yet his payment was made in respect of the unpaid nominal

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

amount due upon the shares, and that to the extent of this payment nothing was due from N. upon the shares.

Summons.

This was a summons in the winding up of the above company to ascertain whether a sum of nearly 5d. per share, which had already been received from the former holder of certain shares which had been forfeited and sold by the company, could be obtained again from the purchaser.

The above company was incorporated in 1895 under the Companies Acts, 1862 to 1890, with a capital divided into shares of the nominal value of £1 each, subsequently divided into shares of 5s. each. 40,000 of these shares had been formerly held by a company called the African Gold Properties (Limited). A sum of 3s. 4d. had been paid up on these shares, and the Randt Gold Mining Co. had called up the remaining 1s. 8d.

This call the African Gold Properties (Limited) had not paid, and in May, 1900, their 40,000 shares were by resolution of the Randt Gold Mining Co., under article 15 of the latter company's articles, declared forfeited, and were, together with 1,300 other shares held by other members and similarly forfeited, sold to the New Balkis Eersteling (Limited) for £150. At the time of sale a certificate was issued to the purchasing company which, after certifying that it was the holder of the shares on which 3s. 4d. per share had been paid, continued: "The remaining 1s. 8d. per share has been called up and is payable by the African Gold Properties (Limited), who were the holders of the shares prior to the same being forfeited, and the said New Balkis Eersteling (Limited) is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof."

In December, 1900, the directors of the Randt Gold Mining Co. made a call of 1s. 3d. per share upon the New Balkis Eersteling Co., this being all they as directors could make at one time. This call the latter company refused to pay, and were sued for, and they were ordered to pay it by Bucknill, J., whose judgment was upheld by the Court of Appeal and the House of Lords; reported as *Randt Gold Mining Co. v. New Balkis Eersteling (Limited)*, 51 W. R. 391, [1903] 1 K. B. 461, 52 W. R. 561, [1904] A. C. 165.

Articles 16 and 17 of the articles of association of the Randt Gold Mining Co. were as follows:

"16. Any share so forfeited shall be deemed to be the property of the company, and the directors may sell, re-allot, or otherwise dispose of them in such manner as they may think fit.

"17. Any member whose shares have been so forfeited shall, notwithstanding, be liable to pay, and shall forthwith pay to the company all calls, instalments, and interest, and expenses owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of 10 per cent. per annum, and the directors may enforce the payment of such moneys or any part thereof if they think fit, but shall not be under any obligation to do so."

Under this latter article the liquidator of the company, which was then being wound up, claimed from, and was paid by, the African Gold Properties (Limited) £790 18s. 1d., a sum just less than 5d. for each of the 40,000 shares formerly held by it. The liquidator of the Randt Gold Mining Co. contended that he was entitled, notwithstanding this payment, to make a further call upon the New Balkis Eersteling Co. of 5d. per share as being the remaining unpaid liability upon those shares.

The present summons was by the liquidator against the New Balkis Eersteling Co., asking that the latter company might be ordered to pay a sum of £898 6s. 8d., which included a call of the remaining 5d. per share upon the 40,000 shares in question held by the respondent company, the rest of the sum being for calls of larger amount upon the remaining 1 300 shares. Of that sum it was agreed that £107 8s. 7d., being the difference between £898 6s. 8d. and £790 18s. 1d., was due from the respondent company, and the only question was as to so much of the larger sum as equalled the £790 18s. 1d. already received from the African Gold Properties (Limited).

Clauson, for the liquidator of the Randt Gold Mining Co.—Articles 16 and 17 incorporate articles 20 and 21 of Table A verbatim. The payment of the £790 by the African Gold Properties (Limited) was made under these articles, and does not relieve the shareholders from their liability to pay the remaining 5d. per share. The payment of the £790 was not made in respect of calls upon the shares, but of a debt due to the Randt Gold Mining Co. in the nature of a penalty: *Ladies Dress Association (Limited) v. Pulbrook*, 49 W. R. 6, [1900] 2 Q. B. 376. The African Gold Properties (Limited) were not contributories of the company, but debtors: *In re Blakely Ordnance Co., Needham's case*, L. R. 4 Eq. 135, 15 W. R. Dig. 58; *In re Blakely Ordnance Co., Stocken's case*, L. R. 3 Ch. App. 412. Consequently their payment of the £790 has no effect upon the money due upon the shares by the holders, the respondent company.

C. C. Scott (*P. O. Lawrence, K.C.*, with him), for the New Balkis Eersteling Co. — The liquidator is asking for part of the money due in respect of these shares to be paid twice over. He has already received the 5d. per share from the former holder and now seeks to make the present holder pay it again. This cannot have been the intention of the Companies Acts. Section 38 (4) limits the liability of the shareholder to the amount (if any) unpaid on his shares. But this 5d. has been already paid. In *In re Accidental and Marine Insurance Corporation, Bridger's case*, 17 W. R. 216, L. R. 4 Ch. App. 266, Selwyn, L.J., says (p. 272) that if any sum has been paid from any source in respect of shares that payment would go in diminution of the liability of the shareholder. The company have now received the whole of the 5s. per share for which these 40,000 shares were issued, and they can claim no more.

Cur. adv. vult.

June 28.—BUCKLEY, J.—The only point which I have to decide is whether this 5d. per share can be recovered from the New Balkis Eersteling Co. The applicant says truly that the African Gold Properties (Limited), after forfeiture, was not a member or a contributory of the Randt Gold Mining Co., and that the 5d. per share which has been recovered from the former company has been paid by it not as a contributory, but under the special contract contained in article 17. He contends that this 5d. has therefore not been called and paid in respect of the shares. He argues that, having regard to section 38 (4) of the Companies Act, 1862, the member, that is to say, the New Balkis Eersteling Co., can be made liable up to the amount unpaid on the shares, and that this 5d. per share has not been paid on the shares, but paid under the special contract contained in article 17. In my judgment it is immaterial that the African Gold Properties (Limited) paid, not as members, but under the special contract in article 17. The material question is, not what was the character of the person who paid, but what was the character of the payment made. If the company have received payment of 5d. in respect of the 5s., the nominal amount of the share, they cannot enforce payment of it a second time. In my judgment it is plain that the 5d. was paid in respect of the

5s. payable upon the share. The special contract is that the member whose shares have been forfeited shall be liable to pay all calls "owing upon or in respect of such shares." The payment which he made was made under a liability to pay the call upon or in respect of the shares at the time of forfeiture. Its payment was, *pro tanto*, a discharge of the 5s. Suppose that a third party has guaranteed to a limited company the payment by a member of his calls upon his shares and that under that guarantee the company recovers against the guarantor and not against the member, still the payment made by the guarantor will be a satisfaction *pro tanto* of the liability on the shares just as much as if the payment had been made by the member. I see no ground upon which the company should be entitled to recover the 5d. twice over, once from the forfeited member, and again from the member who becomes the purchaser after the forfeiture. The purchaser is liable for the whole amount unpaid, but not for the whole amount irrespective of such payments as the company may recover from the forfeited member. As a separate and independent ground, I think that by contract between the company and the purchaser of the share the latter is entitled to the benefit of such payments as are made by the forfeited member. This point arises on the form of the certificate. The shares are sold as shares upon which the 1s. 8d. has been called up and is payable by the African Gold Properties (Limited). To such extent as the company recover in respect of that previous call they have, I think, contracted with the purchaser that he shall have the benefit of it towards satisfaction *pro tanto* of the amount unpaid at the time of his purchase. In my judgment the contention of the liquidator that he can recover over again from the New Balkis Eersteling the £790 18s. 1d. which the African Gold Properties (Limited) have paid, fails. He can only recover £107 8s. 7d., the amount agreed to be owing.

Solicitors, *Sanderson, Adkin, Lee, & Eddis; Dale, Newman, & Hood.*

K. B. Div. (Walton, J.) — Aug. 10, 1904.

EMBIRICOS *v.* ANGLO-AUSTRIAN BANK. (*a.*)

Banker—Conversion—Cheque stolen—Conflict of law—Indorsement forged — Good title passed in foreign country—Cheque drawn in foreign country on bank in England—Bills of Exchange Act, 1882 (45 & 46 *Vict.* c. 61), *ss.* 24, 72.

Plaintiffs in Roumania bought a cheque from a bank in Roumania drawn on a bank in England. The plaintiffs (payees) indorsed the cheque to "G. E. & Co.," a firm in London. The cheque was stolen and the indorsement forged. The thief indorsed the cheque to, and obtained payment for the cheque from, a bank in Vienna. The Vienna bank took the cheque for good consideration, acted in good faith and without gross negligence, and indorsed the cheque to the defendants and forwarded it to England, where it was presented to and paid by the bank on which it was drawn. The thief was prosecuted to conviction. By Austrian law the Vienna bank acquired a good title to the cheque.

Held, in an action for conversion of the cheque, that, since the Vienna bank acquired a good title to the cheque a good title was passed to the defendant bank, and that, therefore, the defendants were not liable for conversion.

Alcock *v.* Smith, [1892] 1 *Ch.* 238, 61 *L. J. Ch.* 161, *followed.*

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

Action tried in the Commercial Court.

This was an action to recover damages for the wrongful conversion of a cheque.

Bankes, K.C., and *de Gruyther*, for the plaintiffs.

Cohen, K.C., and *Maurice Hill*, for the defendants.

The following authorities were referred to: *Alcock* v. *Smith*, [1892] 1 Ch. 238, 61 L. J. Ch. 161, 40 W. R. Dig. 25; *Cammell* v. *Sewell*, 8 W. R. 639 29 L. J. Ex. 350; *Castrique* v. *Imrie*, 19 W. R. 1, L. R. 4 H. L. 414; *Hooper* v. *Gumm*, 15 W. R. 464, L. R. 2 Ch. 282; *La Cave* v. *Credit Lyonnais*, [1897] 1 Q. B. 148, 45 W. R. Dig. 8; Dicey's Conflict of Laws (1896), p. 530, r. 140.

The facts and argument appear in the following considered judgment.

Cur. adv. vult.

Aug. 10.—WALTON, J.—In this case the plaintiffs, Messrs. Leonidas Embiricos and another, sue the Anglo-Austrian Bank and claim £250 damages for the wrongful conversion of a cheque. The case raises a somewhat important question as to the rights of the parties under the circumstances of a case like the present one. Shortly, the controversy is this: The plaintiffs were the payees of the cheque in question. It was stolen from them, and it was fraudulently indorsed by the thief, or someone acting in concert with the thief, to a bank at Vienna, who took it for good consideration and in good faith, and it was indorsed by them to the Anglo-Austrian Bank, the defendants. The Anglo-Austrian Bank, the defendants, obtained payment of it from the bank upon whom the cheque was drawn. It is said that in dealing with the cheque and obtaining payment for it they were dealing with the property of the plaintiffs, that the cheque was the plaintiffs, and that the defendants are responsible for the conversion of the cheque. On the other hand, the defendants say that by the transfer of the cheque, which took place in Vienna to a Vienna bank, a good title passed to the Vienna bank—a good title which this court is bound to recognize—and that the Vienna bank having taken a good title gave a good title to the defendants, and therefore the defendants when they dealt with the cheque and obtained payment of it by presenting it to the bank upon which it was drawn were dealing, not with the plaintiffs' property, but with their own property, and therefore they are not liable in this action. The cheque was drawn on the 6th of March, 1903, by the Banque Generale at Braila, in Roumania, on a bank, the Direction der Disconto Gesellschaft, London, and was payable to the plaintiffs or their order. It was indorsed by the plaintiffs, who carry on business at Braila, to a firm of G. Embiricos, of London. The cheque was placed in an envelope with a letter addressed to Messrs. G. Embiricos & Co., London, and ought to have been posted, but instead of its being posted in due course the clerk in the service of the plaintiffs fraudulently opened the letter and stole the cheque, sending on the letter to its destination—that is, to Messrs. G. Embiricos & Co., London. The cheque then found its way to Vienna, and at Vienna on the 9th of March (the cheque having been drawn on the 6th of March) it was taken by someone who no doubt was acting in concert with the thief to the bank, which I call the Vienna bank, to be cashed. The Vienna bank not knowing the person who brought the cheque to them asked him to call again the next day. It appeared to be properly indorsed. The Vienna bank then communicated with the drawers of the cheque, that is to say, the Banque Generale of Braila, and ascertained from the drawers of the cheque

that the cheque was drawn by them and therefore was a genuine cheque in that sense, and the next day, the 10th of March, the person who had brought the cheque on the previous day to the bank to be cashed, called again, and it was cashed, that is to say, he received its value and the cheque was handed over to the Vienna bank. It purported to be duly indorsed by Messrs. G. Embiricos & Co., to whose order it had been indorsed by the plaintiffs. Then it was sent on, indorsed by the Vienna bank, to the Anglo-Austrian Bank in London and was cashed by them. There is here, of course, no question as to the contractual rights in the cheque as against the bank upon whom the cheque was drawn. They are not parties to the action. The only question is a question as between two successive holders of the cheque as between the original payees, who were holders and from whom the cheque was stolen, and a subsequent holder who acquired his title through and by means of a forged indorsement.

It is plain that if this case is to be governed by English law the defendants—there is no dispute about it—would have no defence to this action. The English law is stated in section 24 of the Bills of Exchange Act, 1882, which provides that: "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority." But the defendants say that the English law as stated in that section of the Bills of Exchange Act does not apply to the present case because the cheque was transferred in Vienna to the Vienna bank, and the defendants say that by the law of Austria, which is the law of Vienna, the Vienna bank obtained a good title to the cheque although it was handed to them by some person who either was the thief or was acting in concert with the thief who had stolen the cheque, and although the indorsement to it, that is, the written indorsement, was a forgery. It is stated that that is the law of Austria, the law which would govern a transaction of this kind in Vienna, and that the question of title arising from the transfer of the cheque in Vienna must be determined by the law of Vienna. Now, with regard to the law of Vienna I do not think there is any dispute. It is stated in affidavits, and, so far as I can see, the affidavits of the plaintiffs and of the defendants agree. In an affidavit used by the defendants (the affidavit of Dr. Wilhem Stein) it is alleged in paragraph 7 that: "By Austrian law the holder of a cheque which he has bought *bonâ fide* and for value is identified as proprietor of the cheque and entitled to the proceeds thereof against all the world, notwithstanding that the cheque has previously been stolen and notwithstanding that the indorsement has been forged." I do not need to read the rest of the affidavit. The articles of the code applicable to Vienna are set out. I think one ought to add to that statement of the law what appears lower down. "By Austrian law the holder of a cheque which he has bought *bonâ fide* and without gross negligence" ought to be added, "and for value is identified as proprietor of the cheque and entitled to the proceeds thereof against all the world notwithstanding that the cheque has previously been stolen and notwithstanding that the indorsement has been forged." The law is stated in an affidavit which has been put in by the plaintiffs practically in the same language. There is no dispute as to what the Austrian law is.

The question is whether the validity of the indorsement and transfer in Vienna depends upon the Austrian law or whether it depends upon English law. Mr. Cohen, for the defendants, relied on the general principle which is applicable to ordinary chattels, and which he contended was applicable also to a cheque such as the cheque in question in this case, and the general rule upon which he relied is stated in the case of *Alcock* v. *Smith*, by Romer, J., now Romer, L.J., in giving judgment in that case, and whose judgment was afterwards affirmed by the Court of Appeal. What Romer, J., said was this: "Generally the rights of transferor and transferee on a transfer in one country of a document of title to a debt or to an interest in personal property are governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in a foreign country." Mr, Cohen with regard to chattels, contended, and I think rightly, that the law is correctly stated in Mr. Dicey's book on the Conflict of Laws in rule 140. The rule as stated by Mr. Dicey, is in these words: "An assignment of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*) is valid." I do not think that it was disputed, or at least I do not gather that it was disputed that that is a correct statement of the law with regard to ordinary chattels and, therefore, if this had not been a cheque, but had been a diamond, say, which had been stolen out of a letter and then sold in Vienna under such circumstances that the purchaser in Vienna took a good title, and the question afterwards arose in this country as to the validity of the sale in Vienna, the English courts would recognize the validity of the transaction in Vienna, if it was good according to the law of Vienna, even although it would not be good according to the law of England. It seems to me the analogy with a sale in market overt is almost exact. A horse is stolen and is taken by the thief to some other place and is sold in market overt: according to the general law, the thief could give no title at all; if it is sold in market overt according to our English law the purchaser does get a good title. You might imagine a somewhat similar state of things with regard to a foreign state like Austria. It might very well be that a sale in Vienna of a chattel might confer a good title according to the Austrian law although if the same sale had taken place in London no title at all would have been given. In such a case it seems to me plain that the title acquired in Vienna, good according to Austrian law, would be a good title in England.

Now, does this apply to a bill or a cheque? It seems to me that the case of *Alcock* v. *Smith* from the beginning to end assumes that the same rule must be applied to a cheque as would be applied to a chattel. Romer, J., having begun by pointing out that in that case the question arose, not as a question of contract between the parties to the contract, but as a question as between successive holders, as to the title to the instrument, refers to the general law and refers to the rule with regard to chattels as to which I have just spoken, and it seems to me in that case that he applies the ordinary rule with regard to chattels to a bill. In that case, stating it quite shortly, the question arose in this way: A bill was purchased in Norway under circumstances which gave the purchaser a good title in Norway by Norwegian law, but which would not have given to the purchaser a good title in England if the transaction had taken

place in England according to English law; at any rate, it would not have given the purchaser a good title as against the plaintiffs in the case of *Alcock* v. *Smith*. The bill having been purchased in Norway was indorsed to the defendant (I am speaking now of the defendant in the case of *Alcock* v. *Smith*), who was in England, and the plaintiffs, against whom, according to the English law, the defendants had acquired no title or not a good title, set up their claim against the defendant in England. The question had to be determined in England, and it was held that although the purchaser under the same circumstances would not have taken a good title, and that, therefore, the defendant would not have had a good title as against the plaintiffs if the purchase and the transaction had been in England, yet because the transaction was in Norway, and was good according to Norwegian law, he did not take a good title as against the plaintiffs. It seems to me that in effect *Alcock* v. *Smith* governs the present case, and that I am bound to follow it, and, if so, my judgment ought to be for the defendants.

Reference was also made to section 72, sub-section 2, of the Bills of Exchange Act, which is this: "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill is determined by the law of the place where such contract is made." "Contract" there means drawing, indorsement, or acceptance, or by acceptance under protest. There is an exception: "Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom." Mr. Cohen scarcely relied upon that sub-section, although, if interpretation of the indorsement means the legal effect of the transfer by indorsement, it seems to me it would have covered the present case—if it means that. "Indorsement," of course, in the Bills of Exchange Act means something more than the mere writing of a name or, at any rate, of some words on the back of a cheque. "Indorsement," as interpreted by the Bills of Exchange Act, means an indorsement completed by delivery; and therefore "indorsement" means the transaction of delivering a cheque indorsed. It has been said in the very case I have referred to of *Alcock* v. *Smith* that the word "interpretation" is not to be read in the strict sense merely of an explanation of words and language, but as meaning the legal effect—that the legal effect of the indorsement is to be determined by the law of the place where such contract is made. If that means the legal effect of the transfer by indorsement, it seems to me it would apply to the present case. But whether it does apply or whether it does not apply, it does not prevent the general rule from applying. I do not think in the case of a codifying Act like the Bills of Exchange Act, because a particular instance of the application of a general rule is expressly provided for and mentioned, that you can properly argue the general rule applies only so far as it is expressly mentioned; that does not exclude as to the other things which are not expressly mentioned, because these Acts, like the Bills of Exchange Act, do not pretend to be scientific codes in which the whole of the principles are laid down from beginning to end, but they are really rather in the nature of a digest; and in this, as in other statutes of the same kind, there is a general saving clause which provides that the general principles of law are to apply, which is section 97, sub-section 2: "The rules of common law, including the law of merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques." Therefore, even although section 72 does not apply, and ought not to be read so as to govern the present case, I think that the general principle which I have endeavoured to indicate does apply, and that this is analogous to a case in which a chattel was transferred in Vienna in such a way as, according to the Austrian law, to give a good title, although not in such a way as would give a good title according to English law. In such a case the title acquired in Vienna would be recognized as a good title in the English courts, and I think the same rule applies to a cheque under the circumstances of this case.

There is another question. By the Austrian law the Vienna bank took a good title only if it took the cheque in good faith and for full value (about which there is no dispute), and also without gross negligence. It is said there was gross negligence, and the gross negligence relied upon is this: That the Vienna bank did not make further inquiries as to the stranger who brought the cheque to the bank to be cashed. That is one point which is relied upon, and I will deal with that first. They did inquire of the drawer of the cheque to ascertain whether the cheque was a genuine cheque to begin with—whether it was really a cheque drawn by the drawer on the bank in London. They found out that it was. Who the person was into whose hands the cheque had got they could not tell at all except by asking him, and it seems to me that that would have been a very useless proceeding, because he could have said anything he chose; and I do not think that they could expect to be able to obtain any reasonable security as to the validity of the transaction, or as to the validity of the title of the person who presented the cheque to them by making inquiries of him. At any rate, the fact that they did not make any further inquiry than they did, does not seem to amount to what the Austrian law calls gross negligence.

Then the other point is this: It is said that the cheque was indorsed to G. Embiricos & Co., and that G. Embiricos & Co. were in London; but there was nothing on the face of the cheque to show that they were in London. So that there was nothing to show that G. Embiricos & Co., to whom the cheque was indorsed, were really in London. It is said that the cheque was cashed on the 10th, and was drawn on the 6th, and that it could not have got to London and back. That may be so, but I do not see that there is anything in that which in itself was suspicious. So far as the Austrian bank was concerned the cheque might quite properly be in the hands of some person in Vienna on the 9th of March, although it was drawn only on the 6th, and it seems to me that the evidence as to gross negligence fails.

Therefore, if I am right in the principle of law which I think ought to be applied to this case, and if I am right in saying that it is governed by *Alcock* v. *Smith*, there must be judgment for the defendants.

The difference between this case and *Alcock* v. *Smith* seems to me to be this: that in *Alcock* v. *Smith* there was no fraud; there was no question of the bill having been stolen; it was not dealt with by a thief or by anybody who had acquired it dishonestly. But in the case of a chattel that would make no difference. In the case of a sale in market overt it makes no difference, and I do not see why it should make any difference in the present case. I have found nothing else that is material which seems to me to distinguish the case of *Alcock* v. *Smith* from the present case, and, therefore, I think there must be judgment for the defendants.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton, & Lewis.*

Solicitors for the defendants, *Bircham & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) March 3, 1904.

JACKSON v. WIMBLEDON URBAN DISTRICT COUNCIL. (a.)

Local government—Drainage—Single private drain—Liability to repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A main or common drain which was admitted to be in itself a sewer within the meaning of the Public Health Act connected with the public sewer by means of a branch drain which was admitted to be a single private drain within the meaning of section 19 *of the Public Health Acts Amendment Act*, 1890;

Held, that the sewer was not thereby converted into a single private drain so as to enable the local authority to recover from the owner of one of the houses his proportion of the cost incurred by them in repairing the drain.

Case stated.

The appellant was summoned on the 8th of August, 1903, for that he did on the 29th of April, 1903, or on some day or days within six months then last past, make default in payment of the sum of £35 1s. due and owing from the appellant to the respondents, being the amount of expenses incurred by the respondents in the execution of certain works in relaying the main or common drain at the rear of Nos. 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, and 73, Hartfield-crescent, and also did make default in payment of £13 7s. 5d., a proportion of the expenses incurred by the respondents in the execution of certain works in relaying a single private drain connecting 73, Hartfield-crescent and 75, Hartfield-crescent, belonging to different owners, with a certain public sewer.

On the north side of Hartfield-crescent, in the respondents' district, are sixteen houses numbered with odd numbers from 51 to 81, both inclusive. The appellant is the owner of twelve of these houses. A Mr. Halliday is the owner of 75, and a Mr. Ysoldt is the owner of the other three. At the rear of these houses runs a main common drain running from east to west connected with the public sewer in Hartfield-crescent by a branch drain (hereafter called branch drain AB) running from north to south between the house numbered 73 and the house numbered 75, at about right angles to Hartfield-crescent, under a narrow piece of land between the two houses which is unbuilt upon. Each of the sixteen houses connects at the rear with the main or common drain by means of branch drains which convey the sewage from each of the houses to the main drain, and thence through the branch drain AB into the public sewer in Hartfield-crescent. The main drain at the rear of the houses Nos. 51 and 81, and the branch drain AB are constructed wholly upon private property.

Part III. of the Public Health Acts Amendment Act, 1890, has been adopted in the respondents' district.

On the 26th of November, 1902, a written application was made to the respondents acting as the local authority under the Public Health Act stating the drains on the premises 77 to 85 (inclusive), Hartfield-crescent were a nuisance and injurious to health, and requesting them in pursuance of the said Act to empower their inspector of nuisances to enter the premises and cause the ground to be opened up and examined.

In pursuance of section 41 of the said Act, the respondents, as the local authority, on the 18th of December, 1902, by writing, empowered their inspector of nuisances, after giving twenty-four hours' notice in writing to the occupier, to enter such premises and cause the ground to be opened.

In pursuance of such authority, after giving the notice specified, the inspector of nuisances did enter and open up the drains at the rear of Nos. 77 to 85, Hartfield-crescent, and found that it was necessary for the drain at the rear of Nos. 75 and 51 to 73 (odd numbers, inclusive), Hartfield-crescent, to be also opened up and examined, and being empowered by the respondents to do this, he also opened up and examined the drains at the back of these premises. The whole of the main or common drain appeared to be in a bad condition and to require alteration, and the inspector duly represented such fact to the respondents.

The respondents thereupon caused notice to be given to the owners and occupiers of all the sixteen houses requiring them to execute the necessary works forthwith, or within a reasonable time therein specified.

The owners of the premises Nos. 75, 77, 79, and 81 duly executed the works required by the respondents to their satisfaction so far as such works affected the main drain, but made default in executing the works required to the branch drain AB.

The appellant, as the owner of the houses Nos. 51 to 73, did not comply with such notice, but made default in executing the works so required to be done to the branch drain AB, and the main drain at the rear of the houses Nos. 51 to 73; and the respondents duly executed such works, and their surveyor duly made an apportionment of the expenses of such works by apportioning the expense of the branch drain AB amongst the owners of the sixteen houses, 51 to 81 (odd numbers), Hartfield-crescent and also apportioned the cost of the works executed to the main drain at the rear of 51 to 73 upon the appellant. The appellant did not within the required statutory period of three months dispute such apportionment, and the same has now become binding. Formal demand was made by the respondents, as local authority, for the sums so apportioned—viz., £35 1s. in respect of repairs to the main drain, and £13 7s. 5d. in respect of the repairs to the branch drain AB, and default having been made by the appellant in complying with such demand, on the 8th of August, 1903, the respondent laid this complaint before the magistrates.

It was admitted before the justices by the appellant that the branch drain AB was a single private drain within the meaning of section 19 of the Act of 1890, but it was contended on his behalf that the main or common drain at the back of the houses Nos. 51 to 73 was a sewer within the meaning of the Public Health Act, 1890, and not a single private drain connecting two or more houses belonging to different owners with a public sewer, within the meaning of section 19 of the Act of 1890.

On behalf of the respondents it was contended that it is necessary to have regard to the entire system of drainage discharging into the public sewer, and that such system of drainage comprehended the drainage of the whole of the houses Nos. 51 to 81, which belong to different owners, and form in fact one entire drain connecting the whole of the sixteen houses with the public sewer; that, therefore, the main or common drain at the rear of the houses Nos. 51 and 81 and the branch drain AB were capable of being dealt with under section 19 of the Act as a single private drain within the meaning of that section.

The question for the opinion of the justices was whether the main or common drain at the rear of the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

houses was a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890.

The justices decided in favour of the respondents, and the question for the opinion of the court was whether their decision was right.

Section 19, sub-section 1, of the Public Health Acts Amendment Act, 1890, provides as follows: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works, under the powers conferred on them by that section, from the owners of the houses in such shares and proportions as shall be settled by their surveyor (or the case of dispute by a court of summary jurisdiction)."

Sylvain Mayor, for the appellant.

Macmorran, K.C. (*G. Humphreys* with him), for the respondents.

The arguments sufficiently appear from the judgment.

Lord ALVERSTONE, L.C.J.—I hope that the day will arrive when no question can arise as to what is a sewer and what is a drain. But really the difficulty of dealing with these questions is such that one does hope that something may be done in the way of a declaratory Act or an amending Act to put these questions beyond the range of discussion. The difficulty probably arises, and the difficulty in legislating probably arose, from the fact that here you are applying modern provisions as to sanitation and repairs of drains to old methods of drainage that have been built up under all kinds of systems.

Now, the main proposition for which counsel for the respondents contends is this: once get section 19 of the Act of 1890 to apply, and you are entitled to go back to the end of all the drains or sewers—for this purpose the drains as I will call them, so as not to appear to beg the question—that connect with the private drain to bring them all within the purview of section 41 of the Act of 1875. I think, stated in that way, the proposition goes too far. I have had a great deal of trouble in this case by reason of the fact that it is admitted that the branch drain AB is a single private drain within section 19 of the Act of 1890, therefore in respect to that part of it at any rate, proceedings could be taken under section 41 of the Act of 1875. But I think that the main contention of counsel goes too far. It does not follow that you are entitled to go to the end of every pipe and say that they are all of them private drains because they happen to connect. One could put a number of cases, although I do not know that very much light is thrown by trying to put cases, but it does seem to me, to take one case, that if that were so, a person who was in possession of an undoubted sewer, or through whose land there went a sewer, the obligation of repairing which sewer really had fallen upon the local authority, might be deprived of those rights by the action of third persons without his consent at all. Therefore I think that the proposition is too wide.

Under these circumstances what is the real question we have to decide? It is that the main or common drain at the rear of the houses 51 to 73 would be a sewer within the meaning of the Public Health Act, 1875, if it had discharged into a sewer at the point whence it runs into the branch drain AB, or if it had been connected by a pipe (which was not a single private drain) which ran from that point to the sewer. At first I was inclined to think that it was difficult to contend that a sewer could communicate with a single private drain; but after the consideration this case has undergone, and the argument that has been addressed to us, I think that that view of mine was not well founded and went too far.

The scheme, as far as one can see there is a scheme of legislation, originally provided that where there was a drain which drained more than two houses or more than two buildings within the definition contained in section 4 of the Act of 1875, it became a sewer because it was not a drain. I can well imagine that there may be a structure, as in this case, dealing with a long row of houses as to which it could not be denied that they would be sewers. They do in fact empty on both sides in this case into that which for this purpose must be taken as being a single private drain.

I do not think that the admission made with regard to a single private drain ought to be construed as being an admission, that the whole of it is a single private drain, because, whatever may have been the reasons for the admission, or however it came to be made, the point was distinctly raised that the main or common drains at the rear of the houses 51 to 73 was a sewer. Does section 19 of the Act of 1890, which enables the local authority to apply section 41 of the Act of 1875, involve the proposition that because you find that there is a single private drain the connections with that must be part of the single private drain and are to be so regarded? As I have already pointed out, that might involve the loss of rights and the change of obligations which undoubtedly existed prior to the Act of 1890, and it would require clear and distinct words in order to bring about that result. The words of section 19 are "where two or more houses belonging to different owners are connected with a public sewer by a single private drain." I am fully conscious of the difficulty of understanding what was meant by "a single private drain" having regard to the fact that if a drain does drain two houses it would become a sewer by virtue of the Act of 1875. But at the same time the Legislature, I think, certainly did not mean to sweep away the distinction between a drain and a sewer for all purposes in that particular case, nor does counsel for the respondents contend that. He says that for some purposes the distinction will remain. If the effect of the section is to throw the obligation of nuisance and repair upon the occupier I do not know what there is substantially left beyond ventilation. At any rate it seems to me that the purview of the section is to confine the operation of section 41 to that which is a single private drain, and I point out that in the case which has been of great assistance to us, and which certainly discussed the matter more carefully than any other case that I know—I mean the case of *Bradford* v. *The Mayor of Eastbourne*, [1896] 2 Q. B. 46, 44 W. R. Dig. 93—it was not contended nor was it any part of the decision that the obligations and the rights extended to more than that it was a single private drain in fact. It was not any part of that decision to decide that that which was connected with a single private drain must of necessity have been a single private drain itself or part of it. I cannot help thinking that the language of the most careful judgment (if he will permit me to say so) of my brother Wills rather excludes the idea that the matter was in any way considered by the court beyond the particular question as to what was the meaning of "a single private drain" under section 19 of the Act of 1890.

Therefore I think that we are entitled, notwithstanding the admission, to say that that which was a sewer may still remain to be a sewer, and that the fact that it connects with a single private drain does not make a difference. It would have been a sewer had

it connected with the main sewer by means of that which was itself a sewer or by a continuation of its own pipe. I do not think that the fact that it does happen to pour out into a single private drain, and thereby get to the sewer, makes any difference for the purpose of deciding what is the character of the main or common drain.

Of course in this case, counsel for the respondents contends you find a private drain, you find the different owners, and therefore a case under section 19 arises. I think that is perfectly true so far as the portion of the pipe or conduit is concerned which is found to be a single private drain into which the other drains or sewers may connect; but I see no reason why a sewer should not connect with the single private drain and then with another sewer.

For these reasons I am of opinion that the justices were wrong in coming to the conclusion that the main or common drain at the rear of the houses 51 to 73 was a drain within the meaning of the Public Health Act, and not a sewer, and that this appeal ought to be allowed.

WILLS, J.—I have come to the same conclusion, though with considerable difficulty, because it seems to me that to reconcile section 19 of the Act of 1890 with the general legislation on this subject is a work of extreme difficulty. The court of which I was a member attempted to do it in the *Eastbourne case*, and I think so far as the *Eastbourne case* was concerned the attempt was not altogether unsuccessful. But now it comes to be applied to a different set of circumstances, and that creates a fresh difficulty and one as to which the considerations of policy appear to me to be pretty evenly balanced; so there is a very great difficulty in saying that there is any particular reason why one should incline to one class of construction rather than another, for reasons of public convenience or general policy.

What appears to me to be the determining factor really is that when you come to look at section 19 the facts which are disclosed in this case would seem to *primâ facie* bring us to say that this was a case in which under certain circumstances at all events section 19 might apply; because there are two or more houses which belong to different owners—namely, those on the right-hand side and those on the left-hand side of the passageway through which the branch drain AB is carried. They are connected with the public sewer by that single private drain AB, and then one has got to see, when that is granted, what the consequences are, those being the facts. The consequences are that application may be made under section 41 of the Act of 1875, and when you turn to section 41 I think it is very clear that the drain in respect of which complaint is to be made, and the drain in respect of which the local authority has the power of calling upon the owner to do the work, and may do it themselves if the owner does not do it, is the same drain in each case. If that is the case, then, inasmuch as the obstruction did not lie in the branch drain AB section 41 would not apply. There seems to be a certain sort of intelligible groundwork for such a view in this consideration—that if the obstruction does arise in the branch drain, generally speaking it would be almost impossible to say which of the various effluents which meet in the branch drain is the one that does the mischief, and therefore it is reasonable enough that the expense of putting things right should be shared amongst all the people who use the branch drain. That, of course, does not apply when you are dealing with the main accommodation at the rear of the houses 51 to 73, because the other houses which are necessary to bring in the operation of section 19 of the Act of 1890 do not directly drain into it.

I do not say that these reasons are satisfactory. I very much doubt whether completely satisfactory reasons could be given for any decision any way upon any question almost of those which have come under my notice under this section 19; but I think upon the whole, for the reasons which I have mentioned, that the decision which my lord has announced is the correct one.

KENNEDY, J.—I think so too. I quite agree that it is very difficult to come to any satisfactory solution of the difficulties which are presented on one side or the other in connection with this case, but it seems to me that the least difficult is the one which my lord has presented.

I will only add just this: the section which is invoked by the repondents here is section 19 of the Public Health Acts Amendment Act, 1890. To what does that relate? To put it shortly, it relates to the rights or duties of repairing and of bearing expense connected with a single private drain which connects two or more houses belonging to different owners with a sewer. Does any portion of the main or common sewer at the rear of the houses 51 and 73—and that is what we have got to deal with—fulfil that condition? Clearly not. It is a complete length which would be a sewer, and repairable by the public authority for the whole distance because it is a length of conveyance of sewage—to avoid the words "drain" and "sewer"—not from different owners but from the same owner. Does the branch drain AB satisfy it? I think myself it does, and no question arises as to the branch drain. Therefore, from 51 to 73 you have got the different owners, and you have got them connected by what certainly may be described as a single private drain. Does the fact, then, that the branch drain is a single private drain and does collect from houses owned by different persons carry with it, so to speak, the right to treat as a single private drain within the section, a track, I will call it, or a range of drainage which clearly does satisfy it, and the connection of which at B is one of the elements, but one which by itself would be insufficient to make AB a single private drain. AB only becomes a single private drain because of the connection with different houses which is involved in the connection at its northern end, not only with the main or common drain at the rear of the houses Nos. 51 to 73, but the main or common drain at the rear of the houses 75 to 81.

It seems to me that that which is the most simple, because the most natural, explanation of the words is also the one which, on the whole, least conflicts with the considerations that arise from the fact that this is an amending Act, and has to be read with the provisions of the earlier legislation, which undoubtedly did protect the private owner in respect of these things.

Solicitors for the appellant, *W. W. Young, Son, & Ward.*

Solicitors for the respondents, *Sharpe, Parker, & Pritchard*, for *R. H. S. Butterworth*, Wimbledon.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Nov. 23.

HOWARD v. PRESS PRINTERS (LIMITED) (a.)

Practice—Injunction—Undertaking in lieu of injunction—Cross-undertaking by plaintiff as to damages.

Where, before the opening of a motion for an interim *injunction, the defendant offers out of court an undertaking which is embodied in the order in lieu of an injunction, there is no practice under which a cross-undertaking in damages by the plaintiff is to be implied. Such an implication may arise where the defendant's undertaking is given under pressure from the court.*

Appeal from a refusal of Farwell, J., to vary the minutes of an arranged order.

The plaintiffs, Mr. Howard and two others, were owners of some residential flats, and they brought an action, and served notice of motion for an *interim* injunction, to restrain the continuance of a nuisance to their tenants caused by the working night and day of the defendants' steam printing and folding engines.

Before the motion was opened on the 5th of August, it was suggested—whether by the judge or counsel was disputed—that a *modus vivendi* might be arrived at, and the respective solicitors accordingly left the court and conferred, with the result that the defendants through their solicitor offered an undertaking, till the trial, not to run their machines after 7 p.m. or before 8 a.m., an exception being allowed of one night in each week and of one additional night in one week in September or October. These terms, with some further provisions as to keeping windows closed, and as to delivery of pleadings so as to expedite the trial, were reduced to writing and signed by the parties, and with some trifling emendations by counsel the agreement was communicated to the court and embodied in an order made in lieu of injunction.

In drawing up the said order the registrar inserted a cross-undertaking by the plaintiffs as to damages, and the plaintiffs moved to vary the minutes by striking out the cross-undertaking, which they said was not included in the terms agreed on, and would not, if proposed, have been acceded to by them. The defendants, on the other hand, contended that such a term was to be implied, and that without it they would not have entered into the agreement.

The motion was heard on the 31st of October.

Butcher, K.C., and *R. J. Parker*, for the plaintiffs.

Upjohn, K.C., and *Whinney*, for the defendants.

FARWELL, J., said that an undertaking given to the court and having the force of an *interim* injunction involved, like it, a cross-undertaking as to damages. This was so well known that it was said in Seton (p. 521) that registrars were directed always to insert it. So invariable was the practice in that court that it was seldom counsel thought it necessary to mention such an undertaking, and then only in case of some concession. It was said there was something special in this case because the agreement was made by the solicitors outside the court. But the defendants' undertaking was an onerous one, and if the matter was wrong it ought to be set right in damages. If parties chose to settle outside, they did so on the understanding that the ordinary practice of the court would be adhered to, and if they wished to exclude it they must do so expressly. The difficulty in the present case was that the defendants had been three months under their undertaking. As to that past time the order must be drawn up, including the cross-undertaking, but, as the plaintiffs wished it and the defendants did not object, both undertakings would be stopped and dissolved as from the present day. He refused leave to appeal.

The plaintiffs appealed by leave of the Court of Appeal.

Butcher, K.C., and *R. J. Parker*, for the plaintiffs.—The judgment in *Attorney-General* v. *Albany Hotel Co.*, [1896] 2 Ch. 696, 699, 700, shows that the court cannot compel a plaintiff to undertake in damages though it will withhold an injunction in the absence of such an undertaking. In *Tucker* v. *New Brunswick Trading Co.*, 38 W. R. 741, 44 Ch. D. 249, 252, an injunction was granted against the company, but not against the two other defendants. One of these latter asked for an undertaking in damages, and the Court of Appeal held that he was entitled to it, but that the other, who had not been represented on the motion for injunction, was not. In *Smith* v. *Day*, 31 W. R. 187, 21 Ch. D. 421, 424, Jessel, M.R., sets forth how these undertakings came to be inserted. It was to insure justice being done in case it turned out on fuller evidence at the trial that the *interim* injunction ought not to have been granted. Farwell, J., did not appreciate the difference between an injunction granted, and a voluntary undertaking by a defendant. [ROMER, L.J.—It might be hard on a plaintiff if a defendant undertook to stop working altogether till the trial, knowing that this was unnecessary, and relying on being recouped for all loss by the plaintiff under an implied undertaking; but I should like to leave open a possible case of a motion to restrain, say, a sale on the following day, and of the judge saying "I shall grant an injunction unless the defendant will give an undertaking." When pressure is thus put on a defendant, I think a cross-undertaking may well be implied.] The result of upholding the decision of Farwell, J., will be to make settlements in future more difficult, and to increase the number of motions that must be fought out.

Upjohn, K.C., and *Whinney*, for the defendants.—In *James* v. *Jones*, 67 L. T. 584, 41 W. R. Dig. 170, the Court of Appeal refused to entertain an appeal from a decision of a judge as to the minutes of his judgment. There is really no difference between what took place on the 5th of August and what would have happened if the agreement had been come to between counsel. If a motion is before the court, and is not fought out because the parties through their counsel agree what shall be done before the trial, it is the same thing as if an injunction had been granted in those terms, and a cross-undertaking ought therefore to be implied. An undertaking in the terms of the notice of motion has the effect of an injunction, and the defendant gets a cross-undertaking as a matter of course. These undertakings were at first confined to *ex parte* applications, and have been gradually extended. We admit we have not found a case deciding they are to be implied where no injunction is granted, but in practice they are inserted without being mentioned. [ROMER, L.J.—What damages are you asking for—those that would follow from an injunction in terms of the notice of motion, or of your undertaking?] Our application is that if it be found hereafter that there was no case for relief on the motion we shall have damages for what we were induced to do under the apprehension of an injunction, though in fact it was never pronounced. The form expressly limits the damages to the amount which the defendants might incur and which the plaintiffs ought to pay.

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

If a defendant should offer too wide an undertaking a plaintiff need not accept it. It is said that the effect of upholding the decision of Farwell, J., would be disastrous, but if defendants know that an injunction does, while an undertaking does not, carry with it an implied undertaking in damages they will be the less likely to come to an agreement.

Butcher, K.C., was not called on to reply.

VAUGHAN WILLIAMS, L.J.—I think this appeal must be allowed, and that the undertaking of the plaintiffs to answer in damages must be struck out. It is said that there is really no difference in the matters which have been under discussion in this case between an injunction and an undertaking. I do not agree with that. I think that an undertaking entered into with the court is the equivalent, and will have the effect, of an injunction thus far, that any infringement of the undertaking may be made the subject of an application to the court to enforce it. But, apart from that, there is this essential difference between the two: an injunction is something that the court orders, something that the court compels. With regard to an undertaking, I do not suppose anyone seriously suggests that the court can by its order compel an undertaking. I do not mean to say that in every sense of the word an undertaking is invariably voluntary; for instance, supposing an injunction has been granted by the court of first instance, and there is an appeal against the order for an injunction; upon the appeal coming on to be discussed, the Court of Appeal might think that the injunction was a great deal too wide, and they might put to the appellants: "We will make an order absolutely dissolving this injunction, not limiting it or amending it, or anything of the sort; but you, the appellants, undertaking," and then the appellants might give an undertaking which would be a reasonable undertaking under the circumstances. But, generally speaking, the proposition is true that a court cannot order what we call an undertaking. Now, that being so, it seems to me that the only question here is a question whether there is any practice in the courts which could justify the court in saying in this case that by necessary implication the plaintiffs here, when they accepted the defendants' undertaking, consented to give an undertaking to answer in damages. It does not seem to me that that has been made out. Farwell, J., says in his judgment: "In my opinion the registrar was right. I think if parties go outside to settle the terms of an order like this" (that is, an order saying "the court doth make no order, the defendant undertaking . . ."), "they settle it on the understanding that the ordinary practice of the court will be adhered to, and, if they wish to exclude that practice, they must bargain and make terms to that effect. If a man takes an undertaking, and does not wish to give a cross-undertaking, in my opinion it is incumbent on him to put it in the terms." Now if that practice had been established to-day, then Farwell, J., would have been quite right, and we should have held that by implication the plaintiff who took the undertaking consented to give a cross-undertaking. But in my judgment no such practice has been established. Mr. Upjohn has frankly said that he cannot produce any authority to that effect. I do not profess myself to have any knowledge of what the practice in such matters in the Chancery Division may have been, but I have heard the statements that have been made in the course of the argument by Romer and Cozens-Hardy, L.JJ., and I accept it, that there is no such practice. Under these circumstances it seems to me that without going the length of saying that there never could be a case in which the plaintiff, by the acceptance of the undertaking of the defendant, impliedly consented to give a cross-undertaking although it was not mentioned, I see nothing in this case to lead me to suppose that this is a case of that sort; and speaking generally of what would be convenient, I think for the reasons that have been given in respect of such a case, for instance, as a defendant expressing his willingness to give a very wide undertaking indeed, the effect of which might be that if the plaintiff gave a cross-undertaking to be answerable in damages he might expose himself to considerable risk, it is much more convenient that if the defendant giving an undertaking wishes for a cross-undertaking, he should expressly say so, and it is not to be taken as against the plaintiff that he assents because he does not exclude such cross-undertaking. I think the order must be amended in the way I have indicated. Costs in any event so as to avoid a separate taxation.

ROMER, L.J.—I am of the same opinion. I do not say that a case may not arise in which, where an undertaking has been given by a defendant on a motion for an injunction, and nothing has been expressly said about an undertaking as to damages on the part of the plaintiff, such an undertaking may not be implied. There may be such a case. The question is whether in the present case such an undertaking as to damages can be implied. Now, when I look at the arrangement come to between the parties, the wording of it, and the form of the order as drawn up, I must say, speaking for myself, that I cannot conceive that an undertaking as to damages ought to be implied. In the first place my experience is that there is no general practice that whenever, on a motion for an injunction, a defendant offers to give an undertaking, a corresponding undertaking as to damages on the part of the plaintiff is in fact to be implied; I know of no such practice. There is a practice, and a right practice I have no doubt, that in cases where the court grants an injunction it always makes a term, whether it is express or to be implied, that the injunction granted is on the terms of an undertaking by the plaintiffs as to damages. In that case the reason why the undertaking is required is of course obvious. It may turn out at the trial that the order was wrong, as subsequent events have proved, and that the court never ought to have made the order it did, and therefore it is for the purpose in that case of restoring the defendant to the position he ought to have been in by recompensing him as to damages, that the court in the case of an injunction requires an undertaking as to damages. It is because it is an order of the court enforcing a certain obligation upon the defendant, which he is protesting against, but which he is bound to obey. But in the case of an undertaking offered by a defendant on the hearing of a motion, that undertaking may be, and generally is, as far as the court is concerned, a voluntary act on the part of the person undertaking, and may go beyond any order that the court would have made but for the undertaking, and go beyond anything that would have been asked for by the plaintiff if the defendant had not voluntarily given the undertaking. Now, in the present case, what happened was this. The parties arranged terms; the defendant offered an undertaking, and it was because of that undertaking on his part that the court, as appears on the face of the order itself that is drawn up, expressly made no order on the motion. The court was not asked to hear the motion, and did not hear it. The parties arranged that undertaking, and the court, as I have pointed out, on its being brought to its notice, took the undertaking, made no order, and did not hear the motion. Now, in the

present case, having regard to what the nature of the motion was, a motion for an injunction to restrain the nuisance alleged, and to the form of the undertaking given, which was an undertaking not to do certain work at all between certain hours of the night, except upon some day or days in the week, I cannot think that if the defendants had not offered that undertaking any such order would have been asked for by the plaintiffs to correspond with what was contained in the undertaking, nor that the court, had it been asked, would have made an injunction in terms corresponding to the undertaking. On the contrary, I feel pretty certain that no such order would have been granted, and that no such order would have been asked for. Nor can I in the present case assume, as against the plaintiffs, that if the defendants had said "We give this undertaking on the terms that you give a corresponding undertaking as to damages," the plaintiffs would have given any such undertaking. On the contrary, I think it might have involved them in a risk which they might well have shrunk from incurring, even if they were right in the action. I do not see how, even if they were entitled to an injunction in respect of a nuisance, they could have been compelled to give any undertaking as to damages which might seem to make them responsible for the defendants not working during the periods contained in the undertaking. Nor can I in this case infer that the plaintiffs must have known, or ought to be taken to have known, that the defendants were relying on any implied undertaking as to damages on the part of the plaintiffs, if in fact the defendants did rely on such an undertaking or thought about an undertaking as to damages at all. I think that the plaintiffs may well have thought that the defendants were willing to give the undertaking they did because they thought it would not substantially hurt them, and I do not think that in the circumstances of this case it is to be implied, as against the plaintiffs, that they were bound to assume that the undertaking was one which would injure the defendants, and that, so far as it would injure them, they, the plaintiffs, would be responsible if they failed at the trial. Under these circumstances it appears to me that no undertaking in respect of damages can be implied as against the plaintiffs, and that, under the circumstances, the court has no power to insert such an undertaking as it did on the motion to vary the minutes made before it in the court below. I think, therefore, the order ought to be amended by striking out the undertaking as to damages. I think that the appeal succeeds, and that the appellants ought to get the costs of the appeal and of the motion in the court below.

COZENS-HARDY, L.J.—I entirely agree—so entirely that I should be content not to add a word, were it not that we are differing from the decision of Farwell, J. The history of undertakings as to damages is given by Sir George Jessel in the case of *Smith* v. *Day*, 31 W. R. 187, 21 Ch. D. 421. It seems to amount to this, that the court can say, and does say, "We will not make an order upon imperfect materials, granting a temporary injunction, except you give an undertaking in damages." That is the term which the court can impose as the price of an injunction. The courts have gone a step farther, and they now say that it is an implied term in every order of an interlocutory nature for an injunction, a term which everybody applying for and obtaining such an interlocutory order must be deemed to know of. But the court cannot compel a person to give an undertaking even in that case; the court can only say, "We will not grant an injunction unless you give an undertaking." But it has been argued before us that cross-undertakings are to be implied in every case in which an undertaking is inserted in an order. Now for that proposition no authority whatever has been cited, and it seems to me to be inconsistent with the very idea of undertakings, which are in their inception voluntary. If these cross-undertakings are not to be inserted as of course in every order, is there any ground for inserting one in the present case? Is this an exceptional case? Here we have the terms in writing—terms which the parties themselves arranged—terms which were, I think, really in the nature of a *modus vivendi*, to use the language of Mr. Butcher when it was mentioned in the court below—and terms on which it was reasonable that the parties should go on until the short period elapsed before the court could finally adjudicate upon the matter. I see no ground whatever for enlarging in this case the terms of the written arrangement which had been made, and I confess I am very greatly impressed by the consideration which Romer, L.J., has indicated, that the undertaking here is in a form and to an extent beyond that which the plaintiffs asked for by their notice of motion, and beyond anything that the court could really have granted. To say that the plaintiffs were to be bound "to abide by any order that the court may make as to damages if the court shall hereafter be of opinion that the defendants shall have sustained any by reason of their undertaking" is asking me to imply that which I think is contrary to the real bargain between the parties and contrary to anything which it is reasonable to suppose they can have entertained. The result is the appeal must succeed, with the consequences which my lord has stated.

Appeal allowed.

Solicitors, *Bircham & Co.; Mayo, Elder, & Co.*

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — July 29, 1904.

RUBEN v. GREAT FINGALL CONSOLIDATED. (a.)

Company—Share certificate—Fraudulent issue of certificate by secretary acting for his own purposes—Forgery—Estoppel—Holding out—Principal and agent.

The plaintiffs advanced a sum of money to the secretary of the defendant company for his own purposes, and received from him as security a document which purported to be a certificate of shares in the defendant company made out in the names of certain nominees of the plaintiffs. The document bore the seal of the company, and appeared to be signed by two of the directors, and was countersigned by the secretary. The seal had been affixed thereto by the secretary fraudulently, and without any authority from the directors, acting not for or on behalf of the company, but entirely for his own purposes. The signatures of the two directors were forgeries by the secretary. It was admitted that the secretary was a proper person to deliver certificates.

Held, that, in the absence of any evidence of a holding out of the secretary by the company as a person having authority to warrant the genuineness of certificates, the company were not estopped from disputing the plaintiffs' right to have their nominees registered as shareholders.

Shaw v. Port Philip and Colonial Gold Mining Co., 32 *W. R.* 771, 13 *Q. B. D.* 103, *distinguished.*

Decision of Kennedy, J. ([1904] 1 *K. B.* 650, 52 *W. R. Dig.* 26), *reversed.*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from the judgment of Kennedy, J., on further consideration: [1904] 1 K. B. 650.

The action was brought to recover damages from the defendant company by reason of the refusal of the company to place the names of Max Rosenhain and Edmond Alexandre on the register of the shareholders of the company.

The material facts of the case, as stated by Kennedy, J., in his judgment, were in substance as follows:

One A. S. Rowe, then a partner in Bewick, Moreing, & Co., was in December, 1902, the secretary of the defendant company. He held the appointment under a written agreement of the 31st of December, 1900, between the defendant company and Bewick, Moreing, & Co., whereby Bewick, Moreing, & Co., undertook to provide the defendant company with suitable offices and office accommodation, a suitable secretary, to be approved of by the company, and a sufficient clerical staff. The secretary was to be paid by Bewick, Moreing, & Co., but was to be deemed to be the secretary and officer of the defendant company, and subject to dismissal by the defendant company at any time. Bewick, Moreing, & Co. were to receive £500 a year from the defendant company, and also all transfer fees received by the defendant company. The defendant company's registered office in December, 1902, was in the offices of Bewick, Moreing, & Co., 20, Copthall-avenue, E.C., and several other limited companies were housed and provided for by Bewick, Moreing, & Co. there, under similar arrangements.

The plaintiffs were a firm of stockbrokers in the city, with whom Rowe had for some months before December, 1902, done business on his own private account in stocks and share transactions. They knew he was a partner in Bewick, Moreing, & Co. They did not know that he was secretary of the defendant company. They believed him to be a director of it. He had been introduced to the plaintiffs as a person in good credit; he kept his engagements, and they had every confidence in him. With Mr. Lindo, one of the partners in the plaintiffs' firm, Rowe was on terms of social acquaintance.

In December Rowe saw Mr. Lindo and asked whether the plaintiffs could arrange a loan for him on 5,000 shares in the defendant company. He said he had a joint account with a friend, who wished to sell, and he desired to take over the friend's interest and so avoid a sale, because, on information which he had received, he believed the shares (which were then at a premium) would rise considerably in value. He wanted the loan for a short time only, and as the 5,000 shares afforded at the price of the day ample security for the £20,000 which he wanted on loan, and as he undertook, if there was any fall in price, to provide a £2 per share margin, the plaintiffs agreed to try to meet his wishes.

On the 16th of December the plaintiffs arranged with Lazard Brothers & Co., who were bankers in the city, for the advance of £20,000 to themselves for a principal on the proposed security; and Mr. Lindo on the same day went to the offices of Bewick, Moreing, & Co., which were also the offices of the defendant company, and told Rowe that the money would be ready on the 18th of December. Rowe said that he would have the share transfer executed by the transferor on the following day. The shares, he said, were standing in the company's books in his friend's name and not in his own.

On the 17th of December the transfer, with the names of Max Rosenhain, who was a partner in the firm of Lazard Brothers & Co., and Edmond Alexandre, as transferees, but with the space for the name of the transferor left in blank, was taken by Lindo to Rowe, and later in the same day it was returned by Rowe to Lindo, and purported to have been executed by "E. Storey" as transferor. In the corner of the document was the usual "certification." Rowe, when he gave Lindo the transfer, said that his directors (that is, the directors of the defendant company) would be meeting the next day at 11 a.m., that he would explain everything to them and have the share certificate made out in the names of Rosenhain and Alexandre, and that it would be ready for Lindo if he called at 11.30 a.m. The same afternoon Lindo brought back to Rowe the transfer executed by the transferees, paid to him a registration fee of 2s. 6d., and received a receipt in due form.

On the 18th of December, at 11.30 a.m., at the office, Rowe delivered to Lindo the share certificate, and Lindo returned the receipt to Rowe. The certificate thus issued was in form perfectly regular. It purported, in accordance with article 12 of the articles of association of the defendant company, to bear the seal of the defendant company, to be signed by two of its directors, and to be countersigned by the defendant company's secretary. Lindo learnt from it for the first time that Rowe was the company's secretary.

The certificate was taken by Lindo to the plaintiffs' office, when it was examined by their clerk, and it was then taken by him to the office of Lazard Brothers & Co., where it was left after its examination by a clerk there, and their cheque for £20,000 in favour of the plaintiffs was handed to Lindo. This cheque was paid by the plaintiffs into their own banking account, and a cheque of the plaintiffs for the same amount, less stamp fee and commission, was handed over to Rowe the same day, and was subsequently cashed by him. Within ten days Rowe absconded, and it was discovered that the certificate was a forgery. The only genuine part of it was Rowe's counter-signature as secretary. The signatures of the two directors, which it bore, were forged, and the seal of the company, which it also bore, had been fraudulently affixed to it by Rowe, who, as secretary, had access to it at all times, and, as the learned judge thought, practically the custody of it, in the safe of the defendant company.

Messrs. Lazard Brothers & Co., by their solicitors, applied to the defendant company for the registration of Rosenhain and Alexandre in the books of the defendant company as the owners of the shares. The defendant company refused to accede to the application. Then Lazard Brothers & Co. applied to the plaintiffs for other equivalent security or repayment of the loan of £20,000. The plaintiffs paid Lazard Brothers & Co. the amount of the loan, with interest, and thereupon, as the defendant company refused to register the ownership of Rosenhain and Alexandre or recognize their title to the shares, they brought the present action, after obtaining from Lazard Brothers & Co. an assignment of that firm's rights, if any, and giving written notice of such assignment to the defendant company. The plaintiffs' claim was against the defendant company, but Lazard Brothers & Co. and Alexandre were made formal defendants in order that all parties concerned might be before the court.

At the trial certain statements or admissions of material facts were agreed to by the counsel for the respective parties, which left, in the learned judge's opinion, no question which it was necessary or proper to leave to the jury. These statements or admissions of fact were, so far as material to the present report, as follows: Agreed—(1) That the alleged certificate was not a valid or genuine document, and that the signatures thereon, other than the signature of Rowe, were forgeries; (2) that (*a*) the bank (Lazard Brothers & Co.) and the plaintiffs respectively made the advances upon the faith of the genuineness and validity of the alleged certificate and of its being

properly issued, and (*b*) the secretary was a proper person to deliver it; (3) that Rowe, in creating and delivering to Lindo the alleged certificate, acted fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage; (4) that the defendant company did not by its directors or otherwise authorize Rowe to make, seal, or issue the alleged document.

The jury having been discharged, the case was argued before the learned judge on these admissions.

The learned judge held, on the authority of *Shaw* v. *Port Philip and Colonial Gold Mining Co.*, 32 W. R. 771, 13 Q. B. D. 103, that the defendants were estopped by the certificate issued by their secretary from disputing the right of the plaintiffs to have the names in question placed on the register of shareholders, and he gave judgment for the plaintiffs for a sum which had been agreed upon between the parties.

The defendants appealed.

Lawson Walton, K.C., J. E. Bankes, K.C., and *A. M. Bremner*, for the appellants.

Rufus Isaacs, K.C., and *J. D. Crawford*, for the respondents.

Cur. adv. vult.

July 29.—COLLINS, M.R., read the following judgment: The question on this appeal is whether the appellants, a limited company, are responsible in the circumstances for the fraud and forgery of their secretary, one Rowe, who is now undergoing a sentence of penal servitude. The respondents are a firm of stockbrokers. Rowe was a member of a well-known firm carrying on business as engineers. He was also secretary of the appellant company, whose business was conducted in the office of his firm. In December, 1892, Rowe, who had frequently done business with the respondents, applied to one of their firm named Lindo to procure a loan of £20,000 on the security of 5,000 shares in the appellant company, which he said were the joint property of himself and a friend in whose name they stood, and who wished to sell them, while he (Rowe) was desirous of acquiring them. The operation was to be carried out by a transfer from the friend in whose name they stood to the proposed lender, who on receiving the certificate would make the required advance. The facts and admissions are fully stated in the judgment of Kennedy, J., and it is not necessary for my purpose to do more than summarize them as briefly as possible. The respondents arranged with a firm of bankers for the required loan on production of the transfer and certificate duly made out in their names. A transfer was accordingly forged by Rowe in the name of Storey to the bankers, by whom it was executed. It was then brought back by Lindo to Rowe to be exchanged for a certificate, which Rowe told him would be passed by the directors and ready for him early the next day. Lindo paid a registration fee to Rowe of 2s. 6d., and, returning the next day at the appointed hour, received the certificate from Rowe and took it to the bank, who then advanced the money to Lindo, who paid it into his firm's bank and gave Rowe a cheque for the amount, less a deduction for commission. Throughout these transactions and until he had received the certificate and taken it to his office Lindo was unaware that Rowe was secretary, though he thought he was the director of the company. Rowe absconded. It was admitted that Rowe had forged the names of the two directors which appeared upon the certificate, and had affixed the company's seal thereto "fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage." It was also admitted that Rowe was "a proper person to deliver the certificate." On discovery of the fraud the company refused to put the transferees on the register. The respondents were, therefore, obliged to recoup the bank the sum of £20,000, and claimed in this action to recover it from the appellants on the ground that they were estopped from setting up Rowe's fraud.

Kennedy, J., who tried the case without a jury upon the admissions which he has set out, was of opinion that the case was indistinguishable from *Shaw* v. *Port Philip Gold Mining Co.* and gave judgment for the plaintiffs. The defendants appealed. The case was very elaborately argued, and the amount at stake is large, but I think the principles on which the decision rests are well established and, when the facts are properly understood, are easy of application.

The general rule governing the responsibility of a master for the acts of his servant were stated by Willes, J., in delivering the judgment of the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank*, 15 W. R 877, L. R. 2 Ex. 259. The passage has been frequently cited and approved, and is, indeed, the *locus classicus* on the subject. It runs as follows: "The master is liable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit though no express command or privity of the master be proved." He then gives instances where this rule has been acted on and proceeds: "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Founding themselves on the principle so stated, the Court of Appeal, in *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 590, 18 Q. B. D. 714, held that an action of deceit would not lie against a principal for a fraudulent misstatement made by his servant for his own private purposes in reply to a class of question which it was within his ordinary duty to answer. The fact that it was made, not in the supposed interest of the master, but for his own private purposes, *ipso facto* took it out of the scope of the actual authority, and also, according to Bowen, L.J., out of the class of acts which the agent was put there to do. In *Thorne* v. *Heard*, 42 W. R. 274, [1894] 1 Ch. 599, Kay, L.J., refers to this case, to which he was not himself a party, in these terms: "It was there deliberately decided that the words 'for his master's benefit' are essential, and that where an agent in the course of his employment committed a fraud not for his principal's benefit but for the benefit of himself, and the principal did not benefit by such fraud, he could not be made liable for it." It was also cited with approval by Lord Brampton in the House of Lords in the recent case of *Whitechurch (Limited)* v. *Cavanagh*, 50 W. R. 218, [1902] A. C. 117. It was also sought in *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* to fix the master with liability on the ground of estoppel by holding out the servant as the proper person to answer such questions. The two judges, however, who dealt with that aspect of the case disposed of it on another ground, which was subsequently disapproved—namely, that a company could not be estopped from denying that which to admit would involve an *ultrà vires* act: see *Balkis Consolidated Co.* v. *Tomkinson*, 42 W. R. 204, [1898] A. C. 396, at p. 407, per Lord Herschell. The case, therefore, is not a direct authority on the question

whether the holding out may be of such a character as to debar the master from escaping responsibility for an act done by his servant within his apparent authority, although done not with any notion of benefiting the master, but exclusively for fraudulent purposes of his own. It is obvious that the ostensible authority may be larger than the actual, but the question will still remain whether it can ever be large enough to make the master responsible for a fraud or crime committed exclusively for the servant's own purposes, and not utilized in any way by the master. A difficulty was raised in argument on this point. It was urged that, where the actual authority is in writing and unambiguous, and covers the actual thing done, the master is bound, though the servant misuses the authority fraudulently for his own purposes, *Hambro* v. *Burnand*, 52 W. R. 583, [1904] 2 K. B. 10, decided in this court, following the opinions of Lord Brougham, L.C., and of the Privy Council, and of a line of cases in America. Ought there then to be any difference where the authority is not in writing, but is nevertheless clearly ascertained by the verdict of a jury or otherwise upon sufficient evidence of holding out? In my opinion it is not necessary to decide this point in this case, since, for the reasons which I will presently state, I do not think the holding out here can possibly be pushed so far as to bring the fabricating the certificate, whether by writing the directors' names or by misusing the seal, within the class of acts which the secretary was apparently authorized to do. It may be, however, that a long step towards the solution of the difficulty will be found in that class of cases where the limits of what has often been called estoppel by negligence have been discussed—for instance, *Bank of Ireland* v. *Trustees of Evans' Charities*, 3 W. R. 573, 5 H. L. C. 389; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482—and for a very full discussion of the subject see Beven on Negligence in Law (2nd ed.), vol. 2, chap. 4.

It is clear that a man may by his negligence where he owes a duty provided that negligence be sufficiently closely connected with the event to bring it within the legal chain of causality, make himself responsible to the person or class of person to whom he owes a duty, for the crime or fraud of another committed for that other's own purposes. It may be that to put a written authority in the hands of another person without conditions or safeguards is such negligence as to entail responsibility to third parties for fraudulent misuse of the authority: see the instance given by Fry, L.J., in *Northern Counties of England Fire Insurance Co.* v. *Whipp*, of a mortgagee who allows a mortgagor to have the custody of the title deeds for the purpose of raising a loan. I cannot think that the judges who decided *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* intended to deny the possibility of the principal's liability in cases of this class for the fraud or crime of his agent committed for the agent's own purposes.

However this may be, it is, I think, clear in this case that there is no evidence of such a holding out as to bring the acts done by Rowe within any presumable scope of authority. To put it most favourably for the respondent, the act whether done for the master's benefit or not, must at least be one of the class of acts which the servant is ostensibly put there to do, so as to bring it within the second limb of the proposition of Willes, J. If we try it by the test of actual authority, the actual scope certainly did not cover any acts other than those of a purely ministerial character, such as bringing the certificate before the directors for signature and appending the seal in their presence; and it does not need the authority of *Bank of Ireland* v. *Evans' Trustees* and *Merchants of the Staple of England* v. *Bank of England*, 21 Q. B. D. 160, 36 W. R. Dig. 78, to show that fraud and forgery were not within the actual scope of such an employment. But so far as regards all this class of prior acts there is no ostensible representation at all. There is no holding out with respect to them. The ostensible action of the secretary is limited to handing over the apparently complete certificate. How does such an act carry with it any implication of authority to make, as well as hand over, the instrument? His own signature may import a personal representation by himself that the document is apparently genuine, and found a right against himself, but it does not import that he had any other than ministerial duties in connection with the matter. If this is so, it does not in any way enlarge the presumption if the act of handing over be often repeated, and it seems to me, therefore, that there is nothing in the point so much pressed that this was a mercantile company whose shares were constantly changing hands on the market. I think, therefore, that the representation, such as it was, based on the fact that Rowe had ostensible authority to hand over the certificates, is not more efficacious to fix the company with liability for his fraud, than the representation implied in the cases cited from the fact that the clerk or secretary was the proper intermediary through whom the forged powers of attorney were deliverable to the bankers to be handed to the banks. Those cases are, therefore, in point, and as it is not contended that there was any such negligence on the part of the company as to fix them with responsibility for Rowe's acts, I think the case against the company fails, and that we are bound to give effect to Kennedy, J.'s, own view, notwithstanding *Shaw* v. *Port Philip Gold Mining Co.* It may be that that case is distinguishable upon its special facts, but it is not necessary to decide the point, for I am clearly of opinion that the facts in this case are not sufficient to found liability in the company.

I have treated this case on the footing that Lindo dealt with Rowe as secretary of the company, and acted on the faith of the ostensible authority implied from his position as such, but I am by no means sure that this is the true inference from the evidence.

An argument was founded upon some observations of the Lords in *Whitechurch (Limited)* v. *Cavanagh* that the certificate itself carried with it a representation by the company which would bind them against third parties who acted upon it even though it was a forgery. But though the words used apart from their context might possibly be open to this construction, I think it is reasonably clear from the train of reasoning in their speeches that nothing of the kind could have been meant, and that the certificate they had in mind was one such as that in *In re Bahia and San Francisco Railway Co.*, 16 W. R. 862, L. R. 3 Q.B. 584, which had been in fact executed in due form by the company, but under a misapprehension. The appeal must be allowed.

STIRLING, L.J., read the following judgment: I entirely agree with the judgment my lord has delivered, but it is right that I should state shortly the ground upon which my judgment proceeds. In this case three questions seem to require consideration. The first is this—Is the defendant company bound by the certificate on which the plaintiffs rely? The articles of association of the defendant company (of which all persons dealing with the company are deemed to have notice) provide (article 12) as follows: "The certificate of titles to shares shall be issued under the seal of the company and signed by two directors, and countersigned by the secretary or some other

person appointed by the directors." The document on which the plaintiffs rely is written on the company's paper, and has the seal of the company affixed and is countersigned by the secretary; it also purports to bear the signatures of two directors, but these are mere forgeries by the secretary. In these circumstances the certificate (as was, indeed, admitted by the defendants at the trial) is not a valid or genuine document, and does not, in my opinion, bind the defendants. It was suggested that, inasmuch as the document appeared on the face of it to satisfy the requirements of the articles of association, the plaintiffs acting as they did in good faith, were not affected by irregularities in the proceedings of the secretary: *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H L. 869. To mere irregularities the principle of that case, no doubt, applies, but it has never been extended to forgery, a forged instrument being simply null and void. The distinction is drawn by Lord Hatherley in advising the House of Lords in the case itself: see L. R. 7 H. L., at p. 899. In that case he says: "Two cases were cited in the argument in which a fraudulent use was made of the seal of the company by the secretary of the company who had been entrusted with that seal. Those cases, however, can have no bearing upon the present case, for they are simply like cases of forgery. It was just as if signatures, not a seal, had been required, and the secretary had forged the names of the directors. A secretary, having no authority to do so, affixed the seal of the company, and the instrument to which the seal was affixed was as void as if the question had been one of handwriting and a signature had been forged."

The second question is—Is the defendant company estopped from disputing the validity of the certificate? It was strongly urged before us that, inasmuch as the certificate was good on the face of it, and was delivered to the plaintiffs by the secretary of the company, who was admitted by the defendants to be "a proper person to deliver it," the company was precluded from denying as against the plaintiffs the validity of the document; and the decision in *Shaw* v. *Port Philip Gold Mining Co.* was relied upon in support of this contention. It was held in that case that the secretary had in the circumstances been held out by the company as their agent to warrant the genuineness of the certificate, and it was said that the like conclusion ought to be arrived at here. I think it is possible that a company may so act as reasonably to produce the belief on the part of members of the public dealing with the company that the secretary or other agent of the company has authority to warrant the genuineness of the certificate which he delivers; but the question whether a particular company has so acted must in each case be one of fact to be decided on the circumstances of the case. It may well be that the conclusion arrived at by the Divisional Court in *Shaw* v. *Port Philip Gold Mining Co.* was well founded, but the circumstances appear to me to differ from those of the case with which we have to deal. Here the articles of association prescribe that the intervention of three persons—namely, two directors and the secretary (or some other person appointed by the directors)—shall be essential to the validity of a certificate. The framers of the articles well knew that certificates were documents of great importance, as regards the preparation of which the company required to be protected; and the provisions of article 12 were directed, and must, as it seems to me, have been recognized by business men as being directed, to the securing of such protection to the company. The ministerial act of delivering the certificate when prepared to the person entitled to it must be entrusted to some one; it was, in fact, entrusted, and properly entrusted, to the secretary. But is it a proper inference of fact that the secretary was thereby held out as an agent to warrant the genuineness of the certificate? I am unable to see that it is. So to hold would, in my opinion, be to deprive the company to a very great extent of the benefit of the precautions carefully provided by article 12, and really leave the company at the mercy of the secretary or other person entrusted with the delivery of a certificate.

The third question is—Are the plaintiffs entitled to recover damages against the company for a wrongful act of the secretary committed in the course of his employment? It is said that the secretary of the company, while acting in the course of the company's business and for the company's benefit, made a representation, on the faith of which the plaintiffs acted and suffered damage, and that, although the secretary had no express authority to make the misrepresentation, still he had authority to do that class of acts, and that the company must be answerable for the manner in which he did the business which the company had entrusted to him: *Barwick* v. *English Joint Stock Bank.* To this there appear to me to be two answers. First, if I am right in the answer which I have given to the second question, the secretary had no authority to make representations as to the genuineness of certificates; he was merely entrusted with the ministerial duty of delivering certificates to those entitled to them. The making of such representations therefore was not included in the class of acts which the company entrusted to him. Secondly, the secretary, in delivering the certificate, was not acting in the interest of the company, but in his own; and the case of *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* appears to me to be a direct authority that in these circumstances the company is not liable. It is true that part of the reasoning found in the judgments of Bowen and Fry, L JJ., has been disapproved by the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson*, but the decision has never been overruled, and in fact was cited as an authority by Lord Brampton in the recent case of *Whitechurch (Limited)* v. *Cavanagh.* In my opinion, therefore, it is binding on this court. For these reasons I think that the appeal ought to be allowed, and judgment entered for the defendants.

MATHEW, L.J., read the following judgment: This is an appeal from the judgment of Kennedy, J., in an action brought to recover damages for the refusal of the defendant company to place the names of the nominees of the plaintiffs on the register of shareholders. The plaintiffs rely upon a share certificate received by them from the secretary of the defendant company, which apparently was in proper order and issued in accordance with the company's articles of association. It was contended that the company was estopped from disputing the certificate as against the plaintiffs, who had, on the faith of it, incurred liability to Lazard & Co. for a loan of £20,000. The defendants contended that they were not bound by a certificate which was a forgery and which was shown to have been issued by the secretary to raise money, not for the company, but for his own purposes. It was not disputed that it was for the benefit of the company that provision should be made for the ready transfer of shares, and that the company followed the usual course in providing for that purpose a transfer department, which was in charge of a principal clerk and a clerical staff. When a transfer was sent to the company the duty of the transfer clerks was to see that the document was in order, to ascertain that the shares stood in the name of the proposed transferor, and to issue a certification. The matter was then referred to the auditors, whose duty it was to see that

the old certificates were cancelled. When this was done the share certificate was filled up and taken to the secretary's office on the morning of a board meeting to be submitted to the board. The secretary had no duty to supervise what had been done in the transfer department. He was not always present at the board meetings, and it appeared that the certificates were usually brought to the board by one of the transfer clerks. The directors had the opportunity of making inquiries, and in a case of this magnitude it would be a neglect of their duty if they did not ask for information or adopt the precaution of comparing the proposed certificate with the share list. When the certificate passed the board the directors signed in accordance with the articles of association. The seal was affixed by the secretary or a director and countersigned by the former, and the certificate was left with him to be handed to the transferee This was a ministerial act only and might be performed by any trustworthy messenger. It seems clear that the defendant company were bound to take precautions to prevent their being made liable, as in the *Bahia case*, for forged or fraudulent transfers, and these regulations as to the conduct of the transfer business would seem to be sufficient for their protection.

It now becomes important to inquire into the transaction between the plaintiffs and Rowe in order to determine whether the estoppel upon which the plaintiffs relied was established; in other words, whether the company had lost the protection against fraud which their regulations were intended to secure. Rowe was a partner in the firm of Bewick & Co., who were the promoters of this and several other companies. He held the appointment under an agreement of the 31st of December, 1900, whereby Bewick & Co. undertook to provide the defendant company with suitable offices, a suitable secretary, and a sufficient clerical staff. The secretary was to be paid by Bewick & Co., but was to be deemed to be the secretary of the defendant company. The plaintiffs were stockbrokers with whom Rowe had done business on his own account. They did not know that he was secretary to the company. They believed him to be a director. Rowe was in good credit and the plaintiffs had entire confidence in him. In December Rowe saw Lindo and asked whether the plaintiffs could arrange a loan for £20,000 for him on 5,000 shares in the defendant company. He stated that he had a joint interest with a friend who wished to sell it, and he desired to take over the shares because he believed they would rise considerably in value. He wanted a loan for a short time only, and, as the 5,000 shares at the then price were ample security for £20,000, the plaintiffs agreed to try to find the money. The plaintiffs arranged with Lazard & Co., who are bankers, for the advance of £20,000 to themselves on the proposed security, and Lindo on the same day informed Rowe that the money would be ready on the 18th of December. Rowe said that he would at once have the share transfer executed. On the 17th of December a transfer in blank was taken by Lindo to Rowe, and later in the day was returned by Rowe and purported to have been executed by E. Storey. This document was forged by Rowe. On the transfer appeared the usual certification. Rowe told Lindo that his directors would be meeting the next day and that he would explain the transaction to them and would have the share certificate made out ready for Lindo at 11.30 next morning. It is important to notice that Lindo was in this way informed that the transfer must have the sanction of the board. The same afternoon Lindo brought back the transfer executed by the transferees. The next day Rowe delivered to Lindo the share certificate. It was perfectly regular in form, and purported, in accordance with the articles of association, to bear the seal of the company, to be signed by two of the directors, and to be countersigned by Rowe as secretary. Lindo did not notice until he got back to his office that Rowe was the company's secretary. It seems clear that up to this point Lindo dealt with Rowe in his personal, and not in his official capacity. As he stated in giving his evidence, he looked upon the loan as Rowe's private business. He supposed him to have authority to transfer the shares, and assumed when the certificate was handed to him that Rowe had taken the proper steps to carry the transaction through. The share certificate was handed to Lazard & Co. The money was advanced to the plaintiffs and paid to Rowe. Within a few days Rowe absconded, and it was discovered that the certificate was a forgery. Lazard & Co. applied to the defendant company for the registration of their nominees as the owners of the shares. This application was refused, and the plaintiffs were compelled to pay Lazard & Co. the amount of the loan with interest. They then brought the present action.

In the argument much reliance was placed by counsel for the plaintiffs on the admission (*b*) that the secretary was a proper person to deliver the certificate. But this guarded concession on the part of the defendant company does not displace and is not inconsistent with the course of business followed by the company. In these circumstances it seems to me there was no estoppel. There was no evidence that Rowe was held out or dealt with as the officer of the company who was empowered to represent to those who dealt in the shares of the company that a transfer was genuine and valid. The company, it seems to me, were no more liable in respect of the forged certificate than they would be upon a verbal statement to the plaintiffs that Storey could transfer the shares. There was no evidence that it was part of the business which Rowe was appointed to transact for the company to make any such representation. I am of opinion that the action fails and the loss must rest where it has fallen. The plaintiffs, and not the Fingall Co., are the victims of Rowe's dishonesty.

In the view which I take of the facts it is unnecessary to comment upon the cases cited in the course of the argument. With respect to the case of *Shaw* v. *Port Philip Gold Mining Co.*, I wish to point out that the judgment proceeded upon the description in the special case of "the regular and authorized duty" of the secretary. The statements upon this subject were regarded as amounting to an admission that his fraudulent acts were within the scope of his authority. It was argued for the defendants that, even if this were so, the defendants were not liable because the fraud had been committed by means of a forgery. No distinction between frauds by forgery and frauds by any other means is to be found in the judgment in *Barwick's case*. It was contended for the defendants that *Shaw* v. *Port Philip Gold Mining Co.* had been overruled by *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* But, with great deference to the eminent judges who decided that case, it seems to me the judgment is not available as an authority for the defendants. The judges in that case did not agree as to the grounds for allowing the appeal. It is not easy to reconcile the judgment of Lord Esher with *Barwick's case*, and Bowen and Fry, L.JJ., base their judgments on the ground that a corporate body cannot be prevented by estoppel from denying that they had done what was beyond their powers to do. But this reasoning was not approved of in *Balkis Consolidated Co.* v. *Tomkinson*. The case of *Whitechurch (Limited)* v. *Cavanagh* related to an unauthorized certification,

and not to a forged certificate. The appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Gilbert Samuel & Co.*

Solicitors for the defendants, *Ashurst, Morris, Crisp, & Co.*

From K. B. Div. (Stirling and Mathew, L.J.) July 25, 1904.

DUVAL & CO. (LIMITED) v. GANS & PICK. (a.)

Practice—Writ—Service out of the jurisdiction—Contract to be performed within the jurisdiction—Action for price of goods sent abroad—No express stipulation as to place of payment—Ord. 11, *r.* 1 (e).

The court has jurisdiction to allow service of a writ or notice of a writ out of the jurisdiction under ord. 11, *r.* 1 (e), *if it appears, having regard to the contract generally and the circumstances, that the contract is one which ought to be performed within the jurisdiction, although it does not state in express terms that it is to be performed within the jurisdiction.*

The rule to the above effect laid down in Reynolds *v.* Coleman, 35 *W. R.* 813, 35 *Ch. D.* 453, *and followed in* Rein *v.* Stein, [1892] 1 *Q. B.* 753, 40 *W. R. Dig.* 191, *has not been overruled by* Comber *v.* Leyland, [1898] *A. C.* 524, 47 *W. R. Dig.* 159.

Appeal by the defendants from the refusal of Bucknill, J., to set aside an order giving leave to serve notice of a writ out of the jurisdiction.

The plaintiffs were an English company carrying on business as wine shippers and merchants, and having their registered office in London. The defendants were resident in New York, in the United States of America.

By a contract made in New York the plaintiffs appointed the defendants to be the sole agents for the sale of certain brands of the plaintiffs' champagnes in the United States, Canada, and Cuba.

By the terms of the contract wines of the specified brands were to be shipped by the plaintiffs to the defendants free on board at Havre at certain prices, and the defendants were to be allowed certain discounts on all payments made within certain specified times. Nothing was expressed in the contract as to where payment was to be made. The defendants in fact made payment by drafts on a London bank sent from New York to the plaintiffs in England.

The defendants having, as the plaintiffs alleged, failed to make certain payments which had become due under the contract, the plaintiffs applied *ex parte* under ord. 11, r. 1 (*e*), and obtained leave to issue a writ for service out of the jurisdiction in an action for the price of goods supplied and to serve notice of the writ on the defendants in New York.

Service of notice of the writ having been effected, the defendants applied to have the order giving leave to issue the writ and the service set aside, on the ground that the action was not founded on an alleged breach of a contract "which, according to the terms thereof, ought to be performed within the jurisdiction," and therefore the case did not come within ord. 11, r. 1 (*e*).

Bucknill, J., dismissed the application.

The defendants appealed.

Arthur Powell, K.C. (*Lincoln Reed* with him), for the defendants.—Service out of the jurisdiction can only be allowed under ord. 11, r. 1 (*e*), where the contract appears from its terms to be one which must be performed within the jurisdiction: *Comber* v. *Leyland*, [1894] A. C. 524, 47 W. R. Dig. 159. Here it does not appear from the contract where it is to be performed; the contract is silent as to where payment is to be made. The defendants might make payment at any place where they could find an agent of the plaintiffs to receive it. *Comber* v. *Leyland* has overruled the previous decisions which construed the rule less strictly.

Norman Craig, for the plaintiffs.—In *Comber* v. *Leyland* the House of Lords did not treat the contract as being silent as to where payment was to be made, but as distinctly providing that payment should be made outside the jurisdiction. There is abundant authority to show that, where the contract is silent as to the place of payment, and the creditor is in England, service out of the jurisdiction may be allowed: *Reynolds* v. *Coleman*, 35 W. R. 813, 35 Ch. D. 453; *Robey* v. *Snaefell Mining Co.*, 36 W. R. 224, 20 Q. B. D. 152; *Rein* v. *Stein*, [1892] 1 Q. B. 753, 40 W. R. Dig. 191; *Bell & Co* v. *Antwerp, London, and Brazil Line*, 39 W. R. 84; [1891] 1 Q. B. 103; *The Eider*, [1893] P. 119, 41 W. R Dig 4.

STIRLING, L.J.—Under this contract it is the duty of the defendants, after making certain deductions for discount, to pay to the plaintiffs the price of the wines shipped. But nothing is said in the contract as to where payment is to be made. The plaintiffs, alleging that the defendants have failed to make payments which are due, have obtained leave under ord. 11, r. 1 (*e*). to serve notice of a writ out of the jurisdiction. The rule is as follows: "Service out of the jurisdiction of a writ of summons may be allowed by the court or a judge whenever . . . the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." The defendants object that leave under that rule ought not to have been given in this case, because the contract for payment is not a contract which, according to the terms thereof, ought to be performed within the jurisdiction.

Having regard to the decisions of the Court of Appeal on the construction of this rule, I think that leave has properly been given in this case to serve notice of a writ out of the jurisdiction. In the case of *Reynolds* v. *Coleman*, in which the construction of the rule came up for discussion for the first time, Cotton, L.J., said: "The question we have to consider is this—What is the meaning of 'which, according to the terms thereof, ought to be performed within the jurisdiction'? It was said by the appellant to mean that it must be an express term of the contract that it should be performed within the United Kingdom. In my opinion that is not the true construction. The difficulty arises from the words 'according to the terms thereof'; but in my opinion those words mean that you must look at the contract and at the facts which existed at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction." That was followed in the case of *Rein* v. *Stein*, which was a case very similar to the present. The action was for the price of goods consigned by the plaintiff, a merchant in England, for sale in Germany by the defendant, a German subject carrying on business in Germany. There was no express stipulation as to the place of payment for the goods; but, according to the course of business in similar transactions between the plaintiff and the defendant,

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

such payment would be made in England. The court held that there was sufficient evidence that the action was founded upon a breach, within the jurisdiction, of a contract which, according to the terms thereof, ought to be performed within the jurisdiction, and that the plaintiff was entitled to an order for service out of the jurisdiction. In the later case of *The Eider* the court approved of *Reynolds* v. *Coleman* and *Rein* v. *Stein*.

The defendants now rely on the case of *Comber* v. *Leyland* in the House of Lords. The contract in that case contained very special terms as to the mode of payment. The defendants, who carried on business at Pernambuco, contracted to sell goods sent to him by the plaintiffs and to remit the proceeds to the plaintiffs in England by first-class bank bills on England not exceeding ninety days' sight made out in the plaintiffs' favour. The House of Lords held that the contract to pay was to be performed by putting the bank bills into the post office at Pernambuco. The ground of their decision was that this was a contract no part of which was to be performed within the jurisdiction. None of the learned lords expressed any intention to overrule the previous decisions of this court, and *The Eider* was approved of. I am, therefore, of opinion that the appeal must be dismissed.

MATHEW, L.J.—I am entirely of the same opinion. The plaintiffs are an English company, having their registered office in England, and they have no existence out of England. The intention of the parties clearly was that payment should be made where alone it could be made—viz., at the office of the company.

Appeal dismissed.

Solicitor for the plaintiffs, *Robert Rodgers.*

Solicitors for the defendants, *Wetherfield, Son, & Baines.*

High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 8.

In re CRAWFORD'S SETTLEMENTS. COOKE *v.* GIBSON. (*a.*)

Settlement—Marriage settlement—Covenant—"Survive her coverture"—Divorce—Variation of settlement—Matrimonial Causes Act, 1857 (20 & 21 *Vict c.* 85), *s.* 45—*Matrimonial Causes Act,* 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act,* 1878 (41 *Vict. c.* 19), *s.* 3.

Covenant in an ante-nuptial settlement by the father to pay £10,000 to his daughter absolutely in the event of there being no issue and of her surviving her now intended coverture,

Held, the marriage having been dissolved by a decree of the Divorce Court, that she had survived her coverture so as to entitle her to the money under the covenant, although her former husband was still alive.

Semble, *that she was also entitled under an order of the Divorce Court directing that the settlement should be read as if the husband had died in the lifetime of the wife.*

Adjourned summons.

By an indenture of settlement of the 26th of July, 1881, made on the marriage of Donald Crawford to Virginia Mary Smith, Thomas Eustace Smith, the father of the lady, covenanted with the trustees of the settlement that his executors or administrators should within twelve calendar months after his death, in case the said D. Crawford and V. M. Smith or either of them or any issue of the said marriage should be living at his death, pay to the trustees the sum of £10,000; and it was declared that the trustees should stand possessed of the trust fund and the investments for the time being representing the same in trust during the joint lives of the said D. Crawford and V. M. Smith to pay the income to the said V. M. Smith for her separate use and without power of anticipation, and after the death of either of them upon trust to pay the income of the trust fund to the survivor during his or her life, and after the death of such survivor to stand possessed of the trust fund upon certain trusts for the children of the intended marriage. It was further agreed and declared that if there should be no issue of the said intended marriage in whom the trust fund should become absolutely vested under the foregoing trusts, then the trustees should stand possessed of the fund "in trust for the said V. M. Smith, her executors, administrators, and assigns, if she shall survive her now intended coverture, but if she shall die during her now intended coverture then in trust for the said T. E. Smith, his executors, administrators, and assigns."

The said marriage was dissolved by decree *nisi* on the 12th of February, 1886, which was made absolute on the 6th of August, 1886. There was no issue of the marriage.

On the 9th of December, 1886, an order was made by consent whereby it was ordered that from and after the date of such order the trustees for the time being of the said marriage settlement should pay and apply the trust fund and the income thereof upon such and the same trusts as would be applicable in respect of the same, in case the said D. Crawford were dead and had died in the lifetime of the said V. M. Crawford.

The said T. E. Smith died on the 5th of December, 1903.

The executors of the will and codicil of the said T. E Smith were prepared to pay over to the trustees of the marriage settlement the sum of £10,000 which T. E. Smith covenanted to pay. But questions arose as to the trusts upon which the trustees were to hold the same. This application was therefore made by by one of the trustees of the settlement in order to obtain the opinion of the court as to the trusts upon which the sum of £10,000 should be held by the trustees.

E. K. Corrie, for the trustees of the marriage settlement.

Borthwick, for the executors of the will of T. E. Smith.—The lady is only entitled to take the money if she has survived her coverture. The fair construction of these words is that the coverture was intended to last during the joint lives of the husband and wife. The court will not assume that the parties were contemplating the coverture being put an end to in any other than the natural way, for that would be against public policy. The Matrimonial Causes Act, 1857, s. 45, only gives the court jurisdiction to make an order altering the settlement of the parties concerned, it does not say anything about altering the property of any other person. The father covenanted to pay £10,000 to the daughter absolutely in the event of there being no issue and of her surviving her coverture. The statute does not compel the father to give what he did not covenant to give; still less does the order of the Divorce Division, which was a consent order between third parties, compel that.

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

Although the lady is not deprived of the benefit of the father's covenant in the settlement, it is submitted that she cannot take advantage of the order or of her own wrong to bring about an acceleration of the increase to her property: *FitzGerald* v. *Chapman*, 24 W. R. 130, 1 Ch. D. 563; *Cartwright* v. *Cartwright*, 10 Hare 630.

Methold, for the lady.—The husband's life interest has been got rid of, and as the marriage has been dissolved the wife has survived her coverture, and therefore she is entitled to the money absolutely. If this form is held bad, the common form of marriage settlements in the conveyancing books which have exactly the same provision will be bad also. *Cartwright* v. *Cartwright* and other cases were discussed in the case of *In re Hope Johnstone*, [1904] 1 Ch. 470, 52 W. R. Dig. 156. The gift was an absolute gift to the wife which ought not to be taken from her. This is not a condition which may be held void, but a limitation.

Borthwick replied.

KEKEWICH, J.—This is one of those cases in which an event has happened which was not in the contemplation of the parties to the agreement in the sense that they really thought about it, although, if the parties have expressed themselves in adequate language, it does not follow that, notwithstanding the event was not in their contemplation, the court may not give effect to the language used.

Upon the marriage of D. C. to this lady V. M. S., the father of the lady, T. E. S., covenanted that his executors should, within twelve months after his death, in case the said D. C. or his wife, or any issue of the marriage be living at such death, pay to the trustees of the marriage settlement the sum of £10,000. T. E. S. died on the 5th of December, 1903, and his daughter is still living, so that in accordance with that covenant the executors are bound to pay to the trustees of the marriage settlement £10,000. There is no escape from that. But the question then arises, Upon what trusts are the trustees to hold it? The settlement declared that the trustees should hold this trust fund during the joint lives of D. C. and V. M. S., to pay the income to the wife, and upon the death of either of them to the survivor, and upon the death of the survivor to hold the trust fund in trust for the children, and if there should be no issue in trust for the said V. M. S. if she shall survive her now intended coverture, but if she shall die during her now intended coverture then in trust for the said T. E. S. It is obvious that the draftsman in framing this clause neglected the words of the covenant, as he did not make the two fit; under the covenant the lady is to be paid £10,000 if she survives her father, who, under the trust, is not to get the money back unless she dies during her coverture, and the two are not the same in fact. The coverture has been dissolved by the Divorce Court, and is no longer existing. Marriage may come to an end in three ways—by the death of the husband, by the death of the wife or by divorce. In this case it has come to an end by divorce, which, although not a natural way of termination, is a way whereby the coverture has none the less come to an end, although the husband is still living. How can I construe this trust as meaning anything else than what it says? There is no issue of the marriage, and the interest of the husband having been put an end to, the trust for the lady takes effect. The words are "if she shall survive her now intended coverture." The coverture has come to an end. She is still living. Therefore she has survived her "now intended coverture," and the father's estate was only to get the fund back if she should die during her intended coverture.

That being so it is unnecessary to consider what the effect of the order of the Divorce Court was. But that appears to me equally to give the fund to the wife. By the order, the trustees of the marriage settlement were directed to hold the fund upon the same trusts as would be applicable in case the husband were dead and had died in the lifetime of the wife. The Matrimonial Causes Act, 1857, s. 45, gave the Divorce Court power to alter settlements where there was issue of the marriage. This was followed by the Matrimonial Causes Act, 1859, s. 5, but the power of the court was still limited to where there were children of the marriage. This was amended by the Matrimonial Causes Act, 1878, s. 3, by which the court might exercise the powers vested in it by the previous Acts, notwithstanding there were no children of the marriage, and could vary the provisions of the settlement either for the benefit of the children or of either parent. The Divorce Court has in the present case ordered that the settlement should be varied and should be read as if the husband were dead, and so the coverture has come to an end in that way. It has been argued that the Divorce Court has no power to make an order interfering with the rights, liabilities, and interests of persons who are not parties before it, so that it could not vary the covenant of the father so as to make him liable to pay the money on other conditions than what he had covenanted to do. This argument will deserve very careful consideration when the point arises, but it does not arise here. The Divorce Court did not touch the father's covenant; it only ordered the money to be paid as if the husband were dead. The wife's title is complete. The father's covenant was to pay the money if the daughter was living at the time of his death; she was, and therefore her title is complete, and his executors are bound to pay the money to the trustees of the settlement, and the trustees must pay it to the lady as having survived her coverture.

Solicitors for the trustees and the wife, *Russell, Cooke, & Co.*

Solicitors for the executors of T. E. Smith, *Pennington & Sons*, for *Clayton & Gibson*, Newcastle-on-Tyne.

K. B. Div. }
(Channell, J.) } June 29, 1904.

PRUDENTIAL ASSURANCE CO. (LIMITED) *v.* COMMISSIONERS OF INLAND REVENUE. (a.)

Inland Revenue—Stamp—Old age endowment with life assurance—Policy of life insurance—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 98.

By an instrument headed "Old Age Endowment with Life Assurance" an insurance company agreed, in consideration of a weekly premium until the assured should attain the age of sixty-five or during the life of the assured, to make one or other of the following payments according to the event which happened: "(1) If the assured shall attain the age of sixty-five years, then, upon proof . . . the company shall pay to the assured such sum as, according to the age of the assured at entry, is ascertainable from the tables, or (2) in the alternative, if the assured shall die under the age of sixty-five, then upon proof . . . the company shall pay to the executors or administrators of the assured the sum of £30," subject to certain conditions.

Held, that the instrument was a policy of life insurance "within the meaning of section 98, *sub-section* 1, *of*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the Stamp Act, 1891, *and should be stamped as such, and not under the heading 'Mortgage, Bond, Debenture, Covenant.'*"

Case stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891.

On the 13th of January, 1904, an instrument was presented on behalf of the appellants, the Prudential Assurance Co., to the Commissioners of Inland Revenue for their opinion as to the stamp duty with which the instrument was chargeable. The instrument in question was headed "Old Age Endowment with Life Assurance from entry to sixty-five years. For ages from eleven to fifteen next birthday after entry," and contained provisions to the effect that upon payment of a premium of sixpence weekly until the age of sixty-five was reached or death ensued the company would make one or other of the following payments according to the event which happened: "(1) If the assured shall attain the age of sixty-five years, then, upon proof being given to the reasonable satisfaction of the directors of the company of the assured having attained that age, the company shall pay to the assured such sum as, according to the age of the assured at entry, is ascertainable from the table annexed as payable in the event; or (2) in the alternative, if the assured shall die under the age of sixty-five years, then . . . the company shall pay to the executors or administrators of the assured the sum of £30. . . ."

The commissioners, being of opinion that the main part of the contract was the promise to pay the sum of £95 upon the assured attaining the age of sixty-five years, and that the promise to pay the lesser sum on his dying before that age was merely incidental thereto, decided that the instrument was not, as contended by the appellants, a policy of life insurance within the meaning of the definition contained in section 98, sub-section 1, of the Stamp Act, 1891; and they assessed the duty thereon, under the heading "Mortgage, Bond, Debenture, Covenant" in the first schedule to the Stamp Act, 1891, at 2s. 6d. as being for the payment of a sum of money not exceeding £100.

The appellants appealed from this decision, and the question for the opinion of the court was whether the instrument was properly chargeable with the duty so assessed by the commissioners, and, if not, with what duty it was chargeable.

Danckwerts, K.C. (*Vaughan Hawkins* with him), for the appellants.—The commissioners were wrong, for the instrument comes within both branches of the definition of policy of insurance in section 98 of the Stamp Act, 1891, as it certainly depends upon "any life or lives or upon any event or contingency relating to or dependent on any life or lives." Policies of insurance are referred to in section 91 and include "every writing whereby any contract of insurance is made or agreed to be made or is evidenced; and the expression 'insurance' includes assurance." It is necessary to constitute a contract of insurance that the contract must be an insurance against something. That may not be true as regard fire and marine policies which are in fact indemnities. A man cannot insure that a fire shall not take place or a ship be lost, but he can insure the payment of a sum of money on the happening of a certain event. In *Law* v. *London Indisputable Life Policy Co.*, 1 K. & J. 223, p. 228, Page-Wood, V.C., deals with this question and held that the plaintiff could recover.

He cited also section 7 of the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), as to what is a policy of insurance, and from Bunyon on Life Assurance, p. 1, on the same point.

Sir R. B. Finlay, A.G., and *Rowlatt*, for the respondents, relied on section 91 of the Act of 1891. The instrument was not a contract of insurance at all. It was a contract by the company to pay a fixed sum when the assured reached a certain age; the contract to pay £30 being merely subsidiary. In *Limmer Asphalte Co* (*Limited*) v. *Inland Revenue Commissioners*, 20 W. R. 610, L. R. 7 Ex., at p. 217, Martin, B., says: "There is no better established rule as regards stamp duty than that all that is required is that the instrument should be stamped for its leading and principal object, and that this stamp covers everything accessory to this object." It was moreover not a contract of insurance, for it did not insure against something, and that element being absent, the instrument was not a policy.

Danckwerts replied.

Cur. adv. vult.

CHANNELL, J.—The question I have to decide is whether the instrument embodying the contract entered into by the appellant company was a policy of insurance upon any life or lives within the meaning of the Stamp Act, 1891. The Commissioners of Inland Revenue decided that the document must be stamped as a covenant, and it is in one sense, of course, a covenant. It is under seal, and it contains an undertaking to pay a certain sum of money in certain events. It is agreed on both sides that if it comes within the specific and particular definition of a policy of insurance, then it must be stamped as a policy of life insurance. What I have to see, therefore, is whether this contract comes within the definition in the 98th section of the Stamp Act, 1891. The document was headed "Old Age Endowment with Life Assurance," and that was relied on by the Attorney-General to a certain extent as showing that the parties did not call it a life assurance, but something else coupled with life assurance. That is a sort of advertising heading to induce people to enter into this contract, and it is necessary to look at the contract itself to see what it really was. In order that it should come within the definition in the Stamp Act the document must be a policy of insurance, and then if it is a policy of insurance it has to be "upon any life or lives or upon any event or contingency relating to or dependent upon any life or lives." The first question, therefore, I have to determine is whether the contract was a policy of insurance. If it was a policy of insurance, then it is a policy "upon any event or contingency relating to or dependent upon any life or lives." Policies of insurance are also referred to in the 91st section of the Act, where it is said: "For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made or agreed to be made or is evidenced, and the expression 'insurance' includes assurance." What is a contract of insurance? The Attorney-General contended that to constitute a contract of insurance at all, it must be an insurance against something, and as to that Mr. Danckwerts said that that might be true as regarded fire and marine policies, but that it was not true as regarded life policies. The former contracts were indemnities, and in that sense were insurances against loss, but a contract of life insurance was not a contract of indemnity. It is quite clear to my mind on the authorities that it is not an indemnity. The question then arises, that being so, whether that makes any real difference. It seems to me that it is necessary to see what a contract of insurance really is. You cannot insure that a fire will not take place or that a ship should not be lost, but you can insure the payment of a sum of money on the happening of a certain event,

That is one of the requirements of a contract which is a contract of insurance. It must be a contract whereby for some good consideration you secure to yourself some benefit, usually, but not necessarily, the payment of a sum of money upon the happening of some event. That is what is generally known as insuring against something. The next thing that is necessary is that the event should be one which involves some uncertainty. There must be either uncertainty as to whether the event will happen or not, or if it is an event that must happen at some time there must be some uncertainty as to the time when it may happen. The next point is that raised by the Attorney-General, that it must be an assurance against something. The line between contracts which are mere bets or wagers and those which are insurances is a very fine one, and a contract which otherwise might be a mere bet or wager might become an insurance by reason of the possession of an interest in the subject-matter on the part of the person who is the assured. Then the word insurance itself seems to involve that the event, the happening of which was necessary to constitute the contract one of insurance, must be an event adverse to the interest of the assured in some way. By effecting an insurance you insure to yourself a sum of money to meet some possible loss or some detriment which you will suffer upon the event happening. I think, therefore, that what the Attorney-General meant when he said that an insurance involved the idea of insuring against something was that you must insure in reference to some event for a sum of money or some benefit to become payable by reason of the happening of some event, and that that event must be a thing which was *primâ facie* adverse to your interests. I myself do not think that that proposition was fully answered by Mr. Danckwerts's proposition, which was correct in point of fact, that a policy of insurance upon a life was not an indemnity, and that loss by reason of death was not necessary in order to get the money due. By statute it was necessary that at the time of the making of the contract there should be an insurable interest in the person making it, but it is unnecessary that the interest should continue, and the interest is not the measure of the amount recoverable as in the case of a marine or fire policy. Mr. Danckwerts's argument was correct in point of fact, but I cannot help thinking that, in order to make a contract an insurance, it is necessary that the event should *primâ facie* be an adverse event. That is indicated by the doctrine as to insurable interest. A mere contract depending upon the dropping of a life would not necessarily be a contract for life insurance. For instance, a contract by which two people, with a view to obtaining the advantage of survivorship, agreed to become joint tenants of a property instead of tenants in common, or a tontine agreement, would not be a life insurance, although they both are contracts relating to events depending upon lives in one sense.

I think, therefore, that the contract, in order to make it a contract of insurance, must be one which involved the payment of a sum of money or some other benefit, to become due upon the happening of an event, which event must have some amount of uncertainty about it, and must also be of a character more or less adverse to the interest of the person effecting the insurance. So far I agree with the Attorney-General; but it seems to me to be necessary to consider the present contract as a whole and see what the entire contract was. A contract in consideration of the payment of sums of money, to pay a sum of money at a fixed time, and nothing more, would not be a contract of insurance. The present contract, treating the endowment part of it separately, was a contract to pay £95 if the person assured, a child who would be fourteen years of age next birthday, lived until the age of 65. The time of payment was therefore a fixed time. Notwithstanding this, however, there is an uncertainty as to whether the £95 would ever become payable because it was only payable if the person lived to the age specified. Therefore, treating this part of the contract separately from the other, so far as regarded the point of certainty or uncertainty, this was a contract to pay a sum of money at a time certain but on an uncertain event. Therefore there was an element of uncertainty about it. That uncertainty depended upon the duration of human life, and that was why I have said that if this was a policy of insurance at all, I think it was a policy of life insurance within the meaning of section 98, sub-section 1, of the Stamp Act, 1891. The only question remaining to be considered is whether it is in fact a life insurance policy within that section. Looking at the contract as a whole, it seems to me that it was a contract that, in consideration of the payment of a weekly premium of 6d., if a person on whose behalf such payments were made died under the age of sixty-five, then £30 should be paid, and if he lived to sixty-five then £95 should be paid. Is not that an insurance in the sense of its being a contract to pay money upon the happening of events which were *primâ facie* adverse to the interests of the person assured? Here the point is that the sum of money was to be paid in the event of death before the age of sixty-five, and a larger sum in the event of no death before that time. Is that so obviously an event favourable to the person insured that it could not be considered an event upon which you could insure? The very object of these policies was to provide for old age, and in the case of persons who would be likely to be assured at the rate of sixpence a week, the event of living to sixty-five, at which age there would be greater difficulty in earning a living, was a sufficiently adverse event to constitute a contract, entered into for the purpose of securing a payment of money upon the happening of that event, a contract of insurance. When the whole contract was taken together there was no real difficulty. You had to consider whether the events upon which the money was to become payable were sufficiently adverse to the interests of the assured at the time of making the contract to make it the subject of a contract which could be called a contract of insurance. On the whole I have come to the conclusion that the present contract is a contract of insurance within the ordinary meaning of the words policy of insurance. Accepting the Attorney-General's argument that a contract of insurance was a contract against the happening of some event, and that that meant that the event upon which the money to be paid became payable was an event to some extent adverse to the interest of the person assured, it seems to me that, looking at this contract as a whole, there is no doubt that the events were quite sufficient to bring it within the words of section 98, sub-section 1, of the Act of 1891. Admitting it to be a policy of insurance, it is impossible to say that it was not a policy of life insurance within the meaning of the same section. The appeal will therefore be allowed, and the policy declared a policy of life insurance.

Solicitor for the appellants, *W. Gamble.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

House of Lords.

From C. A. (England). May 17, 1904.

SHEPHEARD AND ANOTHER v. BROOME. (a.)

Company — Prospectus — Untrue statement — Fraud — Omission from prospectus—"Deemed to be fraudulent"—"Rights to be honourably met"—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors' Liability Act,* 1890 (53 & 54 *Vict. c.* 64), *s.* 3.

The non-disclosure in a prospectus issued by the directors of a limited company of a contract and resolution of the board of directors, which were material, will render them liable under the 38*th section of the Companies Act,* 1867, *to persons taking shares on the faith of the prospectus, although the directors were advised and honestly thought that the disclosure was immaterial. They would also be liable under the Directors' Liability Act,* 1890, *s.* 3.

Decision of the Court of Appeal (sub. nom. Broome *v.* Speak, 51 *W. R.* 258, [1903] 1 *Ch.* 586) *affirmed.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.), affirming the decision of Buckley, J. (50 W. R. 614).

The London and Northern Bank (Limited) was incorporated on the 6th of April, 1898, with a capital of £2,000,000, divided in 25,000 preference shares of £10 each and 175,000 ordinary shares of £10 each, for the purpose of carrying on the business of bankers in all its branches. The appellants and one Speak became directors. Mr. Bowden was a promoter, and on the 9th of May, 1898, an agreement was made between Bowden and the company under which he was to receive £20,000 for promoter's expenses. Later on negotiations took place for the acquisition by the company of the assets and business of the Leeds Bank. The purchase price was to be £142,500, and a deposit was required of 10 per cent.—£14,250—which Bowden agreed to advance. The London and Northern Bank in a letter of the 21st of September, 1898, wrote to one Craig, who was a nominee of Bowden, in the following terms: "The London and Northern Bank (Limited), 30-31, Clement's-lane, London, E.C., September 21st, 1898. Charles Craig, Esq., Lawrence-buildings, Manchester. Dear Sir,—In consideration of your advancing me the sum of £14,250 to enable me to pay the same to the Leeds Joint Stock Bank (Limited), as deposit on purchase of their undertaking and assets, and your taking the risks of forfeiture, I hereby agree to repay the same on the directors going to allotment or on October 30 next altogether with £7,500 bonus for such loan."

On the 26th of September, 1898, the purchase agreement was signed and the sum of £14,250 deposited, and on the 27th the agreement was adopted, and the company's seal affixed.

On the 1st of October the agreement to repay the amount of the deposit and to pay the bonus of £7,500 to Craig was adopted at a meeting of the board, and a letter was written to Craig in the following terms: Dear Sir,—I am instructed to acknowledge receipt of your letter of the 21st ult., which I placed before my directors at their meeting to-day, and to say that, in consequence of your having introduced the business and carried through the negotiations and found the deposit in connection with the purchase of the Leeds Joint Bank (Limited), my directors agree to repay you the same together with a bonus of £7,500.—Yours faithfully, H. G. CLOSE (secretary *pro tem* P.). J. D. H."

A meeting between the directors of the company and the directors of the Leeds Bank was held on the 10th of October, 1898, and the following resolution was passed: "That after full discussion and hearing the views of the directors of the Leeds Joint Stock Bank (Limited) and upon the chairman giving Mr. Bowden his assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank (Limited) and raising the necessary deposit shall be honourably met at a future meeting of the directors of the London and Northern Bank (Limited), it is resolved with the assent of Mr. C. E. Craig that the contract contained in the letter of the 21st of September, 1898, be cancelled, and that the subject be adjourned to a future meeting of the board." At the same meeting the prospectus, proofs of which had already been printed, was altered by striking out the reference to the letter of the 21st of September, 1898, which it had previously contained. On the 18th of October, 1898, Craig wrote to the trustee of the London and Northern Bank (Limited): "Referring to the letter which you wrote to me dated the 21st of September, 1898, I understand that the directors of the London and Northern Bank have passed a resolution to the effect that the claim which I may have for commission in introducing the business of the Leeds Joint Stock Bank (Limited) or for raising the necessary deposit shall be honourably and properly met. Having regard to that assurance, I am quite willing to agree to the terms of your letter to me being cancelled and the arrangement there suggested as being considered at an end."

On the 20th of October, 1898, a meeting of the board took place, at which both the appellants Shepheard and Clayton were present, and the prospectus as altered was adopted and issued soon after.

On the faith of the prospectus the respondent applied for and was allotted shares in the company. The company went into voluntary liquidation, and respondent brought this action against the directors (the appellants Shepheard and Clayton, and against Speak, the chairman) to recover damages for the non-disclosure in the prospectus, on the faith of which he had taken shares, of the contract made by the letters of the 21st of September and the 1st of October, and the resolution of the 10th of October; and it was held by Buckley, J., and by the Court of Appeal, that the contracts should have been disclosed under section 38 of the Companies Act, 1867.

Shepheard appealed from these decisions.

Haldane, K.C., and *Cassel*, for the appellant.—The contracts relied on were not legally binding and were not material. As to the words "knowingly issue," *Twycross* v. *Grant*, 25 W. R. 586, 2 C. P. D. 469, was referred to. Lord Westbury, in *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149, restricted the maxim *ignorantia juris neminem excusat* to the general law. It cannot be considered applicable to the construction of a contract. It was a mistake of fact. The appellant did not know it was a contract: *Earl Beauchamp* v. *Winn*, 22 W. R. 193, L. R. 6 H. L. 223, 21 W. R. Dig. 269; *Sullivan* v. *Mitcalfe*, 29 W. R. 181, 5 C. P. D. 455, at p. 460, Thesiger, L.J., as to the limitation to be placed on section 38.

Astbury, K.C., and *Roskill, K.C.*, for the respondent.—The contract of the 21st of September was only modified and was material, and the subsequent arrangement was also material. *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337, is not applicable.

Haldane, K.C., replied.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—In this case I take the

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

same view which both Buckley, J., and the Court of Appeal have taken as to what the evidence proves. And to my mind it is quite immaterial to go through the whole narrative of events, which have been carefully analyzed by Buckley, J.

It comes practically to this—that the appellants issued a prospectus with the knowledge in their minds that certain contracts had been entered into which were not referred to or stated in the prospectus. That the contract in question was immaterial I should have thought was hardly arguable; and, indeed, once the facts are understood, it is very difficult to argue "that he (Shepheard)" (in the language of Romer, L.J.) "did not appreciate the legal effect of the circumstances he knew, or did not understand that those circumstances caused such a liability to be cast upon the company as had to be set forth in the prospectus under section 38." It is hardly necessary to add that, if this is the true result of the evidence, no advice given him by any one can relieve him from the consequences of being a party to that prospectus.

I feel with Cozens-Hardy, L.J., that it is a painful duty to be obliged to treat that as fraudulent which in truth is not fraudulent; but section 38 of the Act of 1867 compels us to say that it shall be deemed to be fraudulent. The statute, rightly or wrongly, contemplated the possibility of there being no actual fraud, and intentionally enacted that, even if there was no fraud in the ordinary sense, yet, if the facts established the issue of a prospectus which did not mention a contract under the circumstances contemplated by that section, and which exist in this case, such prospectus should be deemed fraudulent.

While, therefore, I quite agree with every judge who has dealt with this case that it would be wrong to attribute fraud to Mr. Shepheard, yet I cannot doubt that his act has brought him within the section of the Act of Parliament, and therefore that this appeal must be dismissed.

Lord MACNAGHTEN.—I am of the same opinion. I should have been very glad if it had been possible to relieve the appellant from the consequences of what has occurred, but I see no reason to differ from the conclusion of the courts below. I must say I am very sorry for him.

Lord JAMES OF HEREFORD.—It is with great regret that I have also come to the conclusion that this appeal must be dismissed. There certainly seems to be two documents—a letter of the 21st of September, 1898, and a resolution of the 10th of October, 1898, which were material and important in the interests of the company and its shareholders. That the appellant knew of them is admitted; and, that being so, the Directors' Liability Act, 1890, renders the director issuing a prospectus which omits to refer to such contracts liable in damages. That the appellant took the best advice he could obtain upon the disclosure that should be made in the prospectus, and has acted in perfect good faith with the fullest intention and desire to omit nothing he ought to have disclosed, does not afford any defence against an action founded upon this statute.

I think also that, a *primâ facie* cause of action being established, the plaintiff in the action (the present respondent), must be afforded an opportunity by an inquiry of showing whether he has sustained any damage. I express no opinion whether the facts established at the hearing do or do not sustain a claim for damages.

Lord LINDLEY.—It is impossible not to sympathise with the appellant in this case, but I cannot say that the decision from which he has appealed is wrong in point of law. The Acts of Parliament which he has been held to have infringed are very stringent and are not very happily expressed. To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful; but the repugnance which is naturally felt against being compelled to do so will not justify this House in refusing to hold the appellant responsible for acts for which an Act of Parliament clearly declares he is to be held liable. He is said to have infringed two statutory enactments—namely, section 38 of the Companies Act, 1867, and section 3 of the Directors' Liability Act, 1890. The first of these has happily been repealed; but its repeal was too late to render the Act inapplicable to this case. The appellant is alleged to have infringed these enactments by not noticing in a prospectus certain letters and resolutions of the board which ought to have been referred to in it, and especially a letter of the 21st of September, 1898, and a resolution passed on the 10th of October of the same year. There can, in my opinion, be no doubt that these letters and resolution were extremely material, and ought not to have been suppressed. The appellant knew of their existence, but he honestly believed that it was unnecessary to refer to them. He took legal advice on the subject, but whether he was wrongly advised or whether he misunderstood the advice given is not clear. If the case had turned only on section 38 of the Act of 1867 it would have become necessary to consider the effect of the waiver clause inserted not only in the prospectus, but also in the applications for shares. But it is not necessary to decide this question, for the waiver clause has no application to the appellant's liability under the Directors' Liability Act, 1890.

The prospectus unfortunately stated a fact which was not true—namely, that the only contracts to which the bank was a party were the two which were mentioned in it. This untrue statement brings the case clearly and unmistakably within section 3, subsection 1, of the Directors' Liability Act, 1890. It is contended for the appellant that he is not liable under this Act because he had reasonable ground to believe, and did believe, that the statement in the prospectus was true. But he knew of the documents, and he knew they were not disclosed; he thought they were not such as required disclosure. This is a question of law, and I agree with Buckley, J., and the Court of Appeal that a mistake of this kind does not furnish a defence to an action founded on the statute in question. *Twycross* v. *Grant* is an authority in favour of this view, although it turned on the Act of 1867.

It was then contended that there was no evidence that the plaintiff, who took shares on the faith of the prospectus, had sustained any damage by reason of the untrue statement contained in it. The company failed about a year after it was formed, and the plaintiff has lost the money he paid for his shares. This appears to me to be sufficient *primâ facie* evidence of some damage sustained by the plaintiff by reason of the untrue statements in question. All that has been done by the court as yet has been to decide that the plaintiff has proved enough to entitle him to an inquiry as to the amount of damages which he has sustained by reason of such statements. This is quite in accordance with the usual practice in actions of this kind when brought in the Chancery Division, and it is extremely convenient. It saves the trouble and expense of going into evidence which will be useless if the plaintiff fails to establish any liability of the defendant to him.

The appeal ought to be dismissed with costs.

Order of Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Waterhouse & Co.*

Solicitors for the respondent, *Rowcliffes, Rawle, & Co.*, for *Cooper & Sons*, Manchester.

House of Lords.

From C. A. (England). July 1, 1904.

ILLINGWORTH v. HOULDSWORTH AND ANOTHER. (a.)

Company—Floating charge—Assignment of present and future book debts — Registration — Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

A mortgage of the present and future book debts of a trading company which contemplates the carrying on of the business in the ordinary way, and leaving such debts for the time being under the control of the directors, is a floating charge within the meaning of section 14 *of the Companies Act,* 1900, *and therefore void, if not registered, as against the creditors of the company.*

Decision of the Court of Appeal (sub. nom. Houldsworth *v.* Yorkshire Woolcombers Association, [1903] 2 *Ch.* 284) *affirmed.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.), affirming decision of Farwell, J.

In April, 1900, the Yorkshire Woolcombers Association (Limited) by deed specifically mortgaged all its freehold and leasehold properties to trustees to secure its debenture stock, and as beneficial owner charged "by way of floating security all its other property and assets, both present and future, and its undertaking, but not including capital for the time being uncalled." By clause 21 of this deed the association was given power to sell, specifically mortgage, or deal with the property by way of floating security, until the trusts to sell, &c., should be exerciseable.

The association having to give security to its directors who had guaranteed large amounts due to the bankers of the association, by a deed of mortgage dated October, 1902, after reciting that the association would require advances, and that the guarantors had requested the association to discharge them from liability, but had agreed not to take any immediate steps to obtain their discharge on having the indemnity and specific security thereinafter appearing, the association thereby covenanted to indemnify the guarantors, and thereby assigned to a trustee (the appellant) by way of mortgage all the book and other debts now owing, or which might at any time during the continuance of the security become due and owing to the association, and the full benefit of all the securities for the present and future book and other debts, in trust for the guarantors The mortgage also provided that the trustee should at any time, if required by the guarantors, give notice of this assignment to the debtors of the association, but that it should not be incumbent on the trustee to give notice unless he thought fit; there were also provisions that the trustee might at any time give notice, appoint a receiver, and exercise the statutory power of sale, but meantime he was not to be answerable for allowing the association to receive the book debts.

In November, 1902, the appellant appointed a receiver of the book and other debts, and notice was given to the debtors of the association of the mortgage and appointment.

A receiver was subsequently appointed in a debenture-holders' action brought by the respondent and the trustees under the deed of 1900, and in that action the appellant applied for liberty to collect the book debts.

Farwell, J., refused the motion, and the Court of Appeal upheld this decision.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Neville, K.C., and *E. P. Hewitt*, for the appellant.

Upjohn, K.C., and *A. H. Montgomery*, for the respondents, were not heard.

Tailby v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 253; *Government Stock and Other Securities Investment Co.* v. *Manila Railway Co.*, 45 W. R. 353, [1897] A. C. 81, were referred to.

Earl of HALSBURY, L.C.—It does not appear to me that this case is susceptible of much discussion, nor do I think it necessary to give an abstract definition of what a floating security is; it is enough to say that this instrument is one, and I think it is one for many reasons. In the first place you have that which in a sense I suppose must be an element in the definition of a floating security, that it is something which is to float, not to be put into immediate operation, but such that the company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by payment to the company, and that other book debts should come in and take the place of those that had disappeared. That seems to me to be an essential characteristic of what is properly called a floating security. The recitals, I agree with Cozens-Hardy, L.J., are not without their importance. They show an intention on the part of both parties that the business of the company shall continue to be carried on in the ordinary way—that the book debts shall be at the command of, for the purpose of being used by, the company. Of course, if there was an absolute assignment of them which fixed the property in them, the company would have no right to touch them at all. The minute after the execution of such an assignment they would have no more interest in them; whereas, as a matter of fact, it seems to me that the whole purport of the instrument is to enable the company to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what is meant by a floating security. It appears to me, notwithstanding the argument we have heard, that it is impossible to doubt that the bargain between the parties which is evidenced by this instrument is one which could only be carried out at all by its being a floating security such as I have indicated, and which must comprehend those incidents.

I am not able to deduce more from the instrument itself than the Court of Appeal have done, and I entirely agree with the judgment pronounced by them, and it appears to me that this appeal ought to be dismissed.

Lord MACNAGHTEN.—I am of the same opinion. I think the judgment of Farwell, J., affirmed by the Court of Appeal, is perfectly correct. With regard to the criticism which Vaughan Williams, L.J., passed, not I think unkindly, on some words of mine in the *Manila case*, I only wish to observe that what I said was only intended as a description, not as a definition, of a floating security. I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

I agree that this is a clear case, and that the appeal should be dismissed with costs.

Lord JAMES.—I concur.

Lord LINDLEY.—So do I.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors, *Leslie Hardy*, for *Frank Taylor*, Bradford; *George Trenam*, for *Addleshaw, Warburton, & Co.*, Manchester.

From C.A. (England). May 17, 1904.

MIDLAND RAILWAY CO. *v.* SHARPE. (*a.*)

Master and servant—Employers' liability—Accident—Compensation—"Earnings"—Lodging allowance—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *First Schedule, clause* 1 (a) (i).

A goods guard, in the employment of a railway company, received in addition to his ordinary wages a certain sum per night for lodging allowance when he was obliged to sleep away from home on the company's business. The object of the allowance was to cover the guard's out-of-pocket expenses, and its amount about equal to the reasonable cost of board and lodging. No inquiry was ever made as to the actual expenses incurred by the guard, or whether he spent the amount or any part thereof.

Held, that the allowance must be taken as part of his "earnings" within the meaning of Schedule I., par. 1 (a) (i), *of the Workmen's Compensation Act*, 1897.

Decision of the Court of Appeal (51 *W. R.* 481, [1903] 2 *K. B.* 26) *affirmed.*

Appeal from a judgment of the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.), affirming a decision given by the county court judge.

The applicant for compensation, the present respondent, was the widow and legal personal representative of Sharpe, who was at the time of his death a goods guard in the employment of the appellants. On the 9th of September, 1902, when he was preparing to couple waggons on to the train of which he had charge at Chellaston East Junction, he was run over by a passing train and killed.

At the hearing of the arbitration the liability of the appellants to pay compensation to the extent of £236 9s. 10d. was admitted, and upon the evidence before him the learned judge found as a fact that the earnings of the deceased for the three years preceding his death amounted to £259 11s. 10d. This amount was made up of the £236 9s. 10d. and of the further sum of £23 2s. admitted by the appellants at the hearing to have been paid to the deceased during the same period, as lodging allowances.

The terms on which these allowances were made are given in Lord Davey's judgment.

The county court judge and the Court of Appeal held that the lodging allowance must be taken as part of the guard's earnings.

Cripps, K.C., and *Hugo Young, K.C.* (*J. B. Crawford* with them), for the appellants.

S. T. Evans, K.C., and *Clement Edwards*, for the respondent, were not heard.

Lord DAVEY.—The appeal in this case is from a judgment of the Court of Appeal, which affirmed a judgment by his Honour Judge Lindley. We have therefore a concurrence of judicial opinion, and the appellants ask us to differ from what has been held by the courts below. The question before your lordships is a short and simple one, and it is this: By the Workmen's Compensation Act, 1897, "if a death results from injury (which is the present case) the amount of the compensation under this Act shall be, if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury." The question really is, what were the deceased man's "earnings" at the time of his death? He was in the employment of the Midland Railway Co. as a goods guards, and a person in that kind of employment has sometimes to sleep away from his ordinary residence or to take his meals away from his home. Accordingly an arrangement is made by the Midland Railway Co. for the remuneration of their guards having regard to that fact. They have a scale by which the wages are of a certain amount, varying with the time during which the guards have been in the company's service. Sixty hours constitute a week's work, and then there is a heading called "lodging allowance," and under that heading we find these allowances: "When men are required to lodge away from home they are allowed one shilling per night in the provinces, and one shilling and sixpence in London if the company's lodging house is used. Three shillings in London and two shillings elsewhere for private lodgings. In the exceptionally long periods of rest for the company's convenience, where men have to lodge for over fifteen hours, an extra shilling is allowed, and two shillings where over twenty hours' rest has to be taken—except in London, where the extra allowances are one shilling and one shilling and sixpence respectively. This extra allowance is not given unless the time occupied on the outward and return journeys together equals twenty hours."

The question is, whether the allowances which were thus made for the purpose which is pointed out in the rules I have read, form an element in arriving at the amount of the earnings of the deceased guard, or, in other words, whether his earnings are to be merely the fixed wage which he received, without taking into account those extra allowances which were made to him. I ought to add this—that I think the county court judge showed that those allowances are carefully adjusted and arrived at, so that not much profit is to be made out of them: but it is, of course, perfectly conceivable that if a man had, for instance, a relative or a friend living in one of the places away from home where he had to pass the night, he might very easily make a profit out of the allowance. The guards are not bound to account to the company for the allowance, and whether their annual expenditure is less or more their allowance remains exactly the same. Now, what are the man's "earnings"? The first answer one would give would be, what he earns; but what does he earn? It appears to me that he earns whatever is the sum which is the fruit of his labour—whatever he receives by way of remuneration for the services he gives, or, as my noble and learned friend Lord Macnaghten appears to have answered the same question in the case of *Abram Coal Co.* v. *Southern*, [1903] A. C. 306, 51 W. R. Dig. 102, a man's "earnings" are the full sum for which the man is engaged to work. Now does it make any difference that, from the conditions of the employment, part of the remuneration that he receives without accounting for the use of it to the company is in consideration of peculiar conditions affecting his employment? I think not. For instance, if wages were three shillings a day, and the company, instead of making a time allowance, gave a fixed addition to the wages, so that,

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

instead of the wages being twenty-one shillings a week the company said, We will give twenty-four shillings and no time allowances. I think nobody could doubt that in that case the earnings would be twenty-four shillings a week, and none the less so because the conditions of the employment were such that the workman had to incur some expenses in order to enable him to perform the services for which he was to be remunerated.

It appears to me that the converse case which has been before your lordships in the case of the *Abram Coal Co.* v *Southern*, and before the Court of Appeal in *Houghton* v. *Sutton Heath Colliery Co.*, 49 W. R. 196, [1901] 1 K. B. 93, is very illustrative. In that case, like the present, the workman had to incur certain expenses, of which I will take lamp-oil as one, for the purpose of his stipulated remuneration. The company, his employers, were willing to supply him with lamp-oil, making a deduction from his wages in respect of it. If the defendants were right in their contention that one must look, not at the wages, but at the amount of profit which the man makes out of his wages, as the test of the amount of compensation under this Act, one would have thought that those deductions, being deductions from his wages for the purpose of enabling him to earn his wages, ought not to be taken into account as against the company for the purpose of ascertaining that compensation. But the contrary was the decision. It was held that what must be looked at was the actual amount of the man's remuneration for his services, and that the expense he had to incur for the purpose of putting himself into a condition to earn that remuneration could not be taken into account.

I think the only difficulty and the apparent *differentia* of this case is the fact that the company, instead of making a fixed addition to the wages to cover those casual and incidental expenses to which guards may be put, give an allowance varying according to the time during which the man is obliged to be away from home at rest; but whether a man's wages have a fluctuating character based upon the time not merely during which he is actually employed, but including also the time during which he is at rest, as is the fact in this case, does not seem to me to make the slightest difference in principle. If the appellants are right, one would in every case have to analyze the remuneration by way of wages or salary which has been paid to an injured or deceased employee, and to ascertain the conditions of his labour and what expenses he was put to in order to earn that remuneration. It appears to me that it would be impossible to analyze that in every case. I think that that cannot have been within the contemplation of the Legislature in framing the Act; and I think that you must take, for the purpose of assessing the compensation, the actual remuneration for his services which was received by the workman quite irrespective of the question of what expenses he was put to for the purpose of earning that remuneration. I therefore move your lordships that the present appeal be dismissed with costs.

LORD JAMES OF HEREFORD.—I entertain no doubt in this case, being clearly of opinion that the judgment of the Court of Appeal is correct.

The question before your lordships is the construction to be put upon the word "earnings" in the schedule of the Workmen's Compensation Act, 1897. The meaning of the word appears to me to be the amount received by the workman on account of, and in return for, his services. In this case we must ask, What did the allowances received by the deceased workman represent? They appear to me to represent a return for the services which he rendered; and if we were to go beyond the question of what was the amount he received in return for those services, your lordships would be making the mistake of inquiring as to profits instead of inquiring as to receipts.

In the argument at the bar the illustration was put of a case where a man received a certain sum of money for a specific object, to which he was bound to apply it, and if he did not so apply it he would have been guilty of a breach of trust, and would probably have committed the crime of embezzlement; but that is not the case. The deceased workman and the other workmen are paid a certain sum of money weekly—a smaller sum if they remain within the neighbourhood of their own homes, a larger sum if they are absent from those homes. In both cases the sums paid are wages; in both cases the workman is entitled to make as much profit as he can out of the sum so received; to be as abstemious as he will; to receive, as it has been said, hospitality, and to obtain the advantages which a man who chooses not to afford himself comforts beyond the necessaries of life obtains over his fellow-workman who is more luxurious in his habits. I cannot understand how it can be said that that is not an "earning." One could give many instances. For example, if a workman were told, you will receive so much wages if you are in uniform, and you will have to find your own uniform, then it is a gross sum he receives. The application of a certain part of it to a particular output—namely, the payment for the uniform—does not render the money he receives any the less "earnings." So in the same way here. If the man is told by the railway company, you will receive if you are away from home so much,, and having received it do what you will with it, we, the railway company, do not ask you to account for it,—it seems to me to be quite clear that the sum so received is an "earning," although no doubt at the time when the sum was fixed the object of fixing the higher rate was to meet a corresponding expense. That is not the question: the question is "earnings" as against "profits"; and, looking at the application of that word in this case, it seems to me, as I have said, quite clear that the judgment of the Court of Appeal is correct.

LORD ROBERTSON.—The contract with this guard is that, *plus* what is called his wages, he is entitled to so much for each night he is away from home, and no inquiry is made whether that sum has been spent on board and lodging or spent at all. This being so, it seems to me that, not the less because the purpose of these extra payments was to meet the cost of board and lodging has this man a right to the money, and not the less because they bear the name "allowances" does the guard earn them each time he, being on the service of his employers, has to spend the night away from home; and if he earns them they are earnings.

Appeal dismissed.

Solicitors for the appellants, *Beale & Co.*

Solicitor for the respondent, *Arthur Toovey*, for *Flint & Son*, Derby.

From C.A. (England). } May 13, 1904.

ATTORNEY-GENERAL *v.* LORD MONTAGU. (*a.*)

Inland revenue—Estate duty—Settled property—Mortgage by tenant for life and remainderman—Indemnity to life tenant—Deduction of mortgage debt in estimating

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

value—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-section* 1 (b); *and s.* 7, *sub-section* 7 (b).

The tenant for life and remaindermen of a settled estate mortgaged the estate in fee as security for an advance to the remaindermen, who alone covenanted with the mortgagee to repay the advance and interest thereon. By an indenture of even date the remaindermen covenanted to indemnify the tenant for life against any liability or loss in respect of the mortgage debt, and out of another estate belonging to them created a rent-charge in favour of the tenant for life for the performance of their covenant. The tenant for life was in fact kept indemnified.

Held, that the whole property, without deduction of the mortgage debt, was liable to estate duty under the Finance Act, 1894, *upon the death of the tenant for life.*

Decision of the Court of Appeal (51 *W. R.* 326, [1903] 1 *K. B.* 483) *reversed, and that of* Phillimore, J. (50 *W. R.* 270, [1902] 1 *K. B.* 429), *restored.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.), reversing a decision of Phillimore, J.

By the will of the Duke of Buccleuch and Queensberry, the testator's Ditton estate, in the counties of Bucks and Middlesex, was settled to the use of the testator's wife for life without impeachment of waste, and from and after her decease to the use of the testator's second son, for life without impeachment of waste, with remainder to the use of his sons successively in tail male, with remainders over.

The duke died on the 16th of April, 1884.

By an indenture dated the 28th of May, 1888, the Ditton estate was disentailed, with the consent of the duchess as protector of the settlement, and a joint power of appointment over it given to Lord Montagu and his eldest son, John Walter Edward Douglas Scott Montagu. By an indenture dated the 29th of May, 1888, and made between the duchess dowager of the first part, the respondent Lord Montagu of the second part, John Edward Walter Douglas Scott Montagu of the third part, and certain mortgagees of the fourth part, Lord Montagu and his son, in consideration of £27,000 lent to them by the mortgagees, jointly and severally covenanted with the mortgagees to repay them the said sum with interest; and the duchess dowager, as tenant for life in possession under the will of the late duke, granted, and the respondent Lord Montagu and John Walter Edward Douglas Scott Montagu, in exercise of the joint power of appointment given to them over the fee simple in remainder expectant on the decease of the duchess dowager by the indenture of the 28th of May, 1888, appointed, the Ditton estate to the use of the mortgagees in fee simple, subject to a proviso for redemption by Lord Montagu and his son.

By another indenture dated the 29th of May, 1888, and made between Lord Montagu of the first part, John Walter Edward Douglas Scott Montagu of the second part, the duchess dowager of the third part, and certain trustees of the fourth part, an estate called the Clitheroe estate, in the county of Lancaster, was charged with a yearly rent-charge of £1,500 in favour of the duchess dowager to keep down the interest on the mortgage debt of £27,000, or on so much thereof as should from time to time be owing on the mortgage, to the intent that the life interest of the duchess dowager in the Ditton estate might be wholly exonerated therefrom

The dowager duchess died on the 28th of March, 1895.

The mortgage for £27,000 was created wholly for the benefit of Lord Montagu and his son, and the dowager duchess and the Ditton estate were in fact kept wholly indemnified by them, or one of them, against the mortgage and all claims in respect thereof. The interest on the mortgage debt was throughout paid by Lord Montagu.

The Crown claimed that upon the death of the dowager duchess, estate duty became payable under the Finance Act, 1894, on the whole of the Ditton estate free from the mortgage debt.

Phillimore, J., so decided, but the Court of Appeal reversed his decision, and held that duty was only payable on the equity of redemption.

Sir R. B. Finlay, A.G., Sir E. Carson, S.G. (*Vaughan Hawkins* with them), for the Crown.—The duty is payable on the whole estate. The dowager duchess in fact enjoyed the whole life interest. The case is different from *Cowley* (*Earl*) v. *Inland Revenue Commissioners*, 47 W. R. 525, [1899] A. C. 198, where it was only the equity of redemption which was settled. Here the settled property was the whole property. You have a right to look and see what was the effect on the life estate, and therefore at the indemnity deed. How is the value to be ascertained without looking at the real transaction. A purchaser of the life estate would have been entitled to the whole.

Danckwerts, K.C., and *Austen-Cartmell*, for the respondents.—The only thing that has been kept in the settlement is the equity of redemption. The extraneous arrangements should not affect the question.

Sir R. B. Finlay, A.G., replied.

Earl of HALSBURY, L.C.—In this case, with the greatest respect for the learned judges in the Court of Appeal, I think they have allowed validity to be given to what is mere form, and not substance, and with that I cannot concur. If one looks at the whole arrangement, it seems to me that the substance of the matter was this—not that there should be a mere contractual relation between the remainderman and this lady who was entitled to this property, but that the property should remain hers as between those two persons, and that she should never have one farthing less than she was entitled to being secured by the property to which she was entitled; and all the analogies which Mr. Danckwerts has endeavoured to put before your lordships seem to me to be beside the question.

It may be that the same deed may have a legal operation as between one set of persons, and yet, as between other parties to it, the real substance of the transaction may be such that it cannot be treated as if it had its full legal operation. That I think is the case here. As between the duchess and Lord Montagu there never was the relation which is insisted upon by Mr. Danckwerts. It seems to me that Lord Montagu, wanting to borrow money, gets the security of this lady's estate, which enabled him to borrow the money; but the parties to the instrument which they executed point out—and I think point out very distinctly—that the effect of it is to be, as between those two persons, such that the duchess is to be entitled for the rest of her life to retain and to keep that which she then had—namely, a right to the property and to the results of the property. And she did so. She paid nothing in the way of interest on the mortgage, and she received the rents and profits. As between those two persons, looking at the instrument, I think that it affected nothing, although it afforded security to the persons who lent the money. But the notion of its not being liable to estate duty when that transaction comes to an end, and when the whole of what she had goes back to Lord Montagu, seems to me a very forced construction of these legal instruments, which are effective for the object that they were designed to effect, but which never were intended to pass the estate itself out of the dowager duchess.

Under those circumstances, with great respect to the Court of Appeal, I am of opinion that the true question was that which was put by my brother Phillimore. He said that what she had to give up, what she relinquished by her death, was the thing that she enjoyed during her lifetime.

That being so, it seems to me that the Crown are perfectly right in the contention which they have set up. I therefore move your lordships that the judgment be reversed.

Lord DAVEY.—I am of the same opinion. I adhere to everything which I am reported to have said in *Lord Cowley's case*, and in particular to the passage from my judgment on which the Court of Appeal found in the decision which they have given. If this were a simple case of mortgage by a tenant for life and a remainderman, or by successive tenants for life and the ultimate remainderman, I think that the property would be taken out of the settlement as from the date of the mortgage, and on the death of the first tenant for life the estate duty could be claimed only on the equity of redemption. But there appear to me to be circumstances in the present case which take it out of that rule. I am not prepared to say—and it is not necessary to express an opinion—whether, if there had been a mere indemnity, such, indeed, as the law would imply from the fact of the mortgage being for the benefit of the remainderman, if there were a mere personal covenant of indemnity to the duchess (to take this concrete case) by Lord Montagu and his son, I am not prepared to say whether that would be sufficient or not; I do not say that it would not be, and I do not say that it would. But in this case it appears to me that we have far more than that. We have what, in my opinion, amounts to an express contract by Lord Montagu and Mr. Montagu with the duchess that under no circumstances, although she had at their request joined in the mortgage in order to effect a mortgage of the fee, should she be called upon to pay anything out of the income of her Ditton property; and provision was made by which, in case any such claim was made upon her, she might have recourse to another fund. Another fund was provided out of which the interest should be obtained. The arrangement between the parties was, in fact and in truth, that the duchess should continue to enjoy the whole income of the Ditton estate discharged, as between them, from any liability by reason of her having joined in the mortgage.

What, then, was the property which passed on the death of the duchess? First, I will take it under section 1. It is admitted that the equity of redemption at any rate passed—that is to say, the property subject to the mortgage. But did the residue of the property pass upon the death of the duchess? Now, if the true transaction between the parties was that as between themselves the mortgage should not effectually attach to the estate until the duchess's death, then I think it may fairly be said that the whole property passed under section 1. But supposing that not to be so—and I quite admit there is a little technical difficulty about it—I am quite satisfied that the property passed under the combined operation of section 1 and section 2. As regards section 1, the equity of redemption—that is, the property subject to the incumbrance—passed undoubtedly under section 1; but, as regards section 2, it appears to me that so much of the income of the Ditton estate as represented, or was equal to, the interest on the mortgage comes exactly within section 2, sub-section 1, heading (*b*). If I am right in the views which I have expressed as to the effect of the arrangements between the parties, the duchess had a beneficial interest, notwithstanding the mortgage, in the whole of the income, including £1,080 a year, which was equivalent to the interest on the mortgage. She had, as between her and Lord Montagu, an undoubted beneficial interest to receive and to retain without incumbrance or charge upon it that portion of the income.

Section 2, sub-section 1, heading (*b*), is this: "Property in which the deceased or any other person had an interest ceasing on the death of the deceased." Now I think that portion of the rents which was equal to £1,080 a year was property in which the duchess had an undoubted beneficial interest ceasing on her death. Then the sub-section says that the property is to be deemed to pass—to what extent?—"to the extent to which a benefit accrues or arises by the cesser of such interest." Lord Montagu thereupon acquired the benefit of receiving that sum of £1,080 a year for the purposes of discharging his mortgage interest. He was under liability for the interest on the mortgage during the duchess's lifetime, but he had no fund out of which to pay it. He now receives a fund out of which he will be enabled to discharge the interest on his mortgage. In my opinion, that is "a benefit which accrues or arises" to him. The property represented by that £1,080 a year, if it did not pass under section 1, is to be deemed to pass under section 2.

To complete the case, I may as well point out that to determine the value which is to be deemed to pass section 7, sub-section 7 (*b*), provides that, "if the interest extended to less than the whole income of the property," the value of the benefit accruing shall be "the principal value of an addition to the property equal to the income to which the interest extended." So that, *quacunque viâ*, I am of opinion that, whatever technical difficulties there may be and whatever was the form of the conveyancing which the parties assumed for the purpose of carrying out the transaction, the Crown is entitled to say that the whole value of the Ditton estate either passed, or should be deemed to have passed, under either section 1 or section 2.

I confess, if there were any difficulty in this view—which I think there is not—I should have thought it was quite open to your lordships to say that if the £1,080 a year is to be deemed a charge upon the Clitheroe annuity, then the case is as broad as it is long, because if Lord Montagu is relieved from the payment of estate duty on the ground that the estate to the extent of the mortgage did not pass by the duchess's death, he would still remain liable to pay an equivalent amount of duty in respect of the cesser of the annuity he created out of the Clitheroe money for the duchess's indemnity.

I am therefore of opinion that the appeal should succeed, and that the judgment below should be reversed.

Lord JAMES OF HEREFORD.—I concur in the results which have been arrived at by my noble and learned friends who have addressed your lordships' House.

No doubt there was in form a mortgage—a mortgage that was good as between the mortgagor and the mortgagee—and I accept Mr. Danckwerts' submission that there was only besides that mortgage a contractual obligation; but I differ from his submission that that contractual obligation cannot affect the estate passing on the death of the tenant for life. It seems to me that the contractual obligation did affect the estate, because it relieved the tenant for life from bearing any of the burden of the mortgage. The result is that in substance there was, as between the tenant for life and the remainderman, no mortgage, and that by the death of the Dowager Duchess

of Buccleuch, the tenant for life, Lord Montagu, obtained the estate without the mortgage affecting him, or at all events obtained the benefit of it to a greater degree than during her life. He had then to bear the burden of the mortgage. By the death of the tenant for life he has become seised of the estate and receives the benefit of it, which he did not receive before. Therefore I concur in thinking that the judgment appealed from ought to be reversed.

Lord ROBERTSON.—I entirely concur.

Order of the Court of Appeal reversed and decree of Phillimore, J., restored, with costs here and below; cause remitted to the King's Bench Division.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitors for the respondent, *Nicholl, Manisty, & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Aug. 6, 1904.

LEADBITTER *v.* MAYOR, &c., OF ST. MARYLEBONE. (*a.*)

Metropolis — Building — Party structure — Building owner's notice—Adjoining owner's notice of requisitions—Difference in respect of execution of works—Arbitration — Jurisdiction of arbitrators — London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 88 (7), 89, 90, 91.

Where the owner of a house in London has given an adjoining owner a building owner's notice, under section 90 *of the London Building Act,* 1894, *of his intention to pull down a party structure and rebuild it under section* 88, *sub-section* 7, *and the adjoining owner has thereupon given the building owner a notice under section* 89 *requiring him to execute certain specified works, and a difference with respect to the execution of such works is referred to arbitration under section* 91, *the jurisdiction of the arbitrators is limited to settling differences with regard to the execution of the works to which the notice relates. An award providing that the adjoining owner shall be entitled at some future time to build on the party structure is to that extent* ultrà vires. *If the adjoining owner at some future time wishes to build on the party structure, he must, notwithstanding any such award, give a fresh building owner's notice.*

Appeal from an order of Phillimore, J., granting an interim injunction restraining the defendants from raising or building on a party-wall between premises belonging to the plaintiffs and premises belonging to the defendants, without serving on the plaintiffs a building owner's notice in accordance with the London Building Act, 1894.

The plaintiffs were the freeholders of a house known as No. 33, John-street, Marylebone; the defendants were the freeholders of the adjoining house, which was known as No. 34, John-street. In April, 1902, one Ecclestone, in pursuance a building agreement entered into between the plaintiffs and himself, pulled down the building which then stood on the site of No. 33 and proceeded to erect a new building. By the terms of the agreement, when the building reached a certain stage, the plaintiffs were to grant Ecclestone a long lease of the premises. The building operations involved the necessity of dealing with the party-wall between No. 33 and No. 34, and Ecclestone proposed to pull down the party-wall and rebuild it of greater strength, as he had the right to do under section 88, sub-section 7, of the London Building Act. He accordingly served a building owner's notice, as required by section 90 of the London Building Act, on the defendants, stating his intention of so doing. The defendants, who were then contemplating the erection of a block of a workmen's dwellings on the site of No. 34, served on Ecclestone a notice, under section 89 of the Act, of certain requisitions to be complied with by him in the rebuilding of the party-wall. A difference having arisen between Ecclestone and the defendants with regard to these requisitions, they each appointed a surveyor, and the two surveyors appointed a third surveyor, for the purpose of settling the matter in dispute in pursuance of section 91 of the Act. The surveyors made an award by which it was provided, *inter alia*, that the party-wall should be of certain specified dimensions, involving a greater thickness than would be necessary in ordinary circumstances, and that the extra thickness of the wall should be on the defendants' land, and it was further provided that the defendants should be entitled to raise the wall at any time as they thought fit. Ecclestone proceeded with the building operations following the requirements of the award, and in September, 1902, he obtained a lease of No. 33 from the plaintiffs in accordance with the building agreement. He subsequently surrendered the lease to the plaintiffs.

The defendants having proposed to increase the height of the party-wall in the carrying out of their scheme for erecting workmen's dwellings, the plaintiffs brought this action for an injunction to restrain them from raising or building on the party-wall without first serving a building owner's notice on the plaintiffs.

By section 5, sub-section 31, of the London Building Act, 1894, "The expression 'building owner' means such one of the owners of adjoining land as is desirous of building, or such one of the owners of buildings, storeys, or rooms separated by a party-wall or party structure as does, or is desirous to do, a work affecting that party-wall or party structure."

By sub-section 32, "The expression 'adjoining owner' means the owner or one of the owners, and 'adjoining occupier' means the occupier or one of the occupiers of land, buildings, storeys, or rooms adjoining those of the building owner."

By section 87, "Where lands of different owners adjoin and are unbuilt on at the line of junction, and either owner is about to build on any part of the line of junction, the following provisions shall have effect: (1) If the building owner desire to build a party-wall on the line of junction, he may serve notice thereof on the adjoining owner describing the intended wall."

By section 88, "The building owner shall have the following rights in relation to party structures (that is to say) . . . (7) a right to pull down any party structure which is of insufficient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose, upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof."

By section 89, "(1) Where a building owner proposes to exercise any of the foregoing rights with respect to party structures, the adjoining owner may by notice require the building owner to build on any such party structure such chimney copings jambs or breasts or flues or such piers or recesses

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

or any other like works as may fairly be required for the convenience of such adjoining owner and may be specified in the notice, and it shall be the duty of the building owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building owner or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right. (2) Any difference that arises between a building owner and adjoining owner in respect of the execution of any such works shall be determined in manner in which differences between owners and adjoining owners are hereinafter directed to be determined."

By section 90, "A building owner shall not . . . exercise any of his rights under this Act . . . in relation to any party-wall or party structure other than a party fence wall unless at least two months before doing so he has served on the adjoining owner a party-wall or party structure notice stating the nature and particulars of the proposed work and the time at which the work is proposed to be commenced."

By section 91, "(1) In all cases not specially provided for by this Act, where a difference arises between a building owner and adjoining owner in respect of any matter arising with reference to any work to which any notice given under this part of this Act relates, unless both parties concur in the appointment of one surveyor they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor or three surveyors or any two of them shall settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner, with power by his or their award to determine the right to do and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference; but any time so appointed for doing any work shall not, unless otherwise agreed, commence until after the expiration of the period by this part of this Act prescribed for the notice in the particular case."

The plaintiffs having obtained an interim injunction, the defendants appealed, and it was agreed that the appeal should be treated as the trial of the action.

English Harrison, K.C., and *G. A. Scott*, for the defendants.—It is not necessary for the defendants to serve a fresh building owner's notice. The powers of a building owner who desires to deal with a party structure are laid down in section 88 of the London Building Act, 1894. Ecclestone proposed to exercise the powers given by sub-section 7 of that section, and, under section 90, he served a building owner's notice on the defendants as adjoining owners. Section 89 gives power to an adjoining owner to serve notice of requisitions with regard to the proposed work. The defendants served such a notice, and a dispute which arose thereon was settled by arbitration in accordance with section 91. The award made in that arbitration is binding between the parties, and by it the defendants are entitled to raise the party-wall at any time as they think fit. The defendants now desire to raise the party-wall. That does not turn them into building owners within the meaning of the Act. The award is not *ultrà vires*, for section 91 empowers the arbitrators "to determine the right to do, and the time and manner of doing, any work, and generally any other matter arising out of or incidental to such difference."

They referred to *In re Stone and Hastie*, 52 W. R. 130, [1903] 2 K. B. 463.

J. Eldon Bankes, K.C., and *A. H. Poyser*, for the plaintiffs.—The award is *ultrà vires*. *In re Stone and Hastie* shows that the arbitrators have no jurisdiction to decide anything beyond the dispute which is submitted to them by virtue of the statute.

COLLINS, M.R.—The legislation dealing with the rights of building owners and adjoining owners in London is now settled by a code which is contained in sections 87-101 of the London Building Act, 1894. We considered that code with some minuteness in the recent case of *In re Stone and Hastie*, and it is not necessary to do so again. In the present case a dispute under the Act has arisen in these circumstances: The defendants, the corporation of Marylebone, desire to erect a substantial building adjoining a house which was built a year or two ago by Mr. Ecclestone, who was at that time tenant to the plaintiffs under a building agreement. When Mr. Ecclestone was about to build that house the corporation took steps to protect their rights as adjoining owners. He had given them a building owner's notice of his intention to proceed under section 88 of the London Building Act, and they gave him a notice under section 89. This latter notice imposed on him an obligation to comply with the requisitions contained in it. A dispute having arisen with regard to the execution of the required works, the matter was referred to arbitration in accordance with the Act. The duty of the arbitrators was to consider how far the adjoining owners, the corporation, were right in the demands which they made. They had to adjust the difference which had arisen between the building owner and the adjoining owners with regard to the work to which the notice related, but in making their award they purported to deal with something more. They not only awarded how far they thought the adjoining owners were entitled to the special securities which they demanded, but they also purported to deal with the adjoining owners' future relations to the party-wall. The award provided that they should be entitled at any time to increase the height of the wall. The time has now come when the corporation desire to raise the height of the party-wall. The plaintiffs object that the corporation have no right to build on the top of the wall without following the procedure provided by the Act, and they have brought this action for an injunction. The corporation say in answer that they have power under the award to build as they propose to do, and that they ought not to be restrained from doing so. Phillimore, J., has granted the plaintiffs an interim injunction, holding that the award was a statutory award, and that it did not confer on the adjoining owners the right of building on the party-wall after it had once been built. The question resolves itself into this: What is the law when an adjoining owner proposes to build? In such circumstances an adjoining owner seems to become a building owner. When the corporation in this case proposed to build on the top of the party-wall they wanted to exercise the rights of building owners; and they came under the same obligation to the plaintiffs, their adjoining owners, as Ecclestone had previously come under to them, the corporation. The plaintiffs are therefore right in saying that they are entitled to notice before the corporation begin to build. The defendants rely on the language of section 91, "with power by his or their award to determine the right to do and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference," and argue that this confers on the arbitrators jurisdiction with regard to what the adjoining owner may be allowed to do hereafter without resorting to the machinery provided by the Act. But the section is expressly limited to differences in respect of matters arising with

reference to work to which the notice relates. The differences over which the arbitrators have jurisdiction must be taken to be defined by the notice. The section does not give a general jurisdiction to deal with differences. The words "any other matter arising out of or incidental to such differences" do not oust the jurisdiction of new arbitrators when the adjoining owner in his turn desires to build. In my opinion the section negatives the defendants' contention, and there has been in the award an excess of jurisdiction which does not bind the parties. The appeal will therefore be dismissed, and, the parties agreeing that the hearing of this appeal shall be treated as the trial of the action, there will be judgment for the plaintiffs for the injunction which they claim.

STIRLING and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiffs, *W. Stubbs.*

Solicitors for the defendants, *Mackrell, Maten, Godlee, & Quincey.*

From K. B. Div. (In Bkcy.) (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) July 29, 1904.

In re PONSFORD.
Ex parte PONSFORD. (*a.*)

Bankruptcy—Adjudication—Practice—Notice to debtor—Adjudication under Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 20, *sub-section* 1—*Bankruptcy Rules, rr.* 27, 28, 190-192a.

If a receiving order is made against a debtor, and the creditors pass a resolution that he be adjudged bankrupt, it is in the power of the court, under section 20, *sub-section* 1, *of the Bankruptcy Act,* 1883, *on the application of the official receiver, to make such an adjudication, although no notice has been given to the debtor that such an application is intended to be made. But, as a general rule, it is more convenient that notice should be given.*

This was an appeal by the debtor from a decision of a Divisional Court (Bigham and Darling, JJ.).

The facts were as follows:

In 1903 a petition in bankruptcy was presented against the debtor in the Newport (Mon.) County Court. At the hearing of the petition, although the debtor was absent on account of illness, the registrar made a receiving order against him. The debtor did not appeal from this order, but in November of the same year he submitted a scheme of arrangement with his creditors. This scheme was considered at an adjourned meeting of creditors on the 15th of December, at which the debtor was present. At the meeting the scheme proposed was rejected, and a resolution was passed for adjudicating the debtor a bankrupt. The official receiver immediately applied for an adjudication in bankruptcy which was made. The debtor had received no notice of the intention of the official receiver to apply for such an adjudication.

In January, 1904, he gave notice of appeal from this order, and on the 23rd of March the appeal was dismissed. He also applied that this adjudication should be annulled as being made without notice and during his absence. This application was dismissed by the registrar, and on appeal to the Divisional Court it was again dismissed, mainly because of the delay in making the application.

The debtor appealed, leave having been given by the Court of Appeal.

Muir Mackenzie and *S. G. Lushington,* for the debtor, cited *Dr. Bentley's case,* 1 Str. 557, 8 Mod. 148; *In re Lord Thurlow,* 43 W. R. 403, [1895] 1 Q. B. 724; section 20, sub-section 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which is as follows: "Where a receiving order is made against a debtor, then if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors, and shall vest in a trustee."

They also referred to the Bankruptcy Rules, 1886 to 1890, rr. 190-192a.

H. Reed, K.C., and *Corner,* for the trustee, were not called upon, but referred to *In re Pinfold,* 40 W. R. 223, [1892] 1 Q. B. 73.

VAUGHAN WILLIAMS, L.J.—After the delay which has taken place the application is hopeless, and the appeal must be dismissed. But as regards the practice under section 20 of the Bankruptcy Act, 1883, whether notice should or should not be given to the debtor of the intention to apply for an adjudication of bankruptcy against him, I wish to say I have no doubt that under that section the court has jurisdiction in a proper case to make an adjudication without any notice to the debtor. But although I feel no doubt as to the jurisdiction, I have equally no doubt that the practice—which has been adopted in the High Court since 1885 under the direction given by Cave, J.—of giving notice to the debtor in such cases is the most convenient practice to adopt. I agree with what counsel for the debtor said as to the effect of an adjudication of bankruptcy in altering the status of the debtor. Therefore, although I think the court has the jurisdiction under section 20 to make an adjudication without notice to the debtor, I think it is the most convenient practice that as a general rule notice should be given. I doubt whether the direction given by Cave, J., governs the practice of the county courts; but I think that generally speaking, unless there is some reason to the contrary, the most convenient practice is that which has been adopted in the High Court, and no doubt it will in future be adopted in the county courts. The Divisional Court decided the present case simply on the ground that the delay of three months was fatal to the bankrupt's application. I agree in that view.

ROMER and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *R. Carter; Taylor, Willcocks, & Co.,* for *Gardner & Herbert,* Newport, Monmouthshire.

From P. D. & Ad. Div. (Collins, M.R., and Stirling, L.J.) July 11, 1904

"THE CHEAPSIDE." (*a.*)

Practice—Admiralty—Jurisdiction—Salvage action—Counterclaim for breach of charter-party—Embarrassment—Ord. 19, *r.* 27—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 24, *sub-section* 3.

The Admiralty Division has jurisdiction to entertain a

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

claim in personam *for damages for breach of a charter-party.*

An action in rem *was brought in the Admiralty Division to recover remuneration for salvage services rendered by the plaintiffs' vessel to the defendants' vessel when the latter took the ground in crossing the bar of a river. The defendants, besides denying that any salvage services had been rendered, counterclaimed* in personam *against the plaintiffs, who were foreigners resident abroad, as charterers of their vessel, for damages for breach of charter-party in delay in loading the defendants' vessel, whereby she was too late in crossing the bar. The judge having refused to strike out the counterclaim,*

Held, that the judge of the Admiralty Division had jurisdiction to try the counterclaim, and that he had rightly exercised his discretion in refusing to strike it out.

Appeal from an order of Barnes, J., reversing an order of the registrar of the Admiralty Division.

The plaintiffs, who were the owners, masters, and crew of the steamship *Oscar Dickson*, brought an action *in rem* against the owners of the steamship *Cheapside* and her freight to recover remuneration for salvage services alleged to have been rendered to her in the River Petschora, in Northern Russia, when loaded with a cargo of wood for London. The owners of *The Oscar Dickson* were foreigners resident out of the jurisdiction.

The plaintiffs alleged in their statement of claim that while their vessel was piloting *The Cheapside* down the river, owing to the accumulation of ice many of the beacons which marked the fairway across the bar had been knocked down and covered with ice, thus rendering navigation difficult, and *The Cheapside* took the ground and *The Oscar Dickson* towed her off.

The defendants, in their defence, denied that any salvage services had been rendered, and they counterclaimed *in personam* against the owners of *The Oscar Dickson* as charterers of *The Cheapside* for this particular voyage for damages for breach of the charter-party in delaying to load the vessel, in consequence of which she was late in attempting to cross the bar.

The plaintiffs applied to strike out the counterclaim upon the grounds—(1) that the Admiralty Division had no jurisdiction to entertain such a claim; and (2) that, if there was jurisdiction, it would embarrass or delay the fair trial of the action, within ord. 19, r. 27, if the counterclaim were tried with the claim. The registrar was of opinion that the Admiralty Division had jurisdiction to try the counterclaim, but that it would embarrass or delay the fair trial of the action, and he accordingly struck it out.

Barnes, J., held that the Admiralty Division had jurisdiction to try the counterclaim, and that to try it in the same action with the claim would not embarrass or delay the fair trial of the action. He accordingly reversed the order of the registrar and allowed the counterclaim to stand.

The plaintiffs appealed.

Dawson Miller, for the plaintiffs.—The old Admiralty Court had no jurisdiction to entertain an action *in personam* by charterers against shipowners to recover damages for breach of a charter-party. That still applies. A counterclaim is only a cross-action, and therefore there is no jurisdiction to try the counterclaim. To do so would be to turn an action *in rem* into an action *in personam*. [He referred to *Griendthoven* v. *Hamlyn & Co.*, 8 Times L. R. 231; *The Bowesfield*, 5 Asp. Mar. Cas. N. S. 265.] Secondly, if there is jurisdiction, the counterclaim ought not to be tried in the same action. The claim would have to be tried with Trinity Masters, whereas the defendants would be entitled to have the counterclaim tried with a jury: see ord. 36, r. 6; *The Germanic*, 44 W. R. 394, [1896] P. 84. The defence to the salvage claim is delay in loading, which prevented the ship going down the river until the ice formed, and thus caused her to go aground. That is also the foundation of the claim for breach of charter-party. There might thus be two inconsistent decisions in one action upon the same facts. This would tend to embarrass or delay the fair trial of the action.

D. Stephens, for the defendants.—The judge of the Admiralty Division, being a judge of the High Court, has power to try the counterclaim: sections 16 and 24, sub-section 3, of the Judicature Act, 1873. Nor will the trial of the counterclaim embarrass or delay the fair trial of the action. The plaintiffs have no right to have the claim tried with nautical assessors. In salvage and collision cases the judge has a discretion to allow a jury. The difficulties of navigation which were the cause of the salvage services arose from the delay in loading the ship—that is, arose from a breach of the charter-party. The facts, therefore, are the same both on the claim and on the counterclaim. The only difficulty the learned judge felt was whether, as the plaintiffs, who were foreigners resident abroad, could not have been served with a writ or notice of a writ, they could be sued by way of counterclaim. That difficulty was removed by the case of *Griendthoven* v. *Hamlyn & Co.*

COLLINS, M.R.—This is an appeal from Barnes, J., refusing to strike out a counterclaim. The action is brought by the owners, master, and crew of the steamship *Oscar Dickson*, the owners being foreigners resident out of the jurisdiction. The defendants, the owners of *The Cheapside*, put in a defence to the claim, and also counterclaimed against the owners of *The Oscar Dickson*, as charterers, for damages for delay in loading the defendants' vessel. That cross-claim was a claim *in personam* and not *in rem*. The plaintiffs apply to have the counterclaim struck out, and they do so upon two grounds. In the first place they say that the Admiralty Division has no jurisdiction to entertain such a claim. But the judge of the Admiralty Division is a judge of the High Court, and as such he has all the jurisdiction of a judge of the High Court, and has therefore jurisdiction to try the counterclaim. Whether he will exercise that jurisdiction is a matter within his discretion, subject to an appeal to this court. This brings me to the second ground—namely, that to try the counterclaim will embarrass or delay the fair trial of the action. In the present case a judge of great experience has come to the conclusion that he would be enabled to do full justice if he tried the claim and counterclaim in the same action, seeing that the plaintiffs are foreigners resident out of the jurisdiction and that there would thus be a difficulty in serving them with a writ or notice of a writ in an action. The defendants desire to avail themselves, as they are entitled to do, of the fact that the plaintiffs have brought the action here, and the learned judge, founding himself upon the case of *Griendthoven* v. *Hamlyn & Co.*, and upon the reasoning so cogently expressed by Lord Coleridge in that case, came to the conclusion that he would be justified in exercising his discretion in allowing the counterclaim to be tried in the action. In the present case there is no such difficulty as there was in *The Germanic*, which was an action *in rem* for damages by collision, because in that case, if the plaintiffs had been allowed to add the pilot as a defendant and proceed against him *in personam*, the question of contributory negligence would have arisen and a different rule of damage would have to be applied as against the ship and as against the pilot, the Admiralty and common law standards being different.

There was also the complication of a jury in the case of the pilot and the ordinary method of trial in the Admiralty Division in the case of the ship. In the present case there is no such complication. There is no question of negligence or contributory negligence. So also as to a jury. The defendants may apply that the counterclaim be tried with a jury, and if the judge thinks that a judge and jury are the proper tribunal to try it, he has a discretion, if he chooses to exercise it, to try the whole case with a jury. The elements of difficulty which were present in *The Germanic* do not exist in the present case. The learned judge has exercised a sound discretion, and the appeal must be dismissed.

STIRLING, L.J.—I agree.

Appeal dismissed.

Solicitors for the plaintiffs, *Trinder, Capron, & Co.*

Solicitors for the defendants, *Holman, Birdwood, & Co.*

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) June 23, 1904.

In re POOLE AND CLARKE'S CONTRACT. (*a.*)

Vendor and purchaser—Purchase of freeholds subject to restrictive covenants — Covenants for indemnity by purchaser.

On a purchase of freehold land subject to restrictive covenants, the vendor having covenanted with his vendor to perform and observe those covenants and to indemnify his vendor, the purchaser ought to enter into a similar covenant with his vendor, but the covenant should be prefaced with the words, "with the object and intention of affording to the vendor, his heirs, executors, and administrators, a full and sufficient indemnity in respect of the restrictive covenants, but not further or otherwise."

This was an appeal from a decision of Kekewich, J.

By an agreement dated the 16th of May, 1903, and made between C. E. Poole of the one part and E. Clarke of the other part, it was agreed that Poole should sell and Clarke should purchase the hereditaments described in the schedules thereto and the inheritance thereof in fee simple "subject respectively to the restrictive covenants and conditions contained in the indentures of conveyance respectively referred to in the first schedule hereto" at the price of £975. The second schedule comprised a piece of land at Woodside, Croydon, "subject nevertheless to the restrictive covenants and conditions contained" in an indenture of the 31st of August, 1887. The present summons was taken out by the purchaser to determine whether he was bound to enter into any covenant with the vendor with reference to the restrictive covenants contained in the said indenture of the 31st of August, 1887.

The purchaser maintained that the property should be conveyed to him subject to the restrictive covenants, but that he was not bound to enter into any covenant with the vendor with reference thereto.

The vendor insisted that the purchaser should covenant with him to observe and perform the restrictive covenants and conditions, so far as they related to the premises conveyed to the purchaser, and to indemnify the vendor, his estate and effects therefrom.

Kekewich, J., declared that the vendor was not entitled to have inserted in the conveyance a covenant by the purchaser that he would perform and observe the stipulations in question, but that the vendor was entitled to have inserted in the conveyance a covenant that the purchaser would indemnify the vendor, his estate and effects, from liability in respect of these stipulations.

The vendor appealed.

Micklem, K.C., and *Ashton Cross.*—The vendor is entitled to a complete indemnity, and this can only be obtained by the purchaser entering into a covenant to perform and observe the original covenants and to indemnify the vendor therefrom. It has been the universal practice of conveyancers to insert a covenant in this form. [They cited *Staines* v. *Morris*, 1 V. & B. 8; *Moxhay* v. *Inderwick*, 1 De G. & Sm. 708; *Lukey* v. *Higgs*, 3 W. R. 306, 24 L.J. Ch. 495.] [ROMER, L.J.—Would you object to prefacing the covenant to observe and perform the restrictive covenants and to indemnify the vendor with the words "with the object and intention of affording to [the vendor] his heirs, executors, and administrators, a full sufficient indemnity in respect of [the restrictive covenants] but not further or otherwise"?] The vendor would not object to that.

P. O. Lawrence, K.C., and *S. P. Butler*, for the plaintiff.—The purchaser will accept the covenant with that preface. [ROMER, L.J.—I think the covenant with this preface will sufficiently protect the vendor, and he will not be able to obtain an injunction to restrain a breach of covenant in any case in which the original covenantee does not complain.]

VAUGHAN WILLIAMS, L.J.—I think there ought to be no costs on either side in either court. I wish to add that the practice of conveyancers with regard to the covenant to be entered into by an assignee of leaseholds must stand unaltered, and there is nothing in our judgment which would render it necessary to introduce into the covenant any other words, but, in my opinion, even in that case the covenant ought to receive the same construction as if it had been prefaced with the words which we have suggested in the present case.

ROMER and COZENS-HARDY, L.JJ., concurred.

Solicitors, *Montague Perkins; Noon & Clarke.*

From K. B. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) March 11, 15, 16; May 17, 1904.

In re REIS.
Ex parte CLOUGH. (*a.*)

Bankruptcy — Act of bankruptcy — Notice to Stock Exchange creditors to close account—Marriage settlement—Covenant to settle all after-acquired property except business assets — Fraud against creditors—Vagueness—Liability—Release by discharge in bankruptcy—Assignment of furniture—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 54), *s.* 4—*Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 31, *and* 49—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 47 *and* 49.

A statement by a debtor that he is unable to pay his debts in full is not an act of bankruptcy, unless it amounts to a statement that he intends to deal with his creditors as a body. Permission given by a debtor to each of his Stock Exchange creditors individually to close his account at once does not amount to such a statement.

Decision of Wright, J. (52 *W. R.* 302), *reversed.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

A covenant by a husband in a settlement, made in consideration of marriage, to settle all his after-acquired property except business assets is not fraudulent and void as against creditors under 13 Eliz. c. 5, nor is it too vague and uncertain to be enforced. Such a covenant, for a breach of which specific performance would be an appropriate remedy, is not barred on the covenantor obtaining his discharge from bankruptcy.

An assignment of personal chattels in pursuance of such a covenant, is a marriage settlement within the exception contained in section 4 of the Bills of Sale Act, 1878, and does not require registration as a bill of sale.

This was an appeal against the decision of Wright, J. (reported 52 W. R. 302).

By an indenture of settlement dated the 9th of September, 1879, executed upon and in consideration of the marriage of the debtor, "a banker and bullion merchant," with his wife, the debtor settled certain property on his wife and children, and the debtor thereby covenanted to convey to the trustees all his after-acquired real and personal property, except business assets, to be held by the trustees upon trusts in favour of his wife and the children of the marriage.

The debtor was adjudicated bankrupt on the 6th of September, 1880, and obtained his discharge on the 22nd of October, 1882. The trustees of the settlement lodged no proof under this bankruptcy in respect of the covenant contained in the settlement.

In 1894 the debtor engaged in the business of an outside stockbroker, and by 1901 his profits exceeded £50,000, and he then invested some £17,000 in purchasing and furnishing a freehold house, in which he resided with his wife and family. In April and May, 1903, he got into monetary difficulties, and on the 26th of May it was alleged that he committed an act of bankruptcy by giving notice to his creditors of suspension of payment under the Bankruptcy Act, 1883, s. 4 (*h*).

The 29th of May, 1903, was pay day on the Stock Exchange, and on the 26th of May the debtor's solicitor saw two of his largest Stock Exchange creditors, Messrs. Lumsden and Hart, and by the debtor's authority informed them that the debtor would have difficulties in meeting his liabilities on pay day, and that they were at liberty if they thought fit to close his accounts. They agreed to avail themselves of this permission, but one of them said that if there were any other Stock Exchange creditors they ought to have the same liberty, and this suggestion was carried out, a like permission being given to the other Stock Exchange creditors. There were other creditors of the debtor besides his Stock Exchange creditors to whom no reference was made and no communication given. Each broker acted for himself in closing the debtor's accounts, and each brought an action against him and recovered judgment for the amount due to him.

On the 10th of June, 1903, in pursuance of a written notice served on him by the trustees on the 23rd of May, the debtor executed two deeds respectively conveying the house and assigning the furniture to the trustees of the settlement, the assignment of the furniture not being registered under the Bills of Sale Act, 1878. On the 22nd of June, 1903, a judgment was recovered against him in an action by one of his Stock Exchange creditors commenced on the 29th of May. On the 14th of July a receiving order was made against him, the act of bankruptcy being non-compliance with a bankruptcy notice founded on the judgment, and on the 23rd of July he was adjudicated bankrupt.

The trustee in the present bankruptcy claimed the house and furniture on various grounds, of which Wright, J., only considered one, since he held that an act of bankruptcy had been committed by the bankrupt on the 26th of May, and that he became bankrupt within the meaning of section 47, sub-section 2, on that day, and that therefore the two deeds of the 10th of June were void as against the trustee in bankruptcy under that section; and on this view it became unnecessary for him to go into the other points.

The bankrupt appealed.

The following provisions of the Bankruptcy Act, 1883, and the Bankruptcy Act, 1869, were referred to in the arguments and judgments of the Court of Appeal:

The Bankruptcy Act, 1883, s. 4, sub-section 1: "A debtor commits an act of bankruptcy . . . (*h*) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

Section 43: "The bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."

Section 44 describes the property of the bankrupt divisible amongst his creditors.

Section 45, sub-section 1, restricts the right of an execution creditor, "unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Section 46 deals with the duties of the sheriff as to goods taken in execution.

Section 47, sub-section 1: "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." Sub-section 2: "Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being property or money of or in right of his wife, shall, on his becoming bankrupt before the money or property has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy."

Section 48 avoids certain preferential conveyances, transfers, charges, payments, obligations, and proceedings if the person is adjudged bankrupt on a bankruptcy petition presented within three months after the date thereof.

Section 49: "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy—(*a*) any payment by the bankrupt to any of his creditors; (*b*) any payment or delivery to the bankrupt; (*c*) any conveyance or assignment by the bankrupt for valuable consideration; (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration."

Bankruptcy Act, 1869, s. 12: "Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act. . . ."

Section 31: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice. Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy. . . . 'Liability' shall, for the purposes of this Act, include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain, or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as a matter of opinion."

Section 49: "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy," with certain exceptions in favour of the Crown and public revenue.

Horridge, K.C., and *Muir Mackenzie*, for the appellant, the bankrupt.

Reed, K.C., *A. J. David*, and *Adler*, for the respondent.

Horridge, K.C., replied.

The following cases were cited in the course of the argument: *Crook* v. *Morley*, [1891] A. C. 316, 40 W. R. Dig. 15; *Hill's Trustee* v. *Rowlands*, [1896] 2 Q. B. 124, 44 W. R. Dig. 12; *In re Scott*, 44 W. R. 587, [1896] 1 Q. B. 619; *Davis* v. *Howard*, 24 Q. B. D. 691, 38 W. R. Dig. 169; *In re Miller*, 49 W. R. 65, [1901] 1 Q. B. 51; *In re Mendelssohn*, [1903] 1 K. B. 216, 51 W. R. Dig. 158; *In re Turner, Ex parte Attwater*, 25 W. R. 328, 5 Ch. D. 27; *Stein* v. *Pope*, 50 W. R. 374, [1902] 1 K. B. 595; *Fawcett* v. *Fearne*, 6 Q. B. 20; *Smith* v. *Topping*, 5 B. & Ad. 674; *Lyon* v. *Weldon*, 2 Bing. 334; *In re Lamb*, 55 L. T. 817, 35 W. R. Dig. 13; *In re Simonson*, [1894] 1 Q. B. 433, 42 W. R. Dig. 5; *In re Friedlander, Ex parte Oastler*, 33 W. R. 126, 13 Q. B. D. 471; *Kevan* v. *Crawford*, 26 W. R. 49, 6 Ch. D. 29; *Colombine* v. *Penhall*, 1 W. R. 272, 1 Sm. & G. 228; *In re MacBurnie*, 1 De G. M. & G. 441; *In re Bolland, Ex parte Clint*, 22 W. R. 152, L. R. 17 Eq. 115; *In re Pennington*, 59 L. T. 774; *Frazer* v. *Thompson*, 7 W. R. 607, 1 Giff. 49; *Collyer* v. *Isaacs*, 30 W. R. 70, 19 Ch. D. 342; *Hardy* v. *Fothergill*, 37 W. R. 177, 13 A. C. 351; *In re Baley, Ex parte Neal*, 28 W. R. 875, 14 Ch. D. 579; *Robinson* v. *Ommaney*, 31 W. R. 525, 23 Ch. D. 285; *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 253; *In re Carter and Kinderdine's Contract*, 45 W. R. 484, [1897] 1 Ch. 776; *In re Brall, Ex parte Norton*, 41 W. R. 623, [1893] 2 Q. B. 381; *In re Clarke, Coombe* v. *Carter*, 36 W. R. 293, 36 Ch. D. 348; *In re D'Epineul, Tadman* v. *D'Epineul*, 30 W. R. 702, 20 Ch. D. 758; *Belding* v. *Read*, 13 W. R. 867, 3 H. & C. 955; *Clements* v. *Matthews*, 11 Q. B. D. 808, 31 W. R. Dig. 23; *Holroyd* v. *Marshall*, 11 W. R. 171, 10 H. L. C. 191; *Campion* v. *Cotton*, 17 Ves. 283a; *Hardey* v. *Green*, 12 Beav. 182; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, 42 W. R. Dig. 10; *In re Satterthwaite*, 15 R. 242; *In re Bumford, Ex parte Games*, 27 W. R. 744, 12 Ch. D. 314; *In re Holland, Gregg* v. *Holland*, 50 W. R. 575, [1902] 2 Ch. 360; *In re Turcan*, 37 W. R. 70, 40 Ch. D. 5; *Lewis* v. *Maddocks*, 8 Ves. 150, 17 Ves. 48; *In re Tonnies, Ex parte Bishop*, 21 W. R. 716, L. R. 8 Ch. 718; *Wenman* v. *Lyon*, 39 W. R. 519, [1891] 2 Q. B. 192; *Courcier* v. *Bardili*, 27 SOLICITORS' JOURNAL, 276; *Buckwell* v. *Norman*, 46 W. R. 339, [1898] 1 Q. B. 622; *Seaton* v. *Deerhurst*, 43 W. R. 436, [1895] 1 Q. B. 853.

Cur. adv. vult.

May 17.—The judgments of the court were delivered in the following order:

COZENS-HARDY, L.J.—This is an appeal from the order of Wright, J., declaring certain deeds executed by the bankrupt in June, 1903, pursuant to a covenant contained in his marriage settlement of 1879, void under section 47, sub-section 2, of the Bankruptcy Act, 1883, as against the trustee, on the ground that he had "become bankrupt"—that is, had committed an act of bankruptcy—on the 26th of May. The act of bankruptcy relied on was that Mr. Reis on that day gave notice to his Stock Exchange creditors that he had suspended, or that he was about to suspend, payment of his debts: see section 4, sub-section 1 (*h*), of the Bankruptcy Act, 1883.

Now the meaning of that sub-section has been fully explained by Vaughan Williams, L.J., in two cases: *In re Scott, Ex parte Scott*, and *Hill's Trustee* v. *Rowlands*. The result of the authorities is that a statement by a debtor that he is unable to pay his debts in full is not by itself an act of bankruptcy, although it may be such if it amounts to a statement that he intends to deal with his creditors in a body.

The transaction of the 26th of May does not, in my opinion, fall within this category. Mr. Reis and his solicitor gave each of his Stock Exchange creditors individually permission at once to close his account, which they could not have done without such permission. Each broker acted for himself; each brought an action for the balance due. I cannot regard this as falling within the sub-section. This was the only point on which Wright, J., gave a decision, although various other points were argued before him upon which it was not necessary for him to express an opinion. But, as we are differing from the learned judge, the respondents have relied before us upon other grounds.

It is urged that the covenant by the husband in the marriage settlement of 1879 was first void under the statute of Elizabeth against creditors—13 Eliz. c. 5; secondly, that it was so vague and general that the court ought to decline to grant specific performance of it; and thirdly, that it was released by the bankruptcy of the husband in 1880, with the result that the deeds of the 10th of June, 1903, were voluntary, and therefore void under section 47, sub-section 1, of the Bankruptcy Act, 1883.

In order to succeed upon the first contention—that is, that the deeds were void under the 13 Eliz. c. 5 against creditors—it is necessary to show that the wife was party or privy to the fraud. Of this there is, and can be, no direct evidence. But it is urged that the deed itself to which she was a party is of such nature that it cannot be deemed other than a fraudulent deed. The decision of Chief Judge Bacon in *In re Clint, Ex parte Bolland*, undoubtedly supports this view. But in my opinion that decision is inconsistent with a line of authorities of which *Hardey* v. *Green* need alone be referred to. The judgment of Lord Langdale in that case seems to me to establish that such a covenant is not on the face of it fraudulent. Then as to the next point, that the covenant is so vague and general that the court ought to decline to grant specific performance of it, I think the husband's covenant is not too vague and general to be enforced. Lord Eldon in *Lewis* v. *Maddocks* held that such a covenant on construction must attach to and affect capital only, and not income, unless "laid up as capital," and that the court ought to give effect to the covenant. *Hardey* v. *Green* is to the same effect. As to the third point, that the covenant was released by the bankruptcy of the husband in 1880 with the result that the deeds of June, 1903, were voluntary, and therefore void under section 47, sub-section 1, I think this objection cannot prevail. When once it has been decided that the covenant is one of which specific performance can be obtained, it follows that the right to specific performance is not barred by the bankruptcy. The covenant was not ancillary to a debt which was released by the bankruptcy, and there is no evidence of any breach of the covenant before the bankruptcy was closed. There is nothing in *Hardy* v. *Fothergill* which justifies the respondent's contention upon this point. Lastly, an objection was taken to the assignment of the furniture on the ground that the deed was not registered as a bill of sale, and that the furniture remained in the apparent ownership of the bankrupt. The only act of bankruptcy which can be relied on was on the 29th of of June, and that is the date to which the title of the trustee relates. Now, a marriage settlement is not a bill of sale within the definition of the Bills of Sale Acts, and it is urged by counsel for the appellants that the furniture was bound in equity by the covenant in the marriage settlement of 1879, which did not require registration, and that the deed of the 10th of June was only for the purpose of completing the legal title by means of an actual transfer of the property. There has not been any transfer of the furniture by delivery to the trustees. They must rely upon the deed of the 10th of June, 1903, as transferring the property to them. The question arises whether that deed is a "marriage settlement" within the exception in section 4 of the Bills of Sale Act, 1878, or is an absolute assignment of personal chattels within the meaning of section 8 of that Act, which cannot be the foundation of a title as against the trustee in bankruptcy. Now, the deed of the 10th of June may, I think, be fairly regarded as forming part of the marriage settlement. It was executed in pursuance of a covenant in the deed of 1879, and was in the nature of a further assurance. A post-nuptial settlement executed in pursuance of an ante-nuptial deed falls within the term "marriage settlement" in the Bills of Sale Act. This is the conclusion at which I should have arrived apart from authority, and it accords with the view taken by the Court of Appeal in the case of *Courcier* v. *Bardili*, a note of which is found in the SOLICITORS' JOURNAL for 1883, but which is not fully reported anywhere else.

The result is that, in my opinion, the appellant succeeds both as to the leasehold house and as to the chattels.

STIRLING, L.J.—The first question to be considered in this case is whether Mr. Reis committed an act of bankruptcy on the 26th of May, 1903. Wright, J., finds that he did, the act being that he gave notice to his creditors, or some of them, that he was about to suspend payment of his debts, that being an act of bankruptcy under section 4, sub-section 1 (*h*), of the Bankruptcy Act of 1883. It is my misfortune to differ from the conclusion at which Wright, J., arrived, and in that respect I only differ from him on the question of fact which he decided, and I do not quarrel with any of the law which he laid down in his judgment. In considering the meaning of the sub-section with which we have to deal particularly, it has to be borne in mind that by sub-section (*f*) it is an act of bankruptcy if there is filed in the court a declaration of inability on the part of the debtor to pay his debts. These two sections were much considered in the House of Lords in the case of *Crook* v. *Morley*, where Lord Selborne, in advising the House, says: "It is undoubtedly possible, that there might be a document speaking of inability to pay a man's debts in such a context and in such a manner as not to imply 'that he had suspended, or that he was about to suspend payment of his debts.' But on the other hand there might be a document of which the language might amount to 'a declaration of his inability to pay his debts,' which, taking it with all its circumstances and in its context, would practically and according to the common sense of mankind, be a 'notice to his creditors that he had suspended, or was about to suspend payment of his debts.'" In the same case Lord Watson says: "A declaration of his inability to pay his debts may be made by a debtor to one or more of his creditors, in terms and under circumstances which do not suggest that he means to stop payment of his debts as they fall due. But that such a declaration may be couched in language which clearly implies that the debtor means to pay nobody in full, and to place his assets at the disposal of his creditors, does not appear to me to be doubtful." The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts—that is to say, to abstain from paying his debts as they fall due at least for a time. Now, in the present case Mr. Reis was an outside broker who found himself in difficulties as to the settlement which was to take place on the Stock Exchange at the end of May, 1903. He consulted a solicitor, and that solicitor, by his instructions, saw two of the largest Stock Exchange creditors, Mr. Lumsden and Mr. Hart, on the 25th of May. This was the day on which at midday the amount which would have to be paid by Mr. Reis at the settlement would be ascertained. But that amount would not be actually payable till the 29th of May. The solicitor informed these two Stock Exchange creditors that Mr. Reis would have difficulty in paying them, they being large creditors, on the 29th of May. He informed them that he had Mr. Reis's

authority to give power, if they saw fit, to close the accounts between them and Mr. Reis before the 29th of May, a step which might be for the benefit of the Stock Exchange creditors, and which he was willing they should take if they saw fit so to do. They agreed to avail themselves of this permission, but one of them said to the solicitor that if there were any other Stock Exchange creditors they ought to have the same liberty. Thereupon the solicitor undertook to communicate a like liberty to the other creditors, who were not creditors to nearly the same extent as the two with whom he was dealing, and he did in point of fact communicate with them they were at liberty to close their accounts in the same way as Mr. Lumsden and Mr. Hart. Besides those Stock Exchange creditors there were others—two at least, one of considerable importance—namely, Mr, Reis's bankers—and no reference was made as to any dealing with them whatever. In these circumstances I am unable to agree with Wright, J., that the debtor did give notice to any of his creditors that he had suspended or was about to suspend payment of his debts. Certainly he did nothing which would indicate an intention on his part to place his assets entirely at the disposal of his creditors or to preclude himself from dealing as he might think fit with others, with whom no communication appears to have been made, nor I think with the Stock Exchange creditors, Lumsden and Hart. For these reasons I am unable to agree with the conclusion of fact at which Wright, J., arrived.

The next point which I have to consider is this: whether Mr. Reis was released from the covenant in his marriage settlement by the previous bankruptcy. The marriage settlement was executed on the 9th of September, 1879. Mr. Reis became bankrupt in 1880, and he received his discharge in 1882. At that time, so far as appeared, Mr. Reis had not acquired any property within the covenant in the marriage settlement; there was no proof by the trustees of the settlement in the bankruptcy. But it is said that the liability of Mr. Reis under the covenant was provable in the bankruptcy, and consequently that the bankrupt was released from it by the order of discharge. At the time in question the Bankruptcy Act in force was that of 1869, the material sections of which are sections 12, 31, and 49. The material provisions of these sections were incorporated in the present Act of 1883. Now those sections were considered in two cases—namely, *Collyer* v. *Isaacs*, by the Court of Appeal, and the case of *Hardy* v. *Fothergill* in the House of Lords. In *Collyer* v. *Isaacs* the case to be considered was one in which there was given as the security for the debt an assignment of future chattels. The debtor became bankrupt, and after the bankruptcy and the order of discharge he acquired chattels which answered the description in the security—but the creditor did not prove his debt in the bankruptcy—and it was held that the security so far as affected his future chattels was discharged by the bankruptcy. It is obvious that the case there was entirely different from the present case, in which we have to deal with a covenant in a marriage settlement for the settlement of after-acquired property. The Master of the Rolls (Sir George Jessel), in giving his judgment in that case, carefully guards himself against saying that what was decided in that case would apply to the case of a marriage settlement containing a covenant to settle after-acquired property, saying that when you have a debt and a covenant to secure that debt in a particular way it would be a strange result if it barred the debt and not the ancillary covenant. In the case of *Hardy* v. *Fothergill* the question again was of an entirely different nature, the question relating to the liability of the assignee of a lease for a term of years who had covenanted to indemnify the lessees against damages for breach of their covenants. In that case it was held that the claim of the lessee was barred under section 49 of the Bankruptcy Act, 1869, the effect of section 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the bankruptcy unless an order of court declared it to be a liability incapable of being fairly estimated. In advising the House of Lords Lord Selborne says this: "There may be contracts—such for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, &c.—which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction for specific performance would be the most proper remedy." These observations of Sir G. Jessel and of Lord Selborne of course do not amount to decisions, but I think they afford guidance in the decision of the present case. In my judgment, the covenant in the present case is one in which specific performance is the appropriate remedy, and it ought not to be held barred by the order of discharge in the first bankruptcy.

The next point to be considered is whether the covenant is too vague or too wide to be capable of specific performance in a court of equity. On this we have the guidance, as it appears to me, of clear authority. In the case of *Lewis* v. *Maddocks* there was a covenant in a marriage settlement on the part of a husband that he would "by deed or will convey, give, devise, and assure, all and singular his ready money, goods, chattels, personal estate and effects, to and for the use and behoof of him the said Richard Maddocks, and Ann, his said intended wife, and the survivor of them for ever," upon certain trusts. Lord Eldon decreed specific performance of that contract after the death of the husband. The form of judgment is stated at the end of the report, and it began with a declaration that the personal estate of which the husband was possessed during the coverture was liable under the contract. In a subsequent case, *Hardey* v. *Green*, Lord Langdale held that property coming to a husband after marriage was bound by a stipulation contained in articles executed previous to the marriage "by which the husband and wife agreed that all property, estate and effects, to which the husband or wife might thereafter become entitled, should be settled to such use as the wife should appoint, and in default on trusts for the husband, wife, and children." The decree gave specific performance of the stipulation in the articles. These cases have never been overruled, and they form strong authority in favour of the proposition that the language of the covenant with which we have to deal in the present case is not too vague to be binding. If anything more is required, I should desire to refer to the judgment of Bowen, L.J., in *In re Clarke, Coombe* v. *Carter*, and the observations of Lord Macnaghten on that case in *Tailby* v. *Official Receiver*.

But a further objection was made that the covenant was so wide that it would be wrong of the court to enforce it, on the ground that if fully carried into effect it would prevent the husband from paying his debts and deprive him of the means of subsistence. In that the observations of Cotton, L.J., in the case of *In re Clarke, Coombe* v. *Carter* and *In re Turcan* were referred to. Now, to this objection there appear to me two answers—first, from the covenant in the marriage settlement in the present case the business

assets of the husband are expressly excepted, and that appears to me to constitute a substantial exception. Secondly, if there were no such exception, it would still seem to me that the same case of *Lewis* v. *Maddocks*, at a subsequent stage, is an authority for holding that a covenant is not to be construed so as to prevent the husband from paying his debts and maintaining his family. *Lewis* v. *Maddocks* came on for further consideration, and in the course of the argument Lord Eldon said "he could not adopt the construction, that annual produce, for instance, dividends of stock, was property acquired during the coverture in the sense of this bond, except only to the extent in which the husband himself might think proper to lay up that produce as capital; otherwise they would not be at liberty to spend a shilling; but in providing for their maintenance and comfort they could not go beyond income." For these reasons I think that effect ought not to be given to this objection.

Next it was urged that the covenant was void under the statute of Elizabeth. As a general rule a marriage settlement cannot be set aside as a fraud on creditors of the husband unless evidence is given that the wife was party to the fraud: see *Kevan* v. *Crawford*. No such evidence was adduced in the present case. It was said, however, that the wife must be taken to have known the terms of the settlement, and those terms were on the face of them, in the language of the Lord Justice in *In re MacBurnie, Ex parte MacBurnie's Trustees*, grossly out of proportion to the station and circumstances of the husband, or so extravagant as that they ought to awaken inquiry. I am unable to come to that conclusion. On this point of the case *Hardey* v. *Green*, already referred to, is a direct authority. The case of *In re Clint, Ex parte Bolland*, which was much relied upon on behalf of the creditors, if rightly decided, is distinguishable, for there the covenant extended to all after-acquired property—property of the husband; while here, as I have already pointed out, the business assets constitute an exception.

Last of all it was urged that there had been no actual transfer pursuant to the contract before the commencement of the bankruptcy under section 47, sub-section 2 of the Bankruptcy Act, 1883. In the present case the bankrupt, in pursuance of the written notice served on him on the 23rd of May, 1903, by the trustees of the settlement executed on the 10th of June, 1903, before the commencement of the bankruptcy, two deeds, by one of which the house was conveyed to the trustees, and by the other of which the furniture in that house was assigned to them—in both cases upon the trusts of the settlement. No question was raised as to the conveyance of the house being an actual transfer sufficient to prevent the operation of section 47, sub-section 2, of the Act of 1883. But it is contended that the assignment of the furniture is a bill of sale within the meaning of the Bills of Sale Act, 1878, and is void against the trustee in bankruptcy under section 8 by reason of its not having been registered in accordance with section 10 of the Act of 1878. To this it is answered that by section 4 of the Act of 1878 marriage settlements are excepted from the operation of the Bills of Sale Act, and that the assignment of the 10th of June, 1903, is a marriage settlement within the meaning of the exception. I think that this is a valid answer to the objection. Unquestionably a wide meaning has been given to the expression "marriage settlement" in these Acts. Thus it was held in *Wenman* v. *Lyon* by the Divisional Court and by the Court of Appeal that an agreement for a marriage settlement which provided for the execution by a subsequent assignment to trustees of certain property of the intended husband was such a marriage settlement, and was effectual to protect the property against the trustee in the husband's bankruptcy, although the agreement was not registered and no assignment to the trustees was ever executed. In *Courcier* v. *Bardili*, which appears to be only reported in the SOLICITORS' JOURNAL, it was also held by the Divisional Court and by the Court of Appeal that a post-nuptial settlement in pursuance of an ante-nuptial settlement was within the exception of the enactment of 1878, and did not require registration. In my opinion the principle of these decisions applies. The assignment of the 10th of June, 1903, was a marriage settlement within the exception in the Bills of Sale Act, 1878, and did not require registration, and the objection founded upon the point of registration appears to me to fail. I think, therefore, the appeal ought to be allowed.

VAUGHAN WILLIAMS, L.J.—I have had the advantage not only of reading the judgment of Cozens-Hardy, L.J., but of having communicated to me the views of Stirling, L.J., in this case; and that being so, I did not consider that I should be doing any good service to the law in merely multiplying judgments which were intended to say the same thing as other judgments had already said. I feel that the judgments of Cozens-Hardy and Stirling, L.JJ., have covered the whole ground, and I therefore propose to say very little. First, I propose to say, out of respect for Wright, J., that I entirely agree in the view of Stirling, L.J., that there is nothing in our judgment to-day which interferes with any proposition of law which was laid down by Wright, J. All that we are doing to-day in differing from Wright, J., is as to a conclusion in fact. Wright, J., came to the conclusion that the solicitor who was acting on behalf of the bankrupt, Mr. Reis, was making a communication which was intended as a communication having reference to all his creditors—a communication that he intended to suspend payment—a communication of such a character that if he had made that statement the bankrupt would have been guilty of a breach of faith if he had, after making that statement, made any arrangement with any particular creditor for the discharge of his debt. I have come to a different conclusion in fact. I have come to the conclusion that all that the solicitor was doing on behalf of the bankrupt when he made the communication to Messrs. Lumsden and Hart was to negotiate with particular creditors as regards their particular debts. He agreed that they should be entitled to do that which they could not have done without his consent—that is, to close the accounts. Upon that point I have no more to say.

I do propose to say a few words as to two of the many points which were raised in this case; but before I do so I should like to say at once a word in respect of the case of *In re Clint, Ex parte Bolland*. I do not know really that I have anything to add to what Stirling, L.J., has said about it. This case of *In re Clint, Ex parte Bolland*, I can say of my own personal knowledge and experience as a bankruptcy judge is a case which has been frequently dealt with. I think that hereafter that case of *In re Clint, Ex parte Bolland*, ought not to be treated as a standing authority. I am quite well aware that there is a distinction in the fact that the property covered was much wider in the case of *In re Clint, Ex parte Bolland*, than it is in the present case, and that one might decide the present case without impugning at all the authority of that case on the ground of these differences that have been referred to. But, speaking for myself, I prefer to say that I do not think that *In re Clint, Ex parte Bolland*, ought any longer to be regarded as a standing authority.

Having said that, there are two points upon which I mean to say a few words. First, the point as to the effect upon the marriage settlement of the prior bankruptcy; and secondly, the point of the necessity of registration of the formal instrument of assignment which followed the original marriage settlement. Now with regard to the first of these points, the facts are simply these—that Mr. Reis made a marriage settlement in 1879—a marriage settlement as to which I may mention in passing that to my mind it is impossible with regard to that marriage settlement to suggest that the execution of it involved any participation by Mrs. Reis to defeat and delay creditors so as to bring the case within the operation of the statute of Elizabeth. That marriage settlement contained a covenant very wide in its terms with regard to the future property of the bankrupt, not comprising the whole of his future property, but future property, to put it shortly, to the exclusion of his business assets. Subsequently to 1879 Mr. Reis became bankrupt. The suggestion made is that the effect of that first bankruptcy was to relieve Mr. Reis, the bankrupt, for ever from the obligations in that marriage settlement under that covenant. Of course, if that were so the result would be that there would be no instrument in the field of operation under which it could be said that, as the husband from time to time acquired property other than his business assets, such property would in equity pass to the trustees of this marriage settlement. I really should not have mentioned this point at all, seeing that I entirely agree with the observations that have been made by my brethren about it, if it were not for the fact that this is a new point as to which there is no positive authority whatsoever. There is the passage in the judgment of Sir G. Jessel in *Collyer* v. *Isaacs*, to which Stirling, L.J., referred, and there is also the passage in the judgment of Lord Selborne in *Hardy* v. *Fothergill*. I do not propose to go into those two passages in detail—they have been read; it is sufficient to say of those passages that they certainly show that neither of those learned judges was then prepared to affirm the proposition that the bankruptcy and discharge of the husband after a marriage settlement like this would discharge him from all obligations under a marriage settlement. But I propose to read two or three words from the same passage to which Stirling, L.J., referred in the advice given by Lord Selborne to the House of Lords. After quoting the words of section 31 of the Bankruptcy Act, 1869, Lord Selborne proceeds: [His lordship here read the passage already referred to by Stirling, L.J., and continued:] It will be observed that among these contracts which Lord Selborne suggests might upon a fair reading of the construction of the definition which I have read from the Act of Parliament be excluded from it, there are not only negative covenants, but there is in one example certainly a positive covenant, as a promise to marry, not broken. In concurring as I do entirely with the judgments of my brethren on this point, I wish to say shortly that the ground upon which I concur is that in my judgment the marriage settlement does not fall within this definition of liability. It is a contract which has been made with a different object from that of the payment of money in any contingency. I wish to add by way of caution that no amount of difficulty in the estimate of the value would justify the exclusion in this court of a proof of debt, because in my judgment the plain words of the statute show that if once the debt or liability, as the case may be, is shown to come within the definition, the only court which can exclude that debt from the operation of bankruptcy and its consequent discharge in freeing the debtor is the court of banbruptcy, and the court of bankruptcy dealing with the particular bankruptcy which has occurred. Therefore in this case it would not make the very slightest difference that the debtor, Mr. Reis, was the same in the 1881 bankruptcy as he is in the later bankruptcy. This court would not have jurisdiction now to declare the value of the debt or liability incapable of estimate. The ground upon which I have come to the conclusion that this liability of the bankrupt under his marriage settlement is not discharged by the earlier bankruptcy is because in my judgment it does not fall within the definition of "liability" which I have read. As to this point I may say, in passing, that Wright, J., did not have to deal with any of these matters because, having arrived at the conclusion there was a prior act of bankruptcy, that was sufficient for the point he had to decide.

The only other matter to which I propose to refer at all is the necessity for the registration of the instrument which was executed in pursuance of the marriage settlement of 1879. The marriage settlement of 1879 contemplates that there may be executed from time to time by the husband a formal instrument assigning to the trustees of the marriage settlement the property in the goods—the subject-matter of it—as they came into existence. That being so in 1903, the year of his last bankruptcy, the trustees of the marriage settlement apparently became anxious in the matter, and they thought it desirable to get the debtor to execute certain instruments in the nature of assignments—which he did, and the date of those instruments is the 10th of June, 1903. The petition itself was based on a subsequent act of bankruptcy at the end of the same month. We have negatived the act of bankruptcy by the notice of intention to suspend, which was the key of the decision of Wright, J. It has been said that the rights of the trustees under this marriage settlement had been avoided, because the second of these two documents had not been registered, as it ought to have been under the Bills of Sale Act. I think that there is sufficient authority already for the proposition that such a document does not require registration. But as the point has not been raised in very clear form, I thought it better to write a word or two upon that which I will read.

The last point made on behalf of the respondent was that the goods and chattels, the subject of the settlement of 1879, were not the property of the trustees of the marriage settlement as against the trustee in bankruptcy, because the title of the trustees of the settlement depends upon the deed of transfer of the 10th of June, 1903, and that that deed is void as a bill of sale for want of registration, or is void as falling within the operation of sub-section 2 of section 47 of the Bankruptcy Act of 1883. I say at once, in passing, so as not to have to mention it again, no point really arises under sub-section 2 of section 47, because, inasmuch as under our decision the commencement of the bankruptcy is not until the end of the month of June, the terms of the section, however strictly construed, are fully complied with by the execution of the instruments of the 10th of June. I think that this point under the Bills of Sale Act fails. The question of the necessity for registration depends upon section 4 of the Bills of Sale Act, 1878, which excepts a marriage settlement from the definition of bills of sale. By the very terms of that section the expression "bill of sale" includes not only assignments, but "also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." It is plain, therefore, that the antenuptial document would have required registration

but for the exception, and that notwithstanding that the document was intended to be followed by the execution of another instrument; but the exception exempts this document as being a marriage settlement from the necessity of being registered, and I think there is nothing in the Bills of Sale Act, 1878, which takes away the equitable rights conferred by such a marriage agreement if in fact it is followed in pursuance of its terms by an assurance or transfer which is not registered.

The case of *Wenman* v. *Lyon*, decided by Pollock, B., and Charles, J., which was confirmed on appeal, makes it clear that the words "marriage settlement" include a memorandum of a marriage settlement which conveys equitable rights only, and would include marriage articles intended to be followed by a formal marriage settlement. It seems to me impossible that the non-registration of an instrument intended to give legal effect to a prior instrument, which had by virtue of the exception in favour of marriage settlements already created valid equitable rights, could avoid or extinguish those rights. A marriage contract might be so drawn that it would manifest an intention that no property should pass unless and until a further instrument of transfer was executed. Such a contract would create a power to seize something in the nature of a floating security, and would, I think, undoubtedly be a bill of sale, and I am inclined to think a marriage settlement, but I do not think that the present marriage contract is such an instrument. [His lordship read the words, and continued:] I do not think that, according to these words, the execution of a transfer or the taking possession by the trustees is a condition precedent to the passing of the property. This being so, it follows, in my judgment, that the bill of sale point fails. The settlement of 1879 did not require registration, and the equitable rights arising under that settlement, as the subject-matter of it from time to time has come into existence, are not avoided by the non-registration of the instruments of transfer of June, 1903.

The result of all this is that the appeal is allowed, with costs.

Appeal allowed.

Solicitors for appellants, *Norden, De Freece, & Co.*

Solicitors for respondent, *Martin & Co.*

House of Lords.

From C. A. (England). Aug. 4, 1904.

REYNOLDS *v.* ASHBY & SON. (*a.*)

Fixtures—Machinery affixed by bolts and screws—Hire-purchase agreement—Rights of mortgagee in possession.

The lessee of a factory mortgaged it, together with the fixtures, machinery, and fittings erected thereon. Shortly afterwards, under a hire-purchase agreement entered into by the mortgagor, certain machines were fastened by the mortgagor in the factory on concrete beds by means of upright bolts and screws, but so that they could be removed without injury to the freehold. The premises were taken possession of by the mortgagee, and the vendor of the machines claimed them under the terms of the hire-purchase agreement.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Held, that the machines were fixtures, and therefore the mortgagee was entitled to retain them.

Decision of the Court of Appeal (51 *W. R.* 405, [1903] 1 *K. B.* 87) *affirmed.*

Hobson *v.* Gorringe, 45 *W. R.* 356, [1897] 1 *Ch.* 182, *approved.*

This was an appeal from an order of the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.), affirming the judgment of Lawrance, J.

The facts are stated in the judgments of Lord James of Hereford and of Lord Lindley.

Haldane, K.C., and *Herbert Reed, K.C.* (*Rowlatt* with him), for the appellant.—The mode and the object of the annexation must be considered: *Leigh* v. *Taylor*, 50 W. R. 623 [1902] A. C. 157. In each case whether fixtures become part of the freehold is a question of fact for the jury.

Gough v. *Wood*, 42 W. R. 469, [1894] 1 Q. B. 713; *Hellawell* v. *Eastwood*, 6 Ex. 295; Lord Blackburn and Lord Watson in *Wake* v. *Hall*, 31 W. R. 585, 8 App. Cas. 195, 204; *Climie* v. *Wood*, L. R. 3 Ex. 257, 16 W. R. Dig. 72; *Hobson* v. *Gorringe*, 45 W. R. 356, [1897] 1 Ch. 182; *Holland* v. *Hodgson*, 20 W. R. 990, L. R. 7 C. P. 328; *Walmsley* v. *Milne*, 8 W. R. 138, 7 C. B. N. S. 115; *Tyne Boiler Works Co.* v. *Longbenton Overseers*, 35 W. R. 110, 18 Q. B. D. 81; and *Lyon* v. *London, City, and Midland Bank*, 51 W. R. 400, [1903] 2 K. B. 135, were cited or referred to.

J. A. Hamilton, K.C., and *Powell, K.C.*, (*J. H. Keeling* with them), for the respondents.—There has been a well-known rule of law for thirty years and more as to these machinery cases and no custom such as that of hire-and-purchase agreements can override it.

Longbottom v. *Berry*, L. R. 5 Q. B. 123, 18 W. R. O. L. Dig. 43; *Sheffield and Yorkshire Permanent Benefit Building Society* v. *Harrison*, 33 W. R. 144, 15 Q. B. D. 358; *Lyde* v. *Russell*, 1 B. & Ad. 394; *Hitchman* v. *Walton*, 4 M. & W. 409; *Ex parte Cotton*, 2 Mont. D. & D. G. 725; *Ex parte Barclay*, 5 De G. M. & J. 403; and *Mather* v. *Fraser*, 2 K. & G. 536, were referred to.

Herbert Reed, K.C., replied.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C. (whose judgment was read by Lord Macnaghten).—I cannot say that I am satisfied with the mode in which this case has been disposed of. There are various modes by which things when they are trade fixtures can be protected from being absorbed by the owner of the freehold or by a mortgagee, and I should hesitate very much before I agreed that such fixtures as are in question here, and which could only be used when fixed, must necessarily belong to the freeholder or to the mortgagee. By an express or implied contract between the parties interested, machinery for the purpose of working in a factory might be protected, so that an unpaid vendor who has lent on the hire system machinery to a person who wanted to use it in his mill might make it safe from being absorbed either by creditor or landlord. There is nothing, however, here from which I can infer either an express or implied contract for the removal of these articles, which undoubtedly were fixed; and under these circumstances I do not dissent from the conclusion at which this House has arrived. I only desire to say that I agree to affirm this judgment upon the special facts which I find, and from the absence of any evidence which can alter the rule which has been so many times affirmed, and upon which the learned judge acted when the case was before him.

Lord MACNAGHTEN concurred.

Lord JAMES OF HEREFORD.—In this case the question for decision is whether certain machines employed for use in a factory have by virtue of their being fixed to the building become a portion of it, or whether they are chattels, and so to be regarded as movable property.

It appears that the plaintiffs sold certain machines to a person named Holdway on what is known as a hire-purchase agreement. The plaintiffs knew that the machines would be used under ordinary conditions in a factory then in course of erection. This factory belonged to Holdway, who executed three mortgages upon the land upon which the factory was being built, "together with the buildings, machinery, and fittings erected thereon." The defendants were the third mortgagees, but having paid off the two preceding mortgages they are now entitled to the land and building of the factory, the further question arising whether the machines have or have not become part of the mortgaged property. The purchaser Holdway, the mortgagor of the factory, did not fulfil his contract with the plaintiffs, so that the goods are unpaid for. On the other hand, it must be taken that the plaintiffs were aware that the machines would be used in a factory and would be affixed in the usual manner to the building. There is also nothing unusual in effecting a mortgage upon a factory (whatever that may include) in the terms I have mentioned. In consequence of Holdway's default the plaintiffs claimed the machines as their property. The defendants resisted the claim upon the ground that, the machines being affixed to the mortgaged building, the property in them passed under the mortgage deed. At the trial, which took place before Lawrance, J., and a jury, the learned judge held that as there were no facts in dispute there was no question for the jury, and the learned judge, following the decision in *Hobson* v. *Gorringe*, held that the contention of the defendants was correct, and directed a verdict for them. The Court of Appeal has confirmed this judgment.

In the first instance I was disposed to think that the question of chattel or fixture, being one of fact, ought necessarily to have been submitted to the jury; but apparently the course taken by the learned judge in treating the question as one of law, or as one of fact upon which the jury were bound to accept his directions and apply the law as declared by him, was correct, and certainly was acquiesced in by both parties to the suit.

The manner in which the machines were affixed to the buildings has been clearly brought to the notice of this House, and is clearly shown by some sketches set out in the case. This affixing of the machines is to obtain steadiness, and effects the usual condition under which such machines are used.

The authorities controlling the questions respecting the difference between fixtures and chattels are very numerous, and have arisen between different parties. The rights of landlord or tenant, of mortgagor or mortgagee, and liability to being rated, have all brought this question to a legal issue for the determination of our courts. I do not propose to review those authorities in detail, but having consulted and considered them I have come to the conclusion that the weight of authority is in favour of the view that these machines must be held to be affixed to the building so as to pass under the mortgage as being a portion of the factory. The cases supporting this view are very numerous, but the principal case now generally referred to is that of *Hobson* v. *Gorringe*, the authority which Lawrance, J., acted upon. Doubtless there are cases and *dicta* upon which the appellants are entitled to rely. *Hellawell* v. *Eastwood*, *Chidley* v. *West Ham Churchwardens*, (1875) 32 L. T. 486, 23 W. R. Dig. 150, *Tyne Boiler Works* v. *Longbenton Overseers*, *Wake* v. *Hall*, and several other cases were relied upon at the bar to show that these machines should be regarded as chattels; but in none of these cases did the question arise between mortgagor and mortgagee, and in some of them the decisions are explained upon grounds other than those existing in the present case. In the same way *Trappes* v. *Harter*, (1833) 2 Cr. & M. 153, a case arising out of a mortgage, was decided principally upon a question of local custom; and in *Lyon* v. *London, City, and Midland Bank* the decision in favour of some chairs being chattels appears to have been correctly decided upon the special facts of that case.

It was argued at the bar that as Holdway had not paid for the machines they remained the property of the plaintiffs, and could not by any act of Holdway be dealt with as fixtures; but the argument cannot, I think, prevail. The machines were sold by the plaintiffs for the purpose of being used in the manner in which they were used. In order so to use them it was necessary that they should be fixed, and so become part of the building.

For these reasons I feel that, following a great preponderance of authority, the judgment of this House should be in favour of the respondents.

Lord LINDLEY.—This is an action brought to recover certain machines bought from the plaintiffs by one Holdway on what is called a hire-purchase agreement. Holdway did not pay the instalments of his purchase-money as they became due, and the machines therefore never became his property. The plaintiffs knew that the machines were wanted in order to fit up a factory which Holdway was building, and he put the machines into the factory on beds of concrete prepared for them. The machines were worked by steam power transmitted from a steam engine by shafts, wheels, and gearing in the usual way. Each machine was complete in itself. Each was fastened down to its concrete bed by bolts and nuts. The bolts were firmly fixed in the concrete, and passed through and projected beyond holes in the machine. The nuts were screwed on the ends of the bolts where they projected, and the machines were thus held fast. By unscrewing the nuts each machine, although heavy, could no doubt be raised up and removed without injury to the building containing it, and without injury to its concrete bed and to the bolts embedded in it.

Whilst the factory was being erected, but before any of the machines in question were put into it, Holdway mortgaged to Burrows the land on which the factory was being built, together with "the buildings, fixtures, machinery, and fittings erected thereon." Holdway afterwards executed a second mortgage to one Hatt, and at a later date he executed a third mortgage to the defendants. The machines in question were put into the factory soon after it was mortgaged to the defendants. After they had been fixed the second mortgagee took possession, and the defendants then paid off the two prior mortgages and took transfers of them. The mode in which the machines were fixed has been stated. The circumstances under which they were obtained and fixed by Holdway have also been stated. The purpose for which they were so obtained and fixed seems to be unmistakable: it was to complete and use the building as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels.

The question is whether they passed by the mortgage. But for the fact that Holdway had not paid for them the question would not in my opinion be

open to the slightest doubt. There is a long series of decisions of the highest authority showing conclusively that as between a mortgagor and a mortgagee machines fixed as these were to land mortgaged pass to the mortgagee as part of the land. The decisions in question begin with *Walmsley* v. *Milne*, and include *Ex parte Barclay*, *Mather* v. *Fraser*, *Climie* v. *Wood*, *Longbottom* v. *Berry*, *Holland* v. *Hodgson*, *Gough* v. *Wood*, and *Hobson* v. *Gorringe*. Others were referred to in the argument, but I need only mention *Southport and West Lancashire Banking Co.* v. *Thompson*, 36 W. R. 113, 37 Ch. D. 64, where it was held that whether the mortgagor is an owner in fee or is only a leaseholder (as in this case) is immaterial with reference to the question now under consideration. It is quite impossible to overrule these decisions.

It must be conceded that there are *dicta* in other cases, and even decisions, which show that for some purposes even machines more or less like these have been treated as chattels. There is *Hellawell* v. *Eastwood*, a case of distress which has been much commented on in later cases, and is of questionable authority; there are rating cases, such as *Chidley* v. *West Ham Churchwardens* and *Tyne Boiler Works Co.* v. *Longbenton Overseers;* there is the case of the miners' huts—*Wake* v. *Hall*—which arose between miners in the Peak district and landowners, and turned entirely on a local custom; there is the tapestry case—*Leigh* v. *Taylor*—which arose between a tenant for life and remainderman; there is *Fisher* v. *Dixon*, 12 Cl. & Fin. 312, which arose between the heir and the executors of the deceased owner of the land and the machinery fixed to it.

I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last, but not least, to the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgagor on the one side and the mortgagee on the other, it is in my opinion impossible to hold that the machines did not pass with the mortgage. The only authorities on mortgages which present any difficulty are *Trappes* v. *Harter* and the very recent case of *Lyon & Co.* v. *London City and Midland Bank*. *Trappes* v. *Harter* was a reputed ownership case, and turned on the facts stated in a special case. The court there held that some trade fixtures did not pass by a mortgage of the property to which they were attached. The special case, however, stated facts showing that the machines as fixed were locally regarded as chattels, that the partners who put them up so regarded them, and that the mortgagee knew this and so treated them. This accounts for the decision. In *Lyon & Co.* v. *London City and Midland Bank* some chairs were hired for the plaintiffs by the owner of a place of public entertainment in Brighton. The Brighton Town Council required the chairs to be fastened so as not to be easily displaced, and this was done. The chairs were screwed to bars fastened to the floor. The building and fixtures were then mortgaged to the defendants. The mortgagees took possession and claimed the chairs, but the court held they did not form part of the property mortgaged, but remained so many chattels. Having regard to the nature of the things fixed, the mode of fixing, and the order of the town council, the decision was, in my opinion, quite right, and in accordance with the authorities above referred to.

I pass now to consider whether in this case the fact that the mortgagor Holdway had not acquired the ownership of the machines by paying for them entitles the plaintiffs to recover their value from the defendants. The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels. This was pointed out in *Gough* v. *Wood*, and is very old law. Holdway agreed to buy the machines; but the plaintiffs knew what he wanted them for, and that before paying for them he intended to put them up in his factory and to use them. They knew that the factory was mortgaged, and they ran the risk of the machines being claimed as fixtures. In effect, Holdway was authorized by the plaintiffs to convert the chattels into fixtures, subject to the right of the plaintiffs to enter and retake them if he did not pay for them. But, apart from this knowledge and authority, the result would be the same, although not so obvious. After the machines were fixed, and before the plaintiffs claimed them, the second mortgagee took possession; the plaintiffs' right to enter and remove the machines, resting as it did on their contract with Holdway, ceased to be exerciseable. The plaintiffs have no greater rights against the defendants than they had against the second mortgagee, whose rights the defendants have acquired. The machines had ceased to be chattels belonging to the plaintiffs; they were not chattels wrongfully detained by the defendants. The machines had become fixtures which the plaintiffs were not entitled to remove from the possession of the mortgagees. This was the view taken both by Lawrance, J., and the Court of Appeal, and was in accordance with *Hobson* v. *Gorringe*, which, in my opinion, was correctly decided.

There were really no facts in dispute, and nothing would have been gained by leaving any question to the jury. The legal questions arising on the undisputed facts were, in my opinion, rightly decided, and the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Scott, Spalding, & Bell.*

Solicitor for the respondent, *T. H. E. Foord.*

Privy Council.

(*From the Court of Appeal, New Zealand.*)

June 22, 1904.

LODDER AND ANOTHER v. SLOWEY. (*a.*)

Contract—Seizure of works and re-entry—Right to determine contract—Quantum meruit—*Default or delay caused by parties suing.*

A party to a contract for the execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress, when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent. A contractor in such circumstances may treat the contract as at an end, and may sue for work and labour done, instead of suing for damages for breach of the contract.

This was an appeal from a decision of the Court of Appeal of New Zealand.

The facts are given at length in their lordships' judgment.

Cripps, K.C., and *Northcote*, for the appellants.

Skerrett, for the respondent.

The judgment of their lordships (Lords MAC-

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

NAGHTEN, DAVEY, ROBERTSON, and LINDLEY) was delivered by

Lord DAVEY.—In the month of December, 1897, a contract was made between the Corporation of Karori, in the Colony of New Zealand, acting by its borough council, with one John McWilliams for the construction by him of certain road works, including a tunnel. The contract was subject to certain conditions, by which it was provided (clause 1) that the contractor should execute the works according to the specification and to the entire satisfaction of Thomas Ward, civil engineer, (clause 4) that the engineer of the borough council should be the sole judge in all matters or questions arising out of the contract and of quality of materials or workmanship, meaning of specification, rate of progress, and general management, and that his decision should be final and conclusive in all cases, and (clause 8) that, should the contractor not proceed with sufficient expedition in the performance of the work or not execute the same in compliance with the specification or drawings, it should be in the power of the engineer on behalf of the borough council to enter on and take possession of the works and materials and complete the same at the expense of the contractor or re-let such works to another contractor, and any loss should be recoverable from the contractor or, in the alternative, to determine the contract, and on such determination the money paid under the contract should be accepted by the contractor in satisfaction of all claims under the contract.

The appellants entered into a bond with the borough council in the sum of £500 for the due carrying out by McWilliams of his contract. The bond itself is not printed in the record, and their lordships do not know the exact terms of it.

In September, 1898, McWilliams made default and, in fact, abandoned the works. The borough council thereupon called upon the appellants under their guarantee, and in the result a contract, dated the 15th of November, 1898, was made between the appellants and the respondent for the execution by the latter on or before the 2nd of March, 1899, of the works undertaken by McWilliams, and left incomplete by him. This contract contained a provision that the respondent should be deemed to have full notice of the contents and effect of all the various documents constituting McWilliams' contract and to be bound by all the terms and conditions of such contract so far as the same were then applicable to the present contract and capable of being carried into effect.

It may be useful at this point to consider the relation which was thus constituted between these three parties, the borough council for whom the works were to be executed, the appellants, and the respondent. The borough council and the appellants seemed to have assumed that on McWilliams' default the borough council had the right to call upon the appellants to complete the works, or that the appellants had an option whether they would do so or pay the penalty on the bond. At any rate they elected to take that course with the acquiescence of the borough council, without, however, binding the corporation by any contract with them. Probably all parties considered that they were subrogated to McWilliams' rights and subject to his liabilities. Instead of executing the works themselves, the appellants engaged the respondent to do so. *Quoad* the borough council the respondent was therefore in the position of a sub-contractor only, and there was no privity of contract as between them. But as between the appellants and the respondent each party was liable to the other one for any breach of the contract. The learned counsel for the respondent referred their lordships to some letters which passed between the solicitors of the appellants and the borough council respectively, in the month of February, 1899. It was then arranged, at the suggestion of the appellants themselves, that the respondent and the borough council should deal directly with each other, but without interfering with the position of the appellants towards the council, and, in answer to an inquiry from the solicitors of the borough council, it was explained that the meaning was that the respondent should be the agent of the appellants in making all arrangements about the tunnel, &c. These letters appear to explain the relative positions of the parties to each other with sufficient clearness.

Perhaps the expression that the respondent was to be deemed the agent of the appellants was not a very happy one, but it clearly meant that the appellants were, in a question between them and the borough council, to be bound by arrangements made with, and instructions given to, the respondent in the course of the execution of the works. On the other hand, by allowing the borough council to deal with the respondent directly, the appellants, in any question on the contract between them and the respondent, made the borough council, acting through their proper officer, the agents of the appellants as regards all matters relating to the execution of the contract, and *quoad* the respondent assumed the responsibility for any directions or instructions given by the council. In fact the execution of the works was proceeded with on this footing. The respondent dealt directly with Mr. Ward, the engineer of the borough council, and received his orders and instructions from him. And the appellants left the entire supervision and superintendence of the respondent's execution of the works to Ward.

The contractor failed to complete the works within the time specified in the contract, and in the month of July, 1899, letters were written by Mr. Ward to the appellants complaining of the condition of the works and threatening to take the works out of their hands and complete them at their expense. Copies of these letters were forwarded by the appellants to the respondent with an intimation that unless something was done to satisfy Mr. Ward, it would be necessary for the appellants to take the work out of the respondent's hands and complete it at his expense. On the 3rd of August, 1899, the officers of the borough council, purporting to act under the power contained in the eighth condition of McWilliams' contract, entered upon and took possession of the works.

The respondent shortly afterwards commenced the present action against the appellants, and by his statement of claim, dated the 6th of November, 1899, after alleging that the appellants had wrongfully entered and taken possession of the works and wrongfully determined, repudiated, and declined on their part to perform their contract, the respondent claimed for work and labour done and materials supplied by him at the request of the appellants and, alternatively, damages for breach of contract.

The corporation of Karori was afterwards added as a defendant.

The action was tried before Edwards, J., and a jury in July, 1900. The jury returned a special verdict in answers to twenty-seven questions left to them. For the purpose of his appeal the most material findings are those numbered 7, 10, 14, 17, and 24.

"7. Did the defendant corporation prior to the seizure of the works improperly prevent the plaintiff

from proceeding with the works in the manner authorized by his contract?—Answer: Yes.

"10. Was such seizure wrongful. Answer: Yes.

"14. Did the plaintiff proceed with the works with the rate of progress required by the defendant corporation's engineer.—Answer: Yes, except that he did not comply with the letters of the 21st and 25th of July.

"17. Did the defendant corporation prevent the plaintiff from proceeding with the said works with sufficient expedition?—Answer: Yes.

"24. What would have been the profit which the plaintiff would have obtained if he had been allowed to finish his contract?—Answer: No evidence that any profit would have been made.

The learned judge, on cross-motions for judgment and non-suit by the plaintiff and both defendants respectively, held that the corporation were under no contractual liability towards the respondent and were liable only for the agreed value of certain plant which they had taken. There is no appeal from this part of the judgment. As against the appellants he held that there was an implied warranty by the appellants that the respondent should have undispossession of the land for the purposes of the contract and the appellants were liable to the respondent for breach of this implied warranty. But he held that the measure of damages was the amount (if any) which the respondent had lost by exclusion from the works before completion, and as there was no evidence before the jury that the respondent had suffered any loss, he gave them the option of a new trial. And the learned judge entered judgment, dated the 25th of August, 1900, accordingly.

This judgment was reversed by the Court of Appeal, and by their judgment of the 1st of February, 1901, judgment was ordered to be entered for the respondent for £1,015 5s. with costs. The present appeal is from this judgment.

The learned judges in the Court of Appeal agreed with Edwards, J., that the appellants were liable to the respondent for the wrongful re-entry and seizure by the borough council, but on rather different grounds. Connolly, J., held that Ward must be treated as agent for the present appellants, with an almost unlimited authority to act for them and bind them in responsibility for his acts. Williams, J., while agreeing with the views expressed by Edwards, J., thought further that even if that conclusion were incorrect, there was an implied warranty or an implied condition of the contract that the respondent should not be wrongly interfered with by the person to whom by the contract the appellants had entrusted the superintendence of the respondent's work—viz., the engineer to the borough council. On the measure of damages the learned judges differed from Edwards, J. They adopted the statement of the law in the notes to *Cutter* v. *Powell* in Smith's Leading Cases, and they thought that Lord Cranworth's judgment in *Ranger* v. *Great Western Railway Co.*, 5 H. L. Cas. 72, which had been relied on by the learned judge in the court below, had been misapplied. All that that case decided, in their opinion, was that the appellants had no claim to equitable relief. Accordingly they held that the respondent was in the circumstances entitled to treat the contract as at an end and to sue on a *quantum meruit* for work and labour done and materials supplied, the net amount of which the jury had found to be £1,015 5s.

Their lordships agree with the conclusion of the Court of Appeal. They do not dissent from the contention of Mr. Skerrett, in his very able argument for the respondent, that in the circumstances of this case it was an implied term of the appellants' contract with the respondent that the borough council would permit the respondent, who was in the position of a sub-contractor, to perform his contract. But they think that the simplest and safest ground on which to rest the liability of the appellants is that they made the borough council, acting through their engineer, their agents for superintending the respondent's execution of his contract with full power to act for them in respect thereto. Not only is this proved by the arrangements made by the appellants with the borough council that the respondent should deal directly with the council and by the actual course of dealing by all parties, but their lordships think that it was also in accordance with the contract which by clause 8 incorporated the conditions of McWilliams' contract so far as then applicable.

It was, however, contended for the appellants at their lordships' bar that according to the true construction and effect of clause 8 of the respondent's contract the borough council had the right to re-enter upon the works if, in the opinion of the engineer, the respondent was not proceeding with sufficient expedition in the performance of the work. For this purpose it was said the engineer was not acting as the officer of the borough council, but was placed by the contract in the position of an arbitrator or referee, and his decision was made conclusive on the rate of progress. No imputation, it was rightly said, had been made upon Mr. Ward's good faith, and, therefore, the re-entry must be held to have been rightfully made and no cause of action arose from it.

Admitting this to be so, and assuming that the true effect of the incorporation of the conditions of McWifliams' contract so far as the same were then applicable was to give the right of re-entry, under Clause 8 of McWilliams' contract, not to the appellants, but to the borough council, the answer to the argument appears to their lordships to be that the jury have found (7) that the corporation prior to the seizure of the works improperly prevented the respondent from proceeding with the works in the manner authorized by his contract, and (17) that the corporation prevented the respondent from proceeding with the works with sufficient expedition.

It was not suggested before their lordships that these matters were not properly before the jury, or that the questions were not properly left to them, or that there was not evidence before them on which they could properly find as they did. Their lordships do not think that the appellants are precluded by the express finding that the seizure was wrongful from raising any questions of law, but they think that the seventh and seventeenth findings are fatal to the appellants' argument. The corporation, of course, means the borough council, acting by their engineer, Mr. Ward. Their lordships have already expressed their opinion that the borough council and Ward were made the appellants' agents for the purpose of superintending the execution of the contract by the respondent, and the acts done and orders given by the borough council or Ward, which the jury have found prevented the respondent from proceeding with the works with sufficient expedition were therefore within the scope of the authority conferred by the appellants. Their lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent: *Roberts* v. *Bury Improvement Commissioners*, 18 W. R. 702, L. R. 5 C. P. 310.

Their lordships also agree with the learned judges as to the proper measure of damages or (more accurately) as to the right of the respondent to treat

the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract.

Their lordships will therefore humbly advise his Majesty that the judgment appealed from should be affirmed and the appeal dismissed. The appellants will pay the costs of the appeal.

Solicitors, *Mackrell, Maton, Godlee, & Quincey*; *Shaen, Roscoe, Massey, & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 3.

ELLINGER & CO. AND SCHLESINGER *v.* MUTUAL LIFE INSURANCE CO. OF NEW YORK. (*a.*)

Insurance—Life—Policy for benefit of creditor—Undertaking not to commit suicide—Warranty—Condition.

An application for a policy of life insurance for five years, effected for the benefit of a creditor of the assured, was expressed to be the basis and a part of the proposed contract for insurance. It was signed by the assured, and it contained a number of statements which were warranted by him to be true. It also contained the following clause: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." Within the period of one year from the date of the policy the assured committed suicide during a fit of temporary insanity. In an action on the policy brought by the creditor,

Held, that the clause as to not committing suicide must be read as a condition, and that the fact of suicide rendered the policy void, and did not merely give the insurance company a cross-claim against the estate of the deceased for damages.

Judgment of Bigham, J. (52 *W. R.* 366, [1904] 1 *K. B.* 832), *affirmed.*

Appeal by the plaintiffs from the judgment of Bigham, J., at the trial of an action without a jury: reported 52 W. R. 366, [1904] 1 K. B. 832.

The action was brought on a policy of life insurance for £4,000 issued by the defendants to one Max Firnberg.

The plaintiffs Ellinger & Co. were the persons for whose benefit the policy was effected and to whom the insurance money was expressed to be payable. The plaintiff Schlesinger was the executor of Firnberg, and sued as trustee for Ellinger & Co.

On the 23rd of May, 1902, Firnberg signed an application addressed to the defendant company for a policy of insurance for £4,000 for five years on his own life.

The material parts of the document were as follows: "This application made to the Mutual Life Insurance Co. of New York is the basis and a part of a proposed contract for insurance. . . . I hereby agree that all the following statements and answers and all those that I make to the company's medical examiner in continuation of this application are by me warranted to be true and are offered to the company as a consideration of the contract which I hereby agree to accept. . . ." Then followed twenty numbered statements, beginning with name of the applicant. The ninth statement was as follows: "The full name of the person to whom the insurance is payable is Ellinger & Co., Manchester." The twelfth statement was as follows: "The insurable interest of the said beneficiary in the life proposed for insurance other than that of family relationship is to cover debt." After these statements there were three clauses in the following words: "I hereby warrant and agree that during the next two years following the date of issue of the contract of insurance for which application is hereby made I will not travel or reside in any part of the torrid zone, or north of the parallel of 60° north latitude in the Western Hemisphere, or north of the parallel of 70° north latitude in the Eastern Hemisphere, and will not engage in any of the following extra-hazardous occupations or employments—retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labour, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad, train, or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. I further warrant and agree that I will not engage in any military or naval service in time of war during the continuance of the said contract without first obtaining written permission from the company. I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract."

The policy was issued on the 24th of May, 1902. It commenced with the following words: "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Co. of New York promises to pay . . . unto Ellinger & Co. . . . creditors of Max Firnberg . . . their successors or assigns £4,000 . . . upon acceptance of satisfactory proof of the death of the said Max Firnberg provided such death takes place within the term of five years from the date hereof during the continuance of this policy upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The half annual premium of £56 16s. 8d. shall be paid in advance on the delivery of this policy and thereafter to the company at its principal agency in Great Britain on the 24th day of November and May in every year during the continuance of this contract until premiums for five full years shall have been duly paid to the said company." A number of provisions were printed on the back of the policy, one of which was as follows: "Military and naval service of any kind, the Volunteer service of Great Britain and Ireland in time of peace excepted, whether as combatant or non-combatant, without permission in writing, signed by one of the officers of the company, is prohibited under this contract."

It appeared that when Firnberg took out the policy he owed money to Ellinger & Co. for some business debt. In November, 1902, Ellinger & Co. were pressing for payment of this debt, and then for the first time Firnberg told them that by way of securing the payment of their debt he had effected the policy.

On the 19th of February, 1903, Firnberg, during a fit of temporary insanity, committed suicide. He died insolvent owing Ellinger & Co. £4,000 or more.

On the 25th of November, 1903, the plaintiffs brought this action upon the policy.

The plaintiffs contended that the policy must be regarded as having been taken out by Firnberg on their behalf, and that they were therefore entitled to ratify and recover on it, and that the clause as to suicide amounted to nothing more than a personal undertaking or independent agreement by Firnberg,

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

for the breach of which the defendants' remedy was limited to a claim against Firnberg's estate.

The defendants contended that the clause amounted to a condition, the effect of it being to exclude liability on their part if death was due to suicide.

Bigham, J., gave judgment for the defendants.

The plaintiffs appealed.

C. A. Russell, K.C., and *Cabaté*, for the plaintiffs.—Generally speaking, a policy of life insurance covers suicide, other than felonious suicide, unless there is an express provision in the policy that any sort of suicide shall avoid the policy. The general principle, which is founded on considerations of public policy, that a contract of insurance is avoided by suicide, only applies to felonious suicide, and not to suicide committed in a fit of insanity: *Horn* v. *Anglo-Australian, &c., Assurance Co.*, 9 W. R. 359, 30 L. J. Ch. 511. There is no reason then, on grounds of public policy, why this insurance should be forfeited. We must therefore look at the terms of the application, which the defendants say take suicide committed during t mporary insanity out of the policy. The clause as to suicide is one of three promises as to the future which follow on a number of warranties properly so-called. It is not expressed that in case of suicide all rights under the policy should cease. If that had been intended, it ought to have been expressed: *Stoneham* v. *Ocean Railway and General Accident Insurance Co.*, 35 W. R. 716, 19 Q. B. D. 237; *Hambrough* v. *Mutual Life Insurance Co. of New York*, 72 L. T. 140, 43 W. R. Dig. 83. There is no case in which a policy has been held void for non-observance of a promise as to the future or of a condition subsequent, unless the policy itself by its terms provided that such non-observance should render it void. The provision as to military and naval service on the back of the policy in this case shows that, when the parties desired to make a stipulation a condition, they knew how to do so in apt terms.

They also referred to *Thomson* v. *Weems*, 9 App. Cas. 671; *Barnard* v. *Faber*, 41 W. R. 193, [1893] 1 Q. B. 340; and *Newcastle Fire Insurance Co.* v. *Macmorran*, 3 Dow, 255.

Haldane, K.C., and *Rowlatt*, for the defendants, were not called upon to argue.

COLLINS, M.R.—I am of opinion that the judgment of Bigham, J., in this case is perfectly correct. In fact I might content myself with merely giving judgment in the very terms of his judgment. But out of deference to the argument which has been addressed to us I will shortly state my own reasons. We have to deal in this action with a policy of life insurance. The policy begins with these words: "In consideration of the application for this policy, which is hereby made a part of this contract," and it purports to be given "upon the following condition and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made part hereof." Before the policy was granted an application form had been addressed to the insurance company by the assured. It begins thus: "This application made to the Mutual Life Insurance Co. of New York is the basis and a part of a proposed contract for insurance. . . . I hereby agree that all the following statements and answers . . . are by me warranted to be true, and are offered to the company as a consideration of the contract which I hereby agree to accept." We start with this—that the application was the basis and a part of the proposed contract, and we also have statements warranted to be true and offered to the insurance company as the consideration of the contract. These are two matters which are emphasised by Lord Esher, M.R., in *Hambrough* v. *Mutual Insurance Co. of New York*. Then there follow in detail a number of statements and answers to questions. These again are followed by three express warranties. The previous statements and answers are made warranties by virtue of the original statement at the beginning of the application form. These latter are express warranties. The third express warranty is as follows: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." These warranties as well as the preceding statements and answers are, in my judgment, by the terms of the application form made the basis of the contract. The question is whether these warranties have the effect of what are ordinarily called warranties in policies of insurance. In a policy of insurance a warranty means a condition. In my opinion it was intended that these different statements and stipulations were to be conditions of the policy.

In *Thomson* v. *Weems*, 9 App. Cas., at p. 684, Lord Blackburn expresses himself as follows: "In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and *primâ facie* at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire: see per Lord Eldon, C., in a Scotch appeal on a fire insurance, *Newcastle Fire Insurance Co.* v. *Macmorran & Co.*" No question arises on that in the present case, but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies. The rule he was referring to is the general rule that *primâ facie* any provision at all in a policy is a condition. Whether that *dictum* is sound or not, that which follows has a strong bearing on this case. Lord Blackburn continued: "But I think, when we look at the terms of this contract and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which, I think, include his statement that he was of temperate habits) is warranted."

The question, then, is whether this particular warranty with which we have to deal in the present case is made a condition. Bowen, L.J., made an accurate statement of the law on this question in *Barnard* v. *Faber*: "It is, therefore, a term of this policy that there should be this promise; and, if this promise is one which goes to the root of the whole engagement and transaction, then it becomes, according to the ordinary principles of ordinary law, a condition—either a condition precedent, or, if the condition is one which cannot be construed as a condition precedent and must be a condition subsequent, then it becomes a condition subsequent. That arises from the materiality of the promise which is assumed to be made, and the making of which is to be a term of the engagement or transaction into which the underwriter has entered. When you have got as far as that, it is clear that it is the term as regards the risk which is material. A term as regards the risk must be a condition."

It is clear that the term of the policy with which we have to deal in the present case is a term as regards the risk. It provides that the company shall not be at the particular risk of the assured committing suicide

within a certain time. It is, therefore, by the agreement constituted a condition.

Now how has Bigham, J., dealt with this case? This is what he said: "What did the parties, Firnberg and the defendant company, intend when they inserted the warranty that Firnberg should not commit suicide? I think it is clear that they intended that in the event of suicide the company should not be liable on the policy. It does not matter, I think, whether the clause is called a warranty or not. It constituted a limitation of the defendants' liability. Death within five years was the event upon the happening of which the defendants were to pay, but death by suicide within the first twelve months was excluded. Apt words have been used to express that intention, and it is, I think, impossible to read the clause as merely giving to the company a cross-claim against the estate of the deceased for damages." That sums up the whole situation in language on which I cannot improve. I therefore think the appeal should be dismissed.

STIRLING, L.J.—I am of the same opinion. It seems to me that the term "warranty," though its primary legal meaning may not be to express a condition of liability, yet is very frequently used in that sense and may be so used. The question is whether it is so in this case. In marine policies the word "warranted" is constantly used in connection with conditions. This is a life policy, but in this very case it is not disputed that in the application form, which is made part of the contract, the word "warranted" is used in reference to conditions. It is not disputed that the truth of the statements and answers to questions is a condition precedent to liability, but it is said that the clause under consideration is not a condition. It seems to me that the fact of the word being used in this sense in the earlier part of the policy affords some ground at least for thinking it possible that it may be so used in the subsequent part; and, there being an ambiguity, I think we may consider the question of probability. I confess it seems to me impossible to believe that business people, dealing with a matter of this sort, where a company grants upon the application of a debtor a policy for payment to his creditor, meant that this clause should be treated not as a condition, but simply as giving the company a right to resort to the debtor, or rather the debtor's estate, whatever it might be, while they were compelled to pay the creditor themselves. I do not think that this is a reasonable view of the policy.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *G. Trenam*, for *Addleshaw, Sons, & Co.*, Manchester.

Solicitors for the defendants, *Freshfields*.

From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) July 29, 1904.

TREDWAY *v.* MECHIN. (*a.*)

Landlord and tenant—Weekly tenancy—Defective state of premises—Covenant to repair—Notice of want of repair—Personal injuries.

The defendant sublet the first floor of a house, of which he himself was the lessee under a repairing lease, to the husband of the plaintiff upon a weekly tenancy made verbally. The plaintiff went one day from her front room on to the balcony, when it gave way and she fell on to the pavement, receiving very serious injuries. The defective condition of the balcony was suspected by no one.

Held, assuming that the defendant had undertaken with the plaintiff's husband to keep the premises in repair (as to which the evidence was contradictory), nevertheless the defendant, not having received notice of any defect in the balcony and not knowing that it was unsafe, was not liable.

Application by the defendant asking for judgment or new trial in an action tried before Grantham, J., and a common jury.

The action was brought by Mrs. Catherine Tredway, and she claimed damages for personal injuries sustained owing to the non-repair of premises let by the defendant to her husband. The defendant, who was tenant of 16, Sidmouth-street, W.C., under a repairing lease granted him in October, 1902, sublet the first floor unfurnished to the plaintiff's husband in the following December upon a weekly tenancy of 10s. 6d. a week. On the 8th of August, 1903, the plaintiff went on to a balcony in front of the window, which gave way, and she fell on to the steps below and sustained the injuries now claimed for.

At the trial the plaintiff gave evidence that she did not know that the balcony was unsafe, but that she had pointed out to the defendant that the cement which covered the stonework of the balcony was defective. She also said the defendant was liable to do all repairs. There was no written contract between the defendant and her husband, but it appeared from the evidence called by the defendant that he had spent some £200 on repairs to the premises, which included the putting right of something wrong with the balcony to which the plaintiff had called his attention, and that the repairs were inspected and passed by the lessor's surveyor.

The jury found for the plaintiff with £150 damages, and judgment was entered accordingly by the learned judge, who, however, expressed his opinion that there was no evidence of any notice to the defendant of the defective state of the balcony.

A. J. Ashton and *W. G. Clay*, for the defendant.

Emile Cannot, for the plaintiff.

During the argument, which sufficiently appears from the judgment, the following cases were cited: *Makin* v. *Watkinson*, 19 W. R. 286, L. R. 6 Ex. 25; *Broggi* v. *Robins*, 15 Times L. R. 224; *Hugall* v. *M'Lean*, 33 W. R. 588, 53 L. T. 94; *Lane* v. *Cox*, 45 W. R. 261, [1897] 1 Q. B. 415.

COLLINS, M.R.—This is an appeal from a decision of Grantham, J., with a jury. The action is one brought by a weekly tenant of certain premises against the landlord, and the cause of action was an accident which happened to the plaintiff's wife by reason of the falling of a balcony on the demised premises by which she sustained serious injury. The question is whether the defendant is liable to pay damages in respect of the injuries so sustained. The law on the matter has been repeatedly laid down and is quite settled. It seems to me to be the law that if there is a contract as between the landlord and tenant that the landlord will repair the premises (that is, during the currency of the term) the landlord is not under any obligation, unless there be an express contract to that effect, to perform repairs unless and until notice of the necessity for those repairs has been given to him. On principle, the tenant and not the landlord is the occupier of the house, and the landlord has no right of access to the house for the purpose,

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

unless he stipulates for it, of examining its condition to see whether repairs are necessary. On the other hand, the tenant is the occupier, and the tenant is the person who has the means of knowing, and is the person most interested in knowing, what the condition of the premises is, and therefore it has been held that a naked undertaking on the part of the landlord to keep the premises in repair is not broken if they are out of repair, unless the tenant has given him notice of the fact. There seems to be no doubt that is the law. I think there was some evidence, it may have been unintentional evidence—that is to say, it may not have been intended to carry the meaning which the jury have put on it—that this was an undertaking on the part of the landlord with the tenant that he, the landlord, would keep the premises in repair. I cannot say there was no evidence on that, but I do not think it is really very material in the case. I assume there was that obligation on the part of the landlord. What happened, as I have said, was that this balcony fell. It seems to me that the evidence is all one way on this one cardinal point in the case, and no evidence to the contrary, because there were several witnesses who were quite unchallenged on cross-examination; and I think the result of the evidence in the case is that no one, from beginning to end, supposed there was any such defect in this balcony as led to this accident. The defendant, who took a long lease of the premises, was under contract with his landlord to put the house in repair. To do that he had to carry out specifications made by the landlord's surveyor, who, having no reason whatever for not putting everything into the specification which he thought was necessary, did not specify that anything should be done to this balcony. That contract was carried out, and certain minor defects in the shape of some want of plaster at the outer edge of the balcony were pointed out, but it never occurred to anybody that that indicated any defect in the structure of the balcony itself. That is quite obvious; in fact, it is common ground. Then it is suggested that the remedy adopted was putting on the small quantity of cement necessary to make good that defect. If there is one thing conclusively established in this case, it is this, that no one, neither those who were living in the house, or the person who had undertaken the repairs, or the persons, of whom there were more than one, who surveyed the repairs after they were done, had the slightest notion there was any radical defect in the balcony at all.

Under those circumstances, it seems to me, we cannot say there was any evidence of notice to the landlord, in the sense of the decisions which say that such notice is essential before the landlord can be held liable for not doing that which he had no notice was necessary to be done. If it were necessary to refer to it, there is one authority which Mr. Ashton called attention to (*Broggi* v. *Robins*), that even where the landlord has means of knowledge, and the tenant has not the means of knowledge, that is not enough to fix the landlord with the obligation to do the thing when he did not, in fact, know that it was necessary. That would be material if there was anything in the suggestion of the jury that the landlord when advised of the fact that there was a defect in the cement at the edge of the balcony might have dug out the whole of the cement, and if he had done so would have found there was a radical defect in the stone underneath at the point where it touched the wall. That cannot be put higher than means of knowledge. It does not amount to more than that, even if it amounted to that; but assuming it does amount to means of knowledge, it is then covered by the authority of that case, because he has no knowledge in fact; even if the jury were right in saying he had that means of knowledge, it does not make him liable.

It seems to me, therefore, on the undisputed facts of this case, there was no evidence for grounding liability on the part of the landlord to make good to the plaintiff the damages sustained by the accident. In my opinion, therefore, the judgment of the court below must be reversed, and entered for the defendant.

STIRLING, L.J.—I am of the same opinion. As regards the law of the case, it appears to me it is governed by the decision in *Broggi* v. *Robins*, which was a decision of this court. The judgment as reported is given by Lord Russell of Killowen, L.C.J., and he held in a very similar case that in order to establish a liability on the part of the landlord of premises let on a weekly tenancy it is necessary that the plaintiff should make out two things—first, that there was an agreement on the part of the defendant to repair; and, secondly, that the defendant must have notice of want of repair. I assume in the present case that there was evidence on which the jury might come to the conclusion that there was an agreement on the part of the defendant, the landlord, to repair. It appears to me that the plaintiff altogether fails on the second point, which it is necessary for him to establish—namely, that there was notice of want of repair. There was certainly notice that some cement ought to be placed on this balcony, but there is no evidence, as it seems to me, even on the part of the plaintiff that the balcony itself—that is to say, the slab which constituted the balcony—was out of repair, and the evidence which was given by the defendant's witnesses is distinctly to the contrary. I think, therefore, the action fails.

MATHEW, L.J.—It seems to me that the case may be disposed of on the assumption, as to which I do not say anything more than that it is an assumption, that there was an agreement between the plaintiff and defendant to keep the premises in repair. That supposed agreement was entered into when the tenancy began, and that was in December, 1902. In August, 1903, the accident happened. The previous June, the attention of the landlord was called to the condition of the balcony. What had he notice of? because he was entitled, on the authority of the cases which had been cited, to notice of the defect that he was called on to repair. The defect called to his attention was this flaw in the cement at the outer edge of the balcony. There is no indication by the plaintiff or any of the defendant's witnesses that there was anything wrong with the structure. An attempt was made to put right the defect which was pointed out; the cement was replaced which was supposed to be worn out. That had been done, and the landlord had no further notice there was anything wrong with the condition of the structure. The jury appear to have thought that he ought to have pulled up all the cement, because there was some wanted at the outer edge; and if he had pulled up all the cement it would have been discovered that the stone beneath had crumbled away. That was a mere suggestion of the jury. There was neither knowledge nor means of knowledge in the landlord of the defect which led to the accident occurring. With some regret I am constrained by the law to say that the verdict and judgment must be altered, and the judgment entered for the defendant.

Appeal allowed.

Solicitors for the defendant, *Hedges & Davis.*

Solicitors for the plaintiff, *Judge & Priestley.*

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) July 8, 1904.

MCGRUTHER v. PITCHER. (a.)

Sale of goods—Conditions as to re-sale—Notice to purchaser—Right to disregard conditions as to re-sale.

If, on the sale of goods, a condition is attached as to the price at which they may be re-sold, this cannot bind a subsequent purchaser, even though he bought with notice of the condition.

A retail trader purchased from H., who had purchased of the licensee of a patent an article manufactured by the licensee under the patent. Inside the boxes in which the article was packed was a printed condition, stating that the goods were not to be re-sold at less than a certain price specified therein. The retail trader having sold some of the goods at less than that specified price, in an action by the licensee to restrain the retailer from so doing.

Held, that the retailer had entered into no contract with the licensee; that the condition could not be made to run with the goods so as to bind the retailer, even though he was aware of such condition.

Taddy & Co. *v.* Sterious & Co., 52 *W. R.* 152, [1904] 1 *Ch.* 354, *approved.*

Decision of Farwell. J., *reversed.*

This was an appeal by the defendant from a decision of Farwell, J.

The facts were as follows:

The action was brought to restrain the defendant, his agents, servants, and workmen, from selling or otherwise disposing of certain rubber heel pads, manufactured by the plaintiffs and purchased from them by the defendant, either directly at a less price than 10d. per pair for ladies' heels and 1s. per pair for gentlemen's heels, or indirectly at a less price than as aforesaid by pretending to sell the same at a less price than as aforesaid, by giving or returning to the purchasers thereof a monetary payment out of such prices as received or otherwise as a present or a gift, contrary to certain terms and conditions of an alleged contract or contracts under which the aforesaid rubber heel pads were purchased by the defendant, and for damages and costs.

The plaintiffs were rubber manufacturers and carried on business at Preston under the style of "The Palatine Rubber Co."

The defendant was a bootmaker at Brixton.

By their statement of claim the plaintiffs alleged that they were the sole manufacturers of the Palatine revolving rubber heel pad under a licence, and that they always sold and disposed of their said revolving heel pads, whether bought directly from them or from any dealer, on the express agreement that the same should not be retailed at less than the above-mentioned prices, and also should not be resold except subject to these conditions, and also that the acceptance of the goods by any purchaser would be deemed to be an acknowledgment that they were sold to him on these conditions and on these conditions only, and that he agreed with the vendors as their agent to be bound by the same. The revolving heel pads were always packed in boxes and on the inside of the lid of each box were printed in large type the said conditions of sale.

The plaintiffs further alleged that early in the month of August, 1903, the defendant purchased from one C. Howes, one of the plaintiffs' factors, three pairs of the plaintiffs' said revolving heel pads and was orally informed of the said conditions of sale, which were accepted by the defendant, and that the defendant subsequently made further purchases of the heel pads from the said C. Howes, and on each occasion was orally informed of the conditions under which they were sold, and that in breach of and contrary to the said terms and conditions the defendant had sold and continued to sell the said revolving heel pads at a less price—that was, 8d. per pair for ladies' and 10d. for gentlemen's.

The defendant denied having had any notice, up to the 3rd of October, 1903, on which day he had received a letter from the plaintiffs, that the plaintiffs sold or disposed of the revolving heel pads on any condition of sale whatever, and if in fact they did, the said conditions were never binding on the defendant, and the defendant never entered into any contract with the plaintiffs regulating the price at which the defendant might sell the heel pads. He also denied having being orally informed by the said C. Howes of the conditions of sale.

On the 2nd and 3rd of October, 1903, the plaintiffs by letter complained to the defendant of, as they alleged, his breach of the said conditions of sale, and after some correspondence between the solicitors, the said action was brought.

Farwell, J., granted the injunction as claimed by the plaintiffs, but limited its duration to the continuance of the patent.

The defendant appealed.

Bramwell Davis, K.C., and *W. M. Cann*, for the defendant.

They cited *Taddy & Co.* v. *Sterious & Co.*, 52 W. R. 152, [1904] 1 Ch. 354.

McCall, K.C., and *T. E. Mansfield*, for the plaintiffs.

They cited *Incandescent Gas Light Co.* v. *Cantelo*, 12 Rep. Pat. Cas. 262, 264.

VAUGHAN WILLIAMS, L.J.—In my judgment this is both in substance and in form an action for breach of contract. So treating it, I suppose no one will deny the authority of *Price* v. *Easton*, 4 B. & Ad. 433, in which it was decided that "an action for breach of contract must be brought by the person from whom the consideration moved"; and that is confirmed by *Twedale* v. *Atkinson*, 1 B. & S. 393. Now, counsel for the plaintiffs very properly and frankly admitted that if an action were brought for the price of these heel pads it could only be brought by Howes. But he said that the plaintiffs, who are licensees from Roberts, the owner of the patent, are entitled to sue for the breach of contract. I cannot assent to that proposition. It is said that the defendant may be sued for breach of the condition as to the prices at which the pads are to be sold. Why? Because it is said the defendant bought with notice of that condition. Even if the defendant did buy with notice of the condition, I entirely deny that this would give any rights to a person who was not a party to the bargain. An attempt of this sort was made in *Taddy & Co.* v. *Sterious & Co.*, 52 W. R. 152, [1904] 1 Ch. 354. The head-note of that case is as follows: "T. & Co., manufacturers of tobacco, sold packet tobaccos subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing the following proviso: 'Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe the stipulations' (a much stronger case, be it observed, than the present). 'In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of T. & Co.' T. & Co. sold to N., who resold for his own profit to S. & Co. S. & Co. had notice of the condi-

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

tions, but sold to the public at a price below the stipulated minimum. Held, that there was no contract between T. & Co. and S. & Co. which T. & Co. could enforce, and that conditions cannot be attached to goods so as to bind all purchasers with notice." One need only look at paragraph 5 of the statement of claim in the present case to see that the pleader meant to affirm just the contrary to the decision of Swinfen Eady, J., in *Taddy & Co.* v. *Sterious & Co.* That paragraph contains really the gist of this action. [His lordship read it, and continued:] The plaintiffs say that because the defendant had notice of these conditions, although he entered into no contract whatsoever directly or indirectly with the plaintiffs, they can sue him for the breach of the conditions. I do not agree, and I think that the decision of Swinfen Eady, J., was perfectly right. He said: "Secondly, they contend that the goods were sold subject to certain conditions, and that even if Netten or any one else had purported to sell them free from the conditions, Sterious & Co., having notice of the conditions, could not sell goods except according to the conditions, and the plaintiffs were entitled to restrain them from doing so. With regard to this last contention there is a short answer. Conditions of this kind do not run with the goods, and cannot be imposed upon them. Subsequent purchasers therefore do not take subject to any conditions which the court can enforce. If there was a breach of contract the plaintiffs could no doubt sue. The question remains, therefore, whether there was any contract. There was no direct contract between Sterious & Co. and Taddy & Co., and the question does not arise as to the effect of a sale by Taddy & Co. direct to a retail trader subject to these terms as to minimum retail price." In my opinion that is perfectly sound, and I think the present plaintiffs have no cause of action. I desire to add that the case does not appear to have been presented to Farwell, J., in the way in which it has been presented to us. Farwell, J., seems to have dealt with the action as if it were brought to enforce the rights of the patentee through his licensees. I say nothing as to those rights, because in my judgment this is simply an action for breach of contract, and the plaintiffs were not parties to the contract.

ROMER, L.J.—I have arrived at the same conclusion. I have tried in vain to see on what ground this case could be successfully based by the plaintiffs, and I am bound to say that I cannot find any secure ground. In the first place, this case is not one in which the plaintiffs can be fairly regarded as seeking to enforce some patent rights which are vested in them. I can find no trace of such a case. The plaintiffs certainly say that the article is patented, but they state that they are mere licensees to manufacture it, and, as I gather also, to sell it. They do not say that as licensees they cannot do that, and if they could, so far as I can see, the person who would have a right to complain would be the patentee. The plaintiffs do not say that any of the rights of the patentee are vested in them beyond what they have as licensees. At any rate, I cannot find any case established which would justify the court in giving the plaintiffs relief on the footing of patent rights. That being so, they must succeed, if at all, on some other ground. Can the plaintiffs succeed on the ground that they are selling goods, and that they purported to attach a condition to the resale of the goods, and that the defendant was informed of this condition when he purchased the goods? Clearly, to my mind, they cannot. A vendor cannot in that way enforce a condition on the sale of his goods out and out, and, by printing the so-called conditions upon some part of the goods or on the case containing them, say that every subsequent purchaser of the goods is bound to comply with the condition, so that if he does not comply with the condition he can be sued by the original vendor. That is clearly wrong. You cannot in that way make conditions run with goods. The only other possible ground for the action is contract. Have the plaintiffs succeeded in showing that they have entered into a contract with the defendant? The evidence utterly fails to prove any such contract. On the contrary, so far as I can see, the defendant has throughout said that he always intended to sell the pads without regard to the conditions, and I certainly cannot find any evidence that he agreed with his vendor to comply with the conditions. And even if the defendant had so contracted with his vendor, I should have a difficulty in holding that that would constitute a contract between the defendant and the plaintiffs. Even if the intermediate vendor was the agent of the plaintiffs, I doubt very much whether the plaintiffs could maintain the action; but I need not consider that case. In fact, I cannot find any intermediate contract between the defendant and his vendor.

That being so, the ground of contract fails, and, as I have already said, I can find no sure ground on which to rest the plaintiffs' case. In my opinion the action fails, and the appeal must be allowed.

COZENS-HARDY, L.J.—I am of the same opinion. On the evidence it is plain that there was no direct contract between the plaintiffs and the defendant when he purchased these goods. He purchased the goods not from the plaintiffs, but from Howes. The defendant and Howes were the only parties to that contract of sale. If there has been a breach of the terms of that contract, Howes is the only person who can sue in respect of it, and as it seems to me, it is in no way relevant to say that Howes, when he bought the goods from the plaintiffs, bought them subject to a condition of which the defendant had notice when he bought the goods from Howes. On that point I have nothing to add to what Swinfen Eady, J., said in *Taddy & Co.* v. *Sterious & Co.*

I cannot help thinking that in the argument in the court below some confusion was introduced by reference to patent rights.

Now this action is neither in form nor in fact an action by a patentee claiming an injunction to restrain an infringement of his patent. In such an action it is open to the defendant to plead a licence by the plaintiff. That licence may be express, or it may be implied from the sale by the patentee of the patented article, but if the defendant pleads a licence, then it is competent for the plaintiff to reply: "The licence which I granted is a limited licence, and you, the person who has now got the patented article, were aware it was only a limited licence, and you cannot, therefore, defend yourself against my claim for an infringement of my patent because you are going outside the licence which to your knowledge I have with reference to this article." Such a case would not depend upon any condition running with or attaching to the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods. For these reasons I think the judgment of Farwell, J., cannot be supported, and the appeal must be allowed with costs.

Appeal allowed.

Solicitors, *Tippetts; Chester & Co.*, for *W. Preston*, Preston.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — May 12, 20, 1904.

MOSELEY v. KOFFYFONTEIN MINES (LIMITED). (a.)

Company—Shares—Issue of shares at discount—Issue of debentures at discount—Option of debenture-holders to take fully-paid shares.

A company proposed to issue debentures at a discount of 20 per cent. The debentures were to be payable on the 1st of November, 1909, and any debenture-holder was, up to the 1st of May, 1909, to have the option of exchanging his debenture for fully paid-up shares in the company at the rate of one £1 share for every £1 secured by the debenture. By the conditions of the debentures the debenture was to become immediately payable on the holder giving written notice to the company that he wished to exercise his option.

Held, that the scheme ought to be restrained by injunction, on the ground that it might be used as a means for issuing shares at a discount.

This was an appeal from a decision of Buckley, J.

The defendant company was incorporated on the 19th of May, 1893, under the Companies Acts, 1862 to 1890, for the purpose of acquiring certain mines known as the Koffyfontein Mines. The original capital of the company was £125,200, divided into 125,000 ordinary shares of £1 each and two shares of £100 each known as life governor's shares. The capital had since been largely increased.

The plaintiff was the largest shareholder in the company.

The company proposed to issue £85,000 5 per cent. first mortgage debentures upon the terms of a circular issued to the shareholders on the 25th of April, 1904. These debentures were to be issued at 80 per cent., in denominations of £10, £25, £50, and £100. They were to be secured by a specific first mortgage on the company's farm and buildings, and a general charge upon the remainder of the company's assets except its mining claims, and they were to be repayable on the 1st of November, 1909. Clause D of the circular was as follows: "Debenture-holders will have the right at any time prior to the 1st of May, 1909, to exchange their debentures for fully-paid shares in the company at the rate of one £1 fully-paid share for every £1 of the nominal amount of the debentures.

By the proposed form of debenture the principal moneys secured by the debenture were to be repaid on the 1st of November, 1909, or on such earlier date as the same might become payable in accordance with the conditions endorsed thereon. Condition 8 made these principal moneys immediately payable: (*b*) in the event of the registered holder giving to the company a direction in writing under condition 10. Condition 10 was as follows: "The registered holder hereof may at any time prior to the 1st day of May, 1909, direct the company, in writing addressed to it at its registered office for the time being, to allot and issue to him in exchange for and in satisfaction of this debenture fully-paid shares of the capital of the company, at the rate of one share of £1 for every £1 of the nominal amount of the debenture, and the company shall after the surrender of this debenture comply with such direction."

The plaintiff on behalf of himself and all other shareholders of the company, except the defendants, moved for an injunction to restrain the company and its directors until the trial of the action from carrying into effect the proposed allotment of debentures pursuant to the scheme set forth in the circular of the 25th of April, and from proceeding with the issue of any debentures pursuant thereto, and from issuing any debentures under the said scheme, or any other debentures pursuant to a similar scheme.

The ground of the application was that the transaction involved the issuing of shares at a discount.

Buckley, J., dismissed the motion.

The plaintiff appealed.

Buckmaster, K.C., and *Greenwood*, for the appellant.—Under this scheme a debenture-holder may exchange his debenture for shares at any time and he is not bound to wait for the arrival of the time for payment. The effect therefore is that he gets £100 worth of shares for £80. This is not like a case of a purchase by the company of goods or services, which do not admit of any exact money value being put on them, but the contract itself shows that the property in exchange for which the shares are to be given is less than the nominal value of the shares.

They cited *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125; *Chapman's case*, 43 W. R. 553, [1895] 1 Ch. 771; *Welton* v. *Saffery*, 45 W. R. 508, [1897] A. C. 299; *In re Wragg (Limited)*, 45 W. R. 557, [1897] 1 Ch. 796; *In re Almada Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415.

Neville, K.C., *Astbury, K.C.*, and *Holmes*, for the defendants.—This is not an issue of shares at a discount, but an issue of debentures at a discount, a transaction which is perfectly lawful. On the issue of the debenture share there becomes due from the company a debt of £100 and the company can pay off that debt by the issue of shares to that amount. The consideration for the shares is not the £80 paid by the debenture-holder but the quittance of the debt of £100 due from the company to the debenture-holders. The alternative view is to regard the debenture as an investment, and the giving of shares for property other than shares does not come within the rule against issuing shares at a discount so long as the consideration is not illusory. This cannot be treated as a colourable device for issuing £100 shares for £80. The shares can have no value unless the debentures are paid in full, and no one would exercise this option unless the shares were at a premium.

Buckmaster, K.C., replied.

VAUGHAN WILLIAMS, L.J.—The basis of the motion was that the issue of debentures, according to this scheme, constituted, or at all events would cover, the issue of shares at a discount—that is to say, the issue of one hundred £1 shares fully paid at a price of £80. There is, of course, no doubt about the obligation of a shareholder to pay to the company the full amount of his shares, as Lord Macnaghten pointed out in the *Ooregum case*, continuing as long as anything remains unpaid on his shares, but the liability, as the law now stands, and as it stood in 1862, can be discharged by payment in money, or (with the consent of the company) by payment in money's worth, and the court will not, if there is a valid contract, which, since the repeal of section 25 of the Act of 1867, no longer requires registration by the company for the acceptance of something of substantial value as money's worth, inquire into the adequacy of the consideration: see *In re Wragg (Limited)*. But the cases decide that a man must really pay for the shares. And, further, that if the contract makes it manifest on its face that the taker of the share is paying less than their nominal cash value, he may be liable for the balance. If the consideration is illusory, or if it permits an obvious money measure to be made showing that discount was allowed, or if the shares are openly issued at a discount, the shareholder may be called on to pay the balance in cash. It seems

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

obvious, therefore, that, if the company propose to issue shares under conditions which disclose any of the features to which I have referred, the person getting the allotment of shares would pay for them less than their nominal cash value, and such an issue ought to be restrained. It seems to me in the present case that the immediate consideration for the issue of shares to a debenture-holder demanding such allotment in exchange for, or in satisfaction of his debenture, is clearly the surrender of the debenture, and the mere fact that the debenture was purchased at a discount of 20 per cent. will not afford an obvious money measure showing that a discount was allowed in the price of the shares. Test it in this way: Suppose the debentures to have been issued at a discount of 20 per cent., and subsequently, quite independently of any contract at the time of the issue of the debentures, the company is minded to buy up as many of the debentures as the debenture-holders will sell, allotting one hundred £1 shares in exchange for a £100 debenture, could it possibly be said that those shares were issued at an obvious discount? I think not. The surrender of the £100 debenture might well be of the full money's worth of £100 cash, and in the great majority of cases would be so. The question therefore arises, does it make any difference that the bargain to issue the one hundred £1 shares in exchange for the £100 debenture issued at the price of £80 was part and parcel of the consideration for the issue of the £100 debenture at the price of £80? It seems to me that such a bargain might be a very good bargain for a company to make who wished to borrow on debentures a large sum of money required for the development of the enterprize of the company. It is true, however, that it might be a very bad bargain for the company, and, what is really essential, such a bargain might enable the debenture-holders who claim the allotment of shares to escape the statutory obligation to pay the full nominal amount of their shares. If the debentures were exchanged for shares immediately after the issue of the debentures, the practical result would be that the shares, although nominally issued in exchange for the surrender of debentures, would really be issued at a discount—*i.e.*, one hundred £1 shares for a payment of £80. The answer given by the company to this is, that as a matter of business no man would surrender a £100 debenture, which would always be entitled to payment in full before the shareholders could touch a penny, in exchange for one hundred £1 shares, unless and until such shares were selling at par in the market, and probably not unless and until such shares were at a premium. It is said in answer to this that it is not impossible, especially as the circular contemplated the issue of debentures to shareholders, that such shareholders might, for the purpose of Stock Exchange operations, exchange immediately their debentures for shares. The fact, however, clearly appears that the bargain referred to in the circular has this blot, that it might result in shares being issued practically at a discount. I think that the real question is, Does this bargain give to the company that which the company as business men might fairly regard as money's worth for the full nominal value of the shares? It is not sufficient for the company to say the bargain was made in good faith. The company must at least establish that there is no obvious money measure on the face of this bargain showing that the shares were issued at a discount. Is this money measure made obvious by the fact that the company bind themselves at any time after the issue of the debentures to allot shares to the full nominal value of the debentures, although those debentures were issued at a discount of 20 per cent.? The case is on the border line, but I am inclined to think that Buckley, J., ought to have issued the injunction asked for, on the ground that the issue of debentures on the proposed terms was open to abuse, even if the agreement was not illusory, but a real agreement honestly made. The appeal must be allowed.

I wish to add one word before I leave this case. It was established long ago that the obligation of a shareholder to pay the full nominal value of his shares need not be satisfied in cash, but might be satisfied in money's worth. It has also been held that the court will not, if it is satisfied that there is an honest bargain under which the money's worth is paid, inquire into the adequacy of the consideration. These two propositions have been affirmed by the highest tribunal, and I am not suggesting for a moment that the cases which established them were not properly decided, having regard to the terms of the Companies Act, 1862; but I hope that the day may come when it will be gravely considered by the Legislature whether it is not for the advantage of the community, and in particular of the commercial community, that an Act should be passed that in all cases the full nominal value of the shares shall be paid in cash and nothing else. I am satisfied from my own judicial experience in the administration of companies that such a law would have a tendency to check a great deal of unwholesome speculation on the Stock Exchange which is largely fed and supported by operations undertaken by vendors, promoters, and others for the purpose of unloading fully-paid shares which they have been allowed to satisfy by giving what is called money's worth instead of making a cash payment.

STIRLING, L.J.—I am of opinion that this appeal ought to be allowed on the short ground that there has been pointed out a blot in the scheme which entitles the plaintiff to relief.

We have before us the form of debenture which is proposed to be issued in pursuance of the scheme, and under condition 10 of that debenture any person having daid £80 to the company, and having received in exchange for such payment a debenture for £100, may forthwith leave at the registered office of the company a notice in writing directing the company to allot and issue to him one hundred fully-paid shares of £1 each in the company, and the company upon the surrender of the debenture will be bound to comply with the direction. If the company does not so comply, will the shares be validly issued? To my mind the result, obvious on the face of the transaction, will be the issue of shares of the nominal value of £100, in consideration of the payment of £80 only in cash—a transaction which is prohibited by the Legislature: see *Ooregum Gold Mining Co. of India* v. *Roper* and *Welton* v. *Saffery*. It is said that the issue of the debentures is not made with any intention of evading the rule which forbids the issue of shares at a discount, and I am quite willing to believe that no such intention exists on the part of the directors of this company. Nevertheless, if in fact the shares are issued at a discount, the honesty or good intentions of the contracting parties will not avail them, as is clearly established by the cases I have just mentioned. It is further said that although the result which I have pointed out may be possible, it is most improbable. I do not feel sure of this, for the shares of the company are dealt in on the Stock Exchange, and are of a highly speculative nature, and I cannot tell what steps the speculator in these shares may see fit to take in order to enable him to obtain control of the market. But I think that the possibility of such a transaction taking place is sufficient to entitle the plaintiff shareholders to an injunction of some kind. I desire in support of

that view to refer to a passage in Lord Watson's speech in *Ooregum Gold Mining Co. of India* v. *Roper*, which was partly cited by Buckley, J., in his judgment. Lord Watson said: "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid-up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and therefore receive less than nominal value for its shares. The court would doubtless refuse effect to a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice." Bearing in mind that the rule is capable of abuse, and it appearing, as I say, on the face of the documents we have before us that there is here a possibility of the scheme as it now stands being made use of with the result that shares will be issued at a discount, I think that an injunction ought to be granted.

COZENS-HARDY, L.J.—This appeal raises a highly important and very difficult question. Is it competent for a limited company in consideration of £80 to contract to issue a fully-paid share of £100, whenever requested so to do? Put in that bare form the answer to the question admits of no doubt. The transaction would result in the issue of shares at a discount. It is, however, urged that all objection is removed if the £80 is advanced to the company by way of loan upon the terms that the company shall pay £100 at a future date with interest in the meantime, and shall give the lender the option at any time to demand a fully-paid £100 share in exchange for the £100 debenture. The issue of the debenture at a discount is admittedly lawful, and it is urged that the result of the issue of the debenture is that the company will be legally indebted in the sum of £100 payable at a future date, and that, if and when the debenture-holder gives a notice to the company, such as is contemplated by condition 8 (*b*) of the debenture in the present case, the £100 will become immediately payable by the company, and this debt will be cancelled on the allotment of a fully-paid share of £100. The company will thus have received £100, and the share will not have been issued at a discount. Now, it is obvious that such a scheme may be used as a means for issuing shares at a discount, the debenture being issued on one day and surrendered on the next day. It would be idle to deny in such circumstances that £80 was the only cash payment for the £100 shares. Nor would it avail the shareholder assert that he had paid for his share otherwise than in cash by surrendering his debenture for £100, inasmuch as, to use the language of Vaughan Williams, J., in *Chapman's case*, it would be manifest on the face of the contract that the shareholder was really paying less than the nominal cash value. I do not think we ought to consider the motive or intention of the company in issuing the debentures in this form. The *Ooregum case* disposes of any such idea. I assume in favour of the directors that, from a business point of view, the transaction is expedient, but that is unimportant if the transaction is contrary to the policy of the Act of Parliament. Nor do I think we ought to consider the probability that this option will not be exercised until some distant future date. But if we are to consider it, I regard shares in a mining company of this nature as gambling counters for use on the Stock Exchange, and I can readily imagine that, for the purpose of creating or destroying a "corner" an option of this nature may be of great and immediate value to speculators at the Stock Exchange. In my opinion, an injunction ought to be granted to restrain the directors from carrying into effect the proposed allotment of debentures pursuant to the scheme in the circular of the 25th of April, on this short and simple ground—that the directors propose thereby to confer an immediate right to demand a £100 share in consideration of a cash payment of £80 only. I desire to guard myself against the supposition that the conclusion at which I have arrived involves the proposition that under no circumstances can a debenture be issued at a discount which may confer a right at some future date to demand a fully-paid share in exchange for the debenture. It is sufficient to say that whenever such a question comes before the court it will be discussed and decided with the care and deliberation which its importance demands.

Solicitors, *Cohen & Cohen; Ingle, Holmes, Sons, & Pott.*

High Court of Justice.

Chan. Div. Buckley, J. } June 28; July 5, 1904.

In re PALMER'S DECORATION AND FURNISHING CO. (LIMITED). (*a*.)

Company—Debentures—Claims upon registered holder—Transfer—Rights of transferee—Conditions of debenture—Right to be registered,

A company issued debentures to B. under the misapprehension that B. had given value for them, which was not the case. The moneys secured were expressed to be payable to B. "or the registered holder thereof for the time being." One of the indorsed conditions was that the moneys secured would be paid "without regard to any equities between the company and the original holder," and that the receipt of the registered holder should be a good discharge to the company for the moneys payable. Another condition was that a transfer must be delivered with such evidence of title as the company might reasonably require. B. deposited these debentures with C. to secure moneys owing to C. by B. C. had no knowledge of the defectiveness of B.'s title. C. afterwards procured a transfer from B., but he did not get himself registered, or demand to be registered, as the holder of the debentures. The company having gone into liquidation, C. demanded to be paid the sums secured by the debentures, without regard to the claims of the company upon B.

Held, that, under debentures drawn in that form, C. had no right to demand to be registered as holder, and that not being registered he was only entitled to the

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

debentures subject to all equities existing between the company and B. with regard to them.

Held, also, that under the indorsed condition the company could refuse to register C., as not having shown a good title to the debentures.

In re Goy & Co. (Limited), 48 *W. R.* 425, [1900] 2 *Ch.* 149, *explained and distinguished.*

Summons.

The above company was formed for the purpose of acquiring a business of decoration and furnishing carried on by P. Burnand, under the name of Palmer & Co. It was incorporated in February, 1902.

In May, 1902, the company entered into an agreement with Burnand for the purchase of his business for the sum of £1,893, which was to be satisfied, as to £400 by debentures issued by the company, and as to the balance of £1,493 in shares.

By clause 10 of the agreement Burnand agreed to subscribe in cash for £1,800 in debentures of the company. Subsequently the directors of the company, being in the belief that Burnand had expended certain moneys of his own on behalf of the company to the amount of £1,425, treated that as being in satisfaction *pro tanto* of his obligations under the agreement, and they accordingly issued to him fifteen debentures for £100 each, as regards four of them as part of the consideration for the sale of the business, and as regards eleven of them, in pursuance of clause 10 of the agreement for sale.

By these debentures the company promised to pay the moneys thereby secured, in accordance with the indorsed conditions, to Burnand, "or other the registered holder for the time being."

The following were among the conditions indorsed:

"3. The registered holder, or his legal personal representatives, will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the company shall not be bound to enter in the register notice of any trust or to recognize any right in any other person save as herein provided."

"4. Every transfer of this debenture must be in writing under the hand of the registered holder or his legal personal representatives, or if the registered holder is a corporation, under the seal of such corporation. The transfer must be delivered at the registered office of the company with a fee of 2s. 6d., and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered and a note of such registration will be indorsed hereon. The company shall be entitled to retain the transfer."

"8. The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder hereof, and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor."

By condition 11 the principal moneys became payable if (among other events) an effective resolution should be passed for the winding up of the company.

These eleven debentures were, however, issued to Burnand under a misapprehension. Burnand had not in fact expended his own moneys on behalf of the company, as his lordship found, and consequently had not performed so far his obligations under the agreement of sale; and he was not properly entitled to the debentures. At the time of the transaction next mentioned, and for long before, Burnand was indebted to the respondent, R. E. Campbell, for £7,500, which was secured by promissory notes and by the deposit of certain shares. On the 5th of July, 1902, at Burnand's request, Campbell, who was unaware of the circumstances under which the debentures had been issued to Burnand, gave him back the shares, and accepted from him in their place these fifteen debentures of Palmer's Decoration and Furnishing Co., and Campbell had ever since held them. In February, 1903, the company went into voluntary liquidation. In April, 1903, Campbell procured a transfer of the debentures from Burnand, but although he claimed to be entitled to the moneys secured, and later on sent the transfer to the liquidator of the company, he never made any demand to have the transfer registered. The facts with regard to the supposed payments by Burnand on behalf of the company having become known to the liquidator, he did not register the transfer, and the question arose as to the equities of the company in respect of the eleven debentures.

A further question arose between the company and the respondent Shand, and other respondents to the summons, in connection with Burnand, as to whether certain promissory notes held by Shand purporting to be drawn on behalf of the company were drawn with the authority of the company. These other respondents were indirectly liable for the payment of these notes. His lordship found that the company had in fact adopted the liability for these notes, and the case is not reported upon this question.

Under these circumstances the liquidator took out this summons against Shand, Campbell, the trustee in bankruptcy of Burnand, and other respondents asking (among other things) whether Campbell, as assignee of Burnand under the assignment of April, 1903, held or was entitled to hold the fifteen debentures in question subject to or discharged from certain disqualifications, equities, and rights of set-off, and otherwise, arising between the company and Burnand.

Sargant, for the liquidator.—The company has a right of set-off against Burnand, and Campbell as his assignee, against their claims under these debentures: *Christie* v. *Taunton, Delmard, Lane, & Co.*, 41 W. R. 475, [1893] 2 Ch. 175. Any equity in respect of the debentures which the company has against the transferor is equally enforceable against the transferee: *In re South Blackpool Hotel Co., Ex parte James*, L. R. 8 Eq. 225, 17 W. R. Dig. 89; *Athenæum Life Assurance Society* v. *Pooley*, 7 W. R. 167, 3 De G. & J. 294; Palmer's Comp. Prec., Part 3, p. 19; *Simm* v. *Anglo-American Telegraph Co.*, 28 W. R. 290; 5 Q. B. D. 188; *Balkis Consolidated Co.* v. *Tomkinson*, 42 W. R. 204, [1893] A. C. 396.

Schiller, for Shand.

Hughes, K.C., and *Leuchars*, for the guarantors of the promissory notes.—Until registration the transferee has no right as against the equities of the company. There may be circumstances which would entitle him to registration, but until he is registered he can only sue in the name of his transferor: *In re Richard Smith & Co. (Limited)*, Ir. Rep. [1901] 1 Ch. 73.

Waggett, for Campbell.—Campbell has a right to demand to be registered, being a *bonâ fide* holder for value (*In re Goy & Co. (Limited)*, 48 W. R. 425, [1900] 2 Ch. 149; *In re Brown & Gregory (Limited)*, 52 W. R. 412, [1904] 1 Ch. 627, 632), and must be treated as being in the position of registered holder. He is therefore entitled to the debentures free from all equities between the company and Burnand under condition 8. Condition 4 only enables the company to require evidence that the share is unincumbered, and does not entitle the company to refuse to register because of equities.

BUCKLEY, J.—If Burnand held the eleven debentures in question they would have been of no value to

him, having been obtained by misrepresentation. But Burnand is not the claimant, but Campbell; and Campbell is a person to whom Burnand owed money long before the 5th of June, 1902, when Campbell gave up the shares and accepted the deposit of fifteen debentures instead. On the 5th of February, 1903, the company was wound up. On the 26th of April, 1903, Campbell, as the depositee of the debentures, procured from Burnand a transfer of them to himself, and he gave notice to the liquidator not to pay the money secured to Burnand. But he made no demand for registration of the transfer. Now, has Campbell any better title that Burnand to those debentures? The debentures provide that the money secured shall be paid in accordance with the indorsed conditions to Burnand "or other registered holder for the time being." The relevant conditions are 3, 4, and 8. [His lordship read them.] Now, suppose Campbell to have made a demand to the liquidator to have the transfer registered, would he or his transferee have had the right to compel the company to register it, so as to destroy the rights which the company possessed as between itself and the transferor? In my opinion he would not. The object of the conditions as here expressed is that, if the transferree becomes the registered holder of the debentures, the company shall be precluded as from the date of the registration from setting up as against the transferee any rights it may have against the original holder. But I do not think that in this case there is any contract that the holder shall be entitled to transfer his debentures to another free from all equities existing between himself and the company. There is a form of debenture which will have that effect. But a debenture in the form of those before me only affords protection to the transferee when he has been put upon the register. The argument on behalf of Campbell is that as transferee he is entitled to have the transfer registered free from the equities of the company against the transferor; and *In re Goy* was cited as an authority for that view. But I do not think that Stirling, J., intended to decide this. In that case the transferee substantially demanded registration of the transfer at the time when it was sent in, and at that time the company were not setting up any claim against the transferor. I do not think that the learned judge meant to decide that if the company had had equities against the transferor at the date of the transfer, and had in consequence refused to register it, the transferee could have compelled the company to do so. Moreover, so far as appears from the report, the conditions upon the debentures in that case were not the same as those here. The words "and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor," which are in condition 8 here, were not there. These words show that it is the registered holder who is referred to in the condition. As regards condition 4, by which the company is entitled to require evidence of title, that gives the company, in my opinion, plenty of room to refuse to register Campbell, upon the ground that his title is deficient. I think, then, that even if Campbell had demanded registration from the company it would have been entitled to refuse and insist upon its equities against Burnand. But in fact he never made the demand. He only asked to be paid the moneys secured by the debentures. I therefore think that Campbell is in no better position as regards these eleven debentures than Burnand, and that the company can insist upon its equities against him. I hold, then, that the claim of Campbell fails, and that that of Shand succeeds.

Solicitors, *Paines, Blyth, & Huxtable; Campbell, Baird, & Perkins; Richard F. Yeo; G. F. Hudson.*

Chan. Div.
Swinfen Eady, J. } Oct. 27.

In re CAYLEY.
AWDRY *v.* CAYLEY. (*a.*)

Will—Estate duty—Death duties payable out of particular fund—Settlement estate duty—Finance Act, 1896 (59 & 60 *Vict. c.* 28), *s.* 19 (1).

A direction in a will to pay out of a particular fund the death duties payable out of the testator's estate covers settlement estate duty.

Originating summons.

By her will dated the 3rd of July, 1889, the testatrix gave certain specific chattels to the trustees and executors appointed by the will upon trust for certain *cestuis que trust* as life tenants, with remainders over, and thereafter gave to her trustees all the moneys belonging and due to the testatrix and out of all investments of and securities for money of which she had absolute power of disposal, upon trust to pay thereout all her funeral and testamentary expenses and the death duties payable out of her estate, and to pay the net residue thereof to certain beneficiaries.

The summons was taken out by the executors and trustees of the will to determine (*inter alia*) whether the settlement estate duty payable in respect of the specific chattels settled by the will was payable out of the settled property or out of the fund provided for the payment of the death duties.

T. A. Nash, for the trustees.

Ward Coldridge, for the residuary legatees.

A. Adams, for the life tenants of the specific chattels.

SWINFEN EADY, J.—The question is whether the expression amounts to an "express provision to the contrary" within the meaning of section 19 (1) of the Finance Act, 1896. The language used in the will is broad, and there is no reason for a restriction of its generality. Settlement estate duty is a death duty; moreover, estate duty, which includes settlement estate duty, is declared to be a death duty in section 13 (3) of the Finance Act, 1894 (57 & 58 Vict. c. 30). But for the decision of Kekewich, J., in *In re Lewis*, [1900] 2 Ch. 176—where the direction was to pay "all duties payable by law" out of the testator's estate, out of a specific fund, and in which it was held that the provision did not include settlement estate duty—it would be clear that the direction to pay death duties would include settlement estate duty. That case is distinguishable from *In re Pimm, Sharpe* v. *Hodgson*, 52 W. R. 648, [1904] 2 Ch. 345. In the latter case estate duty was held payable out of the residuary estate under a direction to pay "my debts, funeral and testamentary expenses, and duties" out of the proceeds of the residuary estate.

There is in the present case an express provision within sub-section 1 of section 19 of the Finance Act, 1896 (59 & 60 Vict. c. 28), and the settlement estate duty payable in respect of the settled chattels must be borne by the fund expressly provided by the will for the payment of the death duties in exoneration of the settled articles.

Solicitors, *Wood, Bigg, & Nash*, for *W. J. & D. Awdry*, Chippenham; *Bell, Brodrick, & Gray*, for *Gray & Dodsworth*, York.

(*a.*) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 22.

EARL v. LUBBOCK. (a.)

Negligence — Contract to repair van — Negligence in repairing—Injury to driver—Liability of repairer.

The defendant agreed with a mineral water manufacturer to keep his vans in good and substantial repair for a period of three years. During the period a servant of the defendant negligently repaired a van, and in consequence thereof one of the wheels came off and the plaintiff, who was a driver in the employment of the mineral water manufacturer and who was driving the van at the time, was thrown off and injured. Neither the defendant nor his servant knew of the defective condition of the van after it was repaired. In an action by the driver against the defendant to recover damages for personal injuries caused by the negligence of the defendant,

Held, that in the circumstances the defendant owed no duty to the plaintiff, there being no contractual relation between them, and the action was not maintainable.

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.), affirming the decision of the judge of the Bloomsbury County Court.

The action was brought to recover damages for personal injuries. The defendant, who was a master wheelwright, had contracted with Beaufoy & Co., who were mineral water manufacturers, "to keep in good and substantial repair" their vans for a period of three years. On one occasion the wheel of one of the vans required repairing, and the defendant's men repaired it.

While the plaintiff was driving the van later on the same day, the wheel came off and the plaintiff was thrown out and injured. The plaintiff alleged that the defendant's servant repaired the wheel of the van in a negligent and unskilful manner, whereby the accident happened. There was no evidence that the defendant or his servant knew of the defective condition of the van after it was repaired.

At the trial, at the close of the plaintiff's case, the county court judge directed judgment to be entered for the defendant upon the ground that, even assuming that there was negligence on the part of the defendant or his servant in repairing the van, he owed no duty to the plaintiff, with whom he had no contractual relation.

The Divisional Court affirmed this judgment.

The plaintiff appealed.

Arthur Powell, K.C., and *W. M. Thompson*, for the plaintiff.—The defendant is liable for the negligence of his servant acting within the scope of his employment in negligently repairing the van whereby the plaintiff was injured. The act of repair being an act of misfeasance, the defendant is liable. For a mere act of non-repair—that is, mere nonfeasance, no one can sue except the person with whom the contract is made to do the repair. But a person who has undertaken to repair a chattel owes a duty to the person or to the class of persons who will to his knowledge use the chattel to exercise due care in repairing it: *Hayn* v. *Culliford*, 27 W. R. 541, 4 C. P. D. 182. It may also be put in this way: A person who represents himself as a skilled man, and who, having repaired a van, hands it over to another man to drive, owes a duty to the driver to exercise due care in repairing the van. *Elliott* v. *Hall*, 15 Q. B. D. 315, shows that such duty exists. *Winterbottom* v. *Wright*, 10 M. & W. 109, was decided on demurrer to the declaration, and the declaration only alleged a negligent failure to repair the coach, a mere nonfeasance. That case, therefore, is not against the plaintiff's contention. *Longmeid* v. *Holliday*, 6 Ex. 761, is not in point. In that case there was a sale of a lamp by a tradesman to a man to be used by himself and his wife, and the lamp exploded owing to a defect in its construction, and injured the wife. The seller did not know of the defect. It was held that there was no misfeasance towards the wife independently of the contract, and that she could not sue the seller. In the present case there was an act of misfeasance in negligently repairing the van, and there was a duty towards the person using the van to take reasonable care in executing the repairs, because want of such care would cause danger and physical injury, as distinguished from injury to the pocket, as in *Scholes* v. *Brook*, 63 L. T. 837, 64 L. T. 674, 39 W. R. Dig. 133. *George* v. *Skivington*, 18 W. R. 118, L. R. 5 Ex. 1, is exactly in point, and it has never been overruled. What had been said about it was that Cleasley, B., had apparently confused negligence and fraud, but the judgments of Kelly, C.B., and Channell and Pigott, B.B., were not open to that criticism. That case was referred to by Collins, M.R., in *Clarke* v. *Army and Navy Co-Operative Society*, [1903] 1 K. B. 155, at p. 158, 51 W. R. Dig. 138, apparently with approval. [COLLINS, M.R.—In *Heaven* v. *Pender*, 30 W. R. 749, 9 Q. B. D. 302, Field and Cave, JJ., treated *George* v. *Skivington* as being inconsistent with *Winterbottom* v. *Wright*, and said that they preferred the latter case; and Cotton and Bowen, L.JJ. (11 Q. B. D. 503), seemed to agree with that view.] The plaintiff's case comes within the principle laid down by Cotton and Bowen, L.JJ., in *Heaven* v. *Pender*, and it is unnecessary to rely upon the wider proposition laid down by Lord Esher, M.R., at p. 510, though, if necessary, that proposition can be supported.

They also referred to *Farrant* v. *Barnes*, 11 C. B. N. S. 553, 10 W. R. C. L Dig. 16; *Parry* v. *Smith*, 27 W. R. 801, 4 C. P. D. 325; *Thrussell* v. *Handyside*, 20 Q. B. D. 359, 36 W. R. Dig. 140; *Le Lievre* v. *Gould*, 41 W. R. 468, [1893] 1 Q. B. 491; *Cunnington* v. *Great Northern Railway Co.*, 49 L. T. 392; *Hopkins* v. *Great Eastern Railway Co.*, 60 J. P. 86; *Thomas* v. *Winchester*, 6 N. Y. Rep. 397.

Montague Lush, K.C., and *Lincoln Reed*, for the defendant, were not called upon, but referred to Lord Herschell's speech in *Caledonian Railway Co.* v. *Mulholland*, 46 W. R. 236, [1898] A. C. 216, as to the real effect of the decision in *Heaven* v. *Pender*.

COLLINS, M.R.—This is an action by the plaintiff, a driver in the employment of Beaufoy & Co., who owned a number of vans, to recover damages from the defendant, who was under a contract with Beaufoy & Co. to repair their vans, in respect of an accident to the wheel of the van which the plaintiff was driving, whereby the wheel came off and the plaintiff was injured. The county court judge, at the close of the plaintiff's case, directed judgment to be entered for the defendant upon the ground that he was under no duty to the plaintiff in the matter, and that therefore the plaintiff had no cause of action. The Divisional Court affirmed this decision. The Divisional Court have elaborately gone through the various cases, and it is unnecessary to do so over again. I think that the case is reasonably clear, and I confess that I do not share the difficulty felt by Kennedy, J., upon the point. The process of reasoning has been gone

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

through in various cases, and the line of liability has been clearly laid down. In my opinion the case is concluded by the decision in *Winterbottom* v. *Wright*, which in its circumstances is indistinguishable from the present case, and which since its decision in 1842 has stood the test of repeated discussion. The law was laid down in that case and laid down in such a way as to bring this case within it. Lord Abinger, C.B., said (10 M. & W. 109, at p. 114): "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party who was not privy to the contract entered into by him can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? That would, at all events, have defeated his claim altogether. By permitting this action we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him." It seems to me that the principle there laid down, which has been affirmed and re-affirmed in subsequent cases, is conclusive of the present case. In my judgment there is no question here of the delivery to a person of a dangerous article, one of the circumstances which would give rise to a cause of action in a person not a party to the contract. The circumstance was pointed out by Parke, B., in delivering the judgment of the Court of Exchequer in *Longmeid* v. *Holliday*, 6 Ex. 761, at p. 767: "And it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon* v. *Bell*, 5 M. & S. 198. But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that, if a machine not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." In the present case there was a van which according to the evidence was not visibly out of repair in any particular which was likely to lead to the mischief which actually happened. The van cannot, in my opinion, be said to come within the category of dangerous articles to which the principle above referred to applies. It is then said that the case comes within the wider principle enunciated by Lord Esher, M.R., in *Heaven* v. *Pender*. That, however, was not the decision of the court, nor was it concurred in by the other members of the court, and it was subsequently qualified and explained by Lord Esher himself. It is sufficient to say that the judgment of the court is contained in the judgment of Cotton, L.J., with which Bowen, L.J., agreed, and this case does not come within measurable distance of that judgment. The plaintiff has failed to bring the case within this principle, and failing to do so, the decision in *Winterbottom* v. *Wright* is conclusive, a decision which has survived the controversy that has raged round the point for over half a century. The appeal therefore fails.

STIRLING, L.J.—I am of the same opinion. In order that the plaintiff should succeed he must bring himself within the proposition laid down by Cotton, L.J., in *Heaven* v. *Pender*, and concurred in by Bowen, L.J.: "Anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act." That passage was cited to the county court judge, and was mainly relied upon by the plaintiff's counsel. As to the first branch of that proposition, dealing with liability for leaving a dangerous instrument in such a way as to cause danger, I take it that that refers to an instrument dangerous in itself. That is shown by the illustration given of a gun, and also by what is dealt with in the second branch of the proposition—namely, an instrument or thing which is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing. In my opinion a van does not fall within the first branch of the above proposition, and the plaintiff has accordingly to bring himself within the second branch, and so it was his duty to adduce evidence that, to the knowledge of the defendant, the van, when repaired, was in such a condition as to cause danger. Having read what took place in the county court, I do not see that the plaintiff was in a position to satisfy that requirement. The appeal therefore fails.

MATHEW, L.J.—I am of the same opinion. The counsel for the plaintiff has addressed to us a very courageous argument. If we were to adopt his contention, it seems to me that anyone in Beaufoy & Co.'s employment who sustained personal injury traceable to the defective condition of the van would have a right of action against the defendant. If the contention were well founded a great many branches of trade would necessarily cease to be carried on. What sane man would sell an article, it may be for a very small sum, if he were to be liable to an action by a third person who was no party to the contract of sale for injury caused by the defective condition of the article, a defective condition which was unknown to him? Suppose, again, that a man repairs an omnibus, and by his negligence it is sent back in a defective condition, though the defective condition is unknown to him, and in consequence of its condition an accident happens to it, according to the argument everyone who was in the omnibus at the time and who was injured by the accident would have an action against the man who repaired the omnibus, because he or his servant was negligent in repairing it. A person who makes a contract knows, or may be taken to know, the measure of damages to which he may be liable to his con-

tractor, and he can regulate the price to be charged accordingly; but he cannot calculate his liability if he were, so to speak, an insurer against possible accidents to anyone arising from his negligence. I agree that there is no evidence here that this van was returned to Beaufoy & Co. in a dangerous condition, and I agree with the judgments delivered by my lord and my brother Stirling.

Appeal dismissed.

Solicitors for the plaintiff, *Buchanan & Hurd.*

Solicitors for the defendant, *Sayle, Carter, & Co.*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Nov. 14.

CHRISTY v. TIPPER. (a.)

Trade-mark — Word — Invented word — Descriptive — Patents, &c., Acts, 1883 (46 & 47 *Vict. c.* 57), *s.* 64 (1) (d) (e), *and* 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

In order to determine what words are proper for registration as trade-marks, the court will look at the word itself in every case. "Absorbine," applied to an absorbent medicament, is not an invented word but a variation of "absorb," and has reference to the character or quality of the article; it is consequently not a proper word for registration.

Appeal from a decision of Joyce, J. (reported 52 W. R. 414, [1904] 1 Ch. 696).

The plaintiffs, Christy & Co., were agents in England for the sale of a veterinary preparation called "Absorbine," manufactured by the plaintiff Young in America, for use in the cure by absorption of swellings in horses and cattle.

They had registered the name as a trade-mark, and brought this action to restrain the defendants from infringing that trade-mark, and from passing off their goods as the goods of the plaintiffs.

The defendants were large manufacturers of horse and cattle medicines, and had for long sold an ointment of their own called "Absorbent," the name of which they had recently, in ignorance of the plaintiffs' preparation, altered to "Absorbine." They denied infringement and moved to expunge the plaintiffs' mark from the register as being not an invented word but one descriptive of the character or quality of the article sold thereunder, and therefore not registrable according the Patents, &c., Acts, 1883, s. 64 (1) (*d*) (*e*), and 1888, s. 10.

The charge of passing off was not pursued.

The learned judge held that the word in question had obvious reference to the character or quality of the goods, and that it was not an invented word, being a mere combination of syllables or parts not themselves invented, and he dismissed the plaintiffs' action and ordered the mark to be expunged from the register.

The plaintiff Young appealed.

Neville, K.C., and *Sebastian,* for the appellant, cited *Eastman, &c. (Limited)* v. *Comptroller General* ("*Solio*" *case*), 47 W. R. 152, [1898] A. C. 571, 581 (*per* Lord Herschell), and *Wellcome* v. *Thompson* ("*Tabloid*" *case*), 52 W. R. 581, [1904] 1 Ch. 736.

Younger, K.C., and *E. P. Hewitt,* for the respondents, were not called upon.

VAUGHAN WILLIAMS, L.J.—Our decision will not deprive the trade of any advantage or of anything which, as has been argued, they have counted on as the result of legislation. In every case of this kind we must look at the word itself. In my opinion "Absorbine" is a mere variation of the word "absorb" and indicates that the article absorbs. I am of opinion that the word shows no invention, such as there was in the word "Solio" in *Eastman* v. *Comptroller-General,* which, though it may have been derived from "Sol," was not a mere variation of it. Under these circumstances the appeal must be dismissed.

ROMER and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Lionel E. Townroe; Belfrage & Co.,* for *T. W. Robinson,* Birmingham.

(a) Reported by R. HILL, Esq., Barrister-at-Law.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) And K. B. Div. (Channell, J.) — Nov. 7.

ATTORNEY-GENERAL v. EARL OF LONDESBOROUGH. (a.)

Inland revenue — Estate duty — Exemption — Personal property settled by will of person dying before the Finance Act — Subsequent conversion of personal property into real estate — Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-section* 1.

A testator who died before the Finance Act, 1894, *bequeathed the residue of his personal estate to trustees upon trust to convert it into money and to invest the money in real estate to the use of a tenant for life with remainder to the use of the eldest son of the tenant for life in tail male. Probate duty was duly paid on the personal estate, and the residue was invested in the purchase of real estate which was conveyed to the uses of the testator's will.*

Held, by the Court of Appeal, *reversing the judgment of* Channell, J., *that on the true construction of section* 21, *sub-section* 1, *of the Finance Act,* 1894, *estate duty was not payable on the death of the tenant for life in respect of such real estate.*

Information by the Attorney-General claiming estate duty on the death of William Henry Forester, Earl of Londesborough.

The following facts appeared from the information and the answer of the defendant, the present earl, who was the eldest son of the deceased earl:

William Joseph Denison, by will dated the 3rd of August, 1848, devised all his manors, lands, and other hereditaments situate in the counties of York and Surrey or elsewhere to the use of his nephew, Lord Albert Denison Conyngham, for his life, with remainder to the use of William Henry Forester Conyngham, the eldest son of his said nephew, and his assigns for life, with remainder to the use of the first and every other son of William Henry Forester Conyngham severally, successively, and in remainder one after another in tail male, with certain remainders over. The testator bequeathed all his personal estate to trustees upon trust to convert into money all his residuary personal estate, and within ten years of his death to invest the money in the purchase of real estate and to settle the real estate so purchased in the same manner and to the same uses as were expressed in the will concerning the testator's real estate.

The testator died on the 3rd of August, 1849, and his executors, having paid probate duty on his personal estate, handed over to the trustees of the will

(a.) Reported by F. G. RUCKER and E. G. STILLWELL, Esqrs., Barristers-at-Law.

the residuary personal estate, amounting in all to £1,594,175 19s. 2d. The trustees of the will invested that final residue in the purchase of hereditaments, which were duly conveyed to the uses of the testator's will.

Lord Albert Denison Conyngham was in 1850 created Baron Londesborough. He died in January, 1860, and was succeeded by his eldest son, the said William Henry Forester Conyngham, as the second Baron Londesborough, and also as tenant for life to the estates devised by and subject to the trusts declared by the will of William Joseph Denison, including the estates purchased with the residuary personalty of the testator.

By an indenture dated the 18th of May, 1886, made between the second Lord Londesborough, his eldest son (the defendant), and others, the estates held under the settlements in the will of William Joseph Denison were resettled.

The second Lord Londesborough, who in 1887 was created Earl of Londesborough, died on the 19th of April, 1900, when the defendant succeeded to the estates and title.

The Commissioners of Inland Revenue claimed that estate duty was payable under the provisions of the Finance Act upon all the property the subject of the resettlement of the 18th of May, 1886.

The defendant contended that he was entitled to exemption under section 21, sub-section 1, of the Finance Act, 1894, from estate duty in respect of that portion of the real estate which was derived from the investment in land of personal estate upon which probate duty had been paid under the will of William Joseph Denison.

The question for the decision of the court was whether or not the defendant was entitled to the exemption claimed.

Section 21, sub-section 1, of the Finance Act, 1894, is as follows: "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Act, in respect of which property any duty mentioned in paragraphs 1 and 2 of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid, or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." Probate duty is one of the duties so mentioned.

March 7.—*Sir Robert Finlay, A.G., Sir Edward Carson, S.G.*, and *Vaughan Hawkins*, for the Crown.

Danckwerts, K.C., and *Bridgeman*, for the defendants.

CHANNELL, J.—I think in this case my judgment must be for the Crown. I quite appreciate Mr. Danckwerts' argument and the proposition of Rigby, L.J., and I personally think that the object of the Legislature was to give the benefit to settled property of having paid, before the Act came into operation, a duty which would free it from further duty of a similar kind during the continuance of the settlement. That was the object of this particular section I have no doubt. But one has to consider whether that object has been carried out in all cases, and in order to do so it is necessary to go by the Act of Parliament. It is possible that if the case of property which was personalty at the time of the settlement and had been converted into realty at the time of the death in question had been contemplated by the Legislature, they would have used other words and have given that property the benefit which they were giving to property which was personalty at the time of the settlement and remained personalty all through the settlement. It is possible they would. On the other hand, it is possible they would not, because I think, as a matter of history, this Act was somewhat directed against landed property and owners of landed property, rather to bring land into taxation in a way in which it had not been before. Therefore it does not follow that the Legislature would, if they had had the case in their direct contemplation, have provided in the way which Mr. Danckwerts suggests they have in fact provided for the case of property which was personalty at the time of settlement and had become converted into realty at the time when the question arose as to whether it should pay duty on a particular death. But it is necessary really to decide all such questions by the language. Now again, in reference to the principle that one is to lean to the lighter burden, I myself very seldom find those principles of much assistance to me. But in this particular case the duty is undoubtedly imposed by the operative words of the Act of Parliament, and the question is whether it comes within the exception, and in reference to that I think different considerations might apply. As an ordinary rule it is the person who says it comes within an exception who has to show that it does. Possibly that may be a sufficient answer to that argument, which, however, is one that seldom appeals to me very much. One has to go to the words of this clause, "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will." I have dealt with the difference between the words "by" and "under," but I think that that clearly means in respect of personal property which is at the time of the death governed by a settlement and passes on that death by virtue of the operation of the settlement. It must mean property—at present I leave out the word "personal"—which is under the operation of the settlement and not property which has at some time past been in fact settled by an instrument. It cannot mean the latter, because otherwise it would give property in respect of which these sorts of duty—probate duty and so on—had been paid, immunity for all time in respect of all future deaths, whether during the time of the continuance of the settlement or not, which is impossible. It is true that the majority of cases which would arise of that kind are provided for by the last clause "unless," but not every possible case.

I think therefore it means personal property which is at the time of the death under the operation of the settlement. Then, if so, that is the time when one has to look to see whether the property is personal or not. The exemption is not given according to that reading of it in respect of real property. Again, if the other construction is correct—namely, that the word "personal" is introduced only because the only property in respect of which the duties afterwards mentioned—namely, the probate duty and analogous duty, were payable was personal property, it was unnecessary to introduce it all.

I quite agree that it not a very strong argument, because it does sometimes happen that words are introduced, as was said by Rigby, L.J., in reference to something in the other sections of this Act, for the sake of clearness. But unfortunately the introduction of this word, if put in for the sake of clearness, has a very different operation.

In my opinion these words are too strong to enable me to accept Mr. Danckwerts' argument, although I quite accept it in principle as indicating what was probably the intention of the Legislature in passing this clause.

They have, however, used words which go beyond

that intention, if that was their intention, and I give judgment for the Crown.

The defendant appealed.

Nov. 7.—*Haldane, K.C., Danckwerts, K.C.*, and *Bridgeman*, for the defendant.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Vaughan Hawkins*, for the Crown.

COLLINS, M.R.—This is an appeal from the decision of Channell, J., upon a question arising under the Finance Act, 1894. No doubt, as the Attorney-General says, the point turns upon a very few words in one section, but I think that the words are such that it is competent for us to give an interpretation of them consistent with what appears to be admitted on all hands as the intention of the Act of Parliament itself. The question arises in respect of a claim for estate duty upon the death of a tenant for life. The original settlor placed a very large estate in settlement for two lives in succession with remainders over. His estate consisted partly of realty and partly of personalty, and he gave a direction that the personalty should be invested in the purchase of land, which was to follow the trusts of his real property. The settlement was made, and the settlor died before the Finance Act, 1894, came into operation, and in the ordinary course probate duty was paid on all the personal estate. Since the coming into operation of the Finance Act the second tenant for life has died, and now on his death the Crown claims estate duty in respect of all the settled property under section 1. That section provides as follows: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called 'estate duty.'" *Primâ facie*, that duty would be payable in this case, unless an exemption is created by the words of the saving clause, "save as hereinafter expressly provided." So far as the Act contains any express exemption, the substantive enactment of section 1 will, of course, not apply. The particular clause which the appellant relies on as an exemption, and by virtue of which, according to him, section 1 never had any operation upon the subject-matter in respect of which duty is now claimed, is section 21, sub-section 1. That sub-section is as follows: "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the first schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." The duties mentioned in that sub-section include probate duty, and probate duty has been paid on the subject-matter of this information. The sub-section indicates an intention on the part of the Legislature not to allow the same duty to be demanded twice over. There is another section which points to a similar intention where the circumstances are such as to require an analogous provision of exemption. Section 5, sub-section 2, runs thus: "If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the first schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property." That requires a second devolution on the death of some person who has actually disposed or was competent to dispose of the property, in order to let in the obligation to pay estate duty again. Both clauses were obviously introduced for the purpose of avoiding what might otherwise have operated unjustly. The Legislature, seeing the possible injustice which would arise if, in the case of a settled estate in respect of which probate duty had been paid, another duty under another name to the same amount should be exacted upon the death of a tenant for life under the settlement, introduced the clause now in question with the object of mitigating or preventing that injustice. We have high authority for saying that that was the intention of the Legislature. In *Attorney-General* v. *Dodington*, 45 W. R. 657, [1897] 2 Q. B. 373, Rigby, L.J., whose judgment was approved by the House of Lords in *Inland Revenue Commissioners* v. *Priestley*, 49 W. R. 657, [1901] A. C. 208, said as follows: "I think that their intention"—*i.e.*, the intention of the Legislature—"looked at broadly was that in the case of settled property, where probate duty has once been paid or become payable in respect of the interest of the settlor in it, that should be as effectual for the purpose of exempting the property from payment of the estate duty, as under section 5, sub-section 2, the fact that estate duty has once been paid on settled property is for the purpose of preventing a second duty from being payable." Although that was not necessary to the decision of the case then before the court, it can hardly be disputed that the principle is that, where duty has once been paid in respect of a particular subject-matter, it ought not to be again payable in respect of the same subject-matter, and the fact that the subject-matter may have changed its character after payment cannot affect that principle. If the Legislature were proposing to remedy an apparent injustice, we are bound to attribute to them the intention of carrying that purpose to its logical result of remedying the injustice whether the subject-matter on which the duty is claimed has changed its character or not. That being the principle underlying the matter, I agree with the Attorney-General that we cannot give effect to it unless the words of the statute permit it. But is seems to me that the words, when fairly read, are capable of an interpretation which will avoid all injustice. The section says that estate duty is not to be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of the Act "in respect of which" probate duty has been paid, I think there is force in the argument put forward by Mr. Danckwerts that the expression "in respect of" must have been deliberately chosen in preference to the word "on." It seems to me that these words do more aptly express what appears to be the intention of the Legislature, and show that the Legislature were dealing with a case where a person is asked to pay a duty over again in respect of property which has already been made the subject-matter of probate duty. From the point of view of injustice it does not matter what particular shape the property has since taken. For the purpose of this sub-section the point of time which is material is not, as it seems to me, the time of the death of the person on whose death duty is claimed, but the time when the particular property, which is the subject-matter under discussion, became liable to probate duty—*i.e.*, the time of the death of the original settlor. If there

is found in the estate of the person upon whose death duty is now claimed, property in whatever shape or form in respect of which, being personal property at the time of the death of the settlor, probate duty was then paid, that comes within this exemption from estate duty. I do not find any grammatical difficulty in giving the sub-section this construction. The subject-matter in respect of which duty is here claimed was personal property settled by the will of a person dying before the Finance Act, in respect of which probate duty has been paid. It fulfils all the conditions of the sub-section, and it is not essential to its coming within the exemption that it should continue to be personal property till the death of the person on whose death duty is claimed. I agree with the Attorney-General that the clause would be easier to interpret if the word "personal" were not in it. But its presence is not an insuperable difficulty. Probate duty was only payable on personal property, and it may have been simply out of greater caution that the expression "personal property" was used. I do not think we should be right in making use of that expression to defeat what must have been the purpose of the Legislature, if they had any purpose at all in this matter. I agree with my brother Stirling that a confirmatory argument is to be derived from the definition clause, which he referred to in the course of the argument. I think, therefore, the appeal ought to be allowed.

STIRLING, L.J.—I agree with the reasoning of the Master of the Rolls, and I will only add a word or two as to the effect of clause (*f*) in section 22, sub-section 1, which provides that in that part of the Act, unless the context otherwise requires, "the expression 'property' includes real property and personal property and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale." The question is whether in this case the exemption from estate duty created by section 21, sub-section 1, applies. Now, having regard to the definition of "property" which I have just read, it seems to me that we may read "personal property" in section 21, sub-section 1, as including not merely what is usually understood by personal property, but as including also the proceeds of the sale of personal property or any money or investment for the time being representing the proceeds of sale of such property. Here, at the time when probate duty was paid, there was personal estate which had been bequeathed by the will of the testator upon trust for investment in land. That personal estate was sold, and the proceeds were applied in the purchase of land, which was conveyed to the trustees of the will and is at the present moment held by the trustees upon the trusts of the will. It appears to me that the real estate is an investment which at the death of the tenant for life represented for the time being the proceeds of sale of that personalty. The Attorney-General contends that in order that the exemption may operate, a claim must be made in respect of personal property existing as such at the death upon which the claim for estate duty is made. In my opinion that unduly limits the operation of the section. For example, suppose that the trust directed by the will had not been to convert the property, as in the present case, from personalty into realty, but had been of this nature—a direction for sale and for investment either in land or in Consols to be held for successive tenants for life, and then, at the death of the last tenant for life, upon trust for sale and distribution among persons indicated. There would then have been a binding trust ultimately for the reconversion of the property which might have been invested in land, and that property would, in the eye of a court of equity, remain personalty and nothing else. But upon the strict construction which, it is argued, should be applied to section 21, sub-section 1, if one half of the property had been invested in Consols and the other half in land, the exemption would operate in respect of so much as was invested in Consols, but would fail as regards that which was invested in land. If it had been entirely invested in Consols, it would all come within the exemption, whereas if it happened to be invested entirely in land, the exemption would not operate. It does not seem to me that that is a probable interpretation of the intention of the Legislature, and it would be inconsistent with the general scheme of the Act as pointed out by Rigby, L.J., in *Attorney-General* v. *Dodington*. I therefore agree that the appeal should be allowed.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Royds & Rawstorne.*

High Court of Justice.

Chan. Div. } Dec. 7.
Kekewich, J. }

In re LADY ANNALY'S TRUSTS.
LADY ANNALY *v.* HON. H. L. BOURKE. (*a.*)

Settlement—After-acquired property—Tenant for life—Irish Land Acts—Covenant for settling after-acquired property—Interpretation.

The bonus given to the vendor of real estate in Ireland under section 48 of the Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *is so closely connected with the land that it must be regarded as an interest in the land.*

A. was tenant for life of real estate under a deed of settlement of real estate, and also tenant for life under a deed of settlement of personalty containing a covenant to settle after-acquired property, with certain specified exceptions, including (inter alia) *the real estates settled by the realty settlement, or "A.'s estate or interest" therein. Part of the real estate was situate in Ireland, and under the Irish Land Act,* 1903, *was purchased by the occupying tenants for a gross sum of* £340,380, *with the result that A. was entitled, as vendor, to a bonus of* £40,845 *by section 48 of the said Act.*

Held, that this bonus was not subject to the covenant to settle after-acquired property contained in the personalty settlement, as it was an interest in real estate specifically excepted from the operation of the said covenant.

Held, further, that as it was not within the covenant, it belonged to A. for her sole use under section 3 of the Land Purchase (Ireland) Act, 1904 (4 *Ed.* 7, *c.* 34).

In re Ely's Estates, [1904] *I. R.* 66, *considered.*

Under the will and codicil of her father Henry Viscount Clifden, in the events that had happened, Lady Annaly eventually became entitled as tenant in tail to his real estate.

By an indenture of settlement dated the 23rd of July, 1884 (herein referred to as the real estate settlement), Lady Annaly on her marriage conveyed the real estates devised by the said will and codicil, to which she was then contingently entitled, to trustees upon the usual trusts.

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

By another indenture of settlement of the same date (herein referred to as the personal estate settlement) Lady Annaly settled upon similar trusts certain funds to which she was entitled.

The last-mentioned settlement contained a covenant for settling Lady Annaly's after-acquired property, excepting (*inter alia*) the property specifically settled by the real estate settlement, "besides" Lady Annaly's "estate or interest in the real estate" settled by the said real estate settlement.

Lady Annaly had entered into over six hundred contracts under the Irish Land Act, 1903, for the sale of real estates, situate in Ireland, of which she was tenant for life under the real estate settlement. The gross purchase-money on the said sales amounted to £340,380. The bonus due to Lady Annaly as vendor by section 48 of the said Act was consequently £40,845.

The question before the court was whether this bonus ought to be brought into settlement as being after-acquired property in accordance with the covenant above recited.

Ogden Lawrence, K.C., and *Geo. Lawrence*, for the plaintiff.

Stewart Smith, K.C., and *Cozens-Hardy*, for the defendant beneficiares.

F. Wright, for the defendant trustees.

KEKEWICH, J.—In order to encourage tenants to buy their land, the State, by the Irish Land Act, 1903, provides a fund out of which the purchase-money, when properly ascertained, can be paid, the purchasers to repay the State by instalments. And in order to encourage the landowner to meet the tenants, the State also provides a fund—a different fund—out of which the landowner is paid a bonus of 12 per cent. of the money advanced. I perhaps ought not to call it a bribe, but it is no doubt a valuable consideration paid to the landowner in order to induce him to sell his land to the tenants. This is the general idea of the Act. The provision in favour of the landowner is contained in the first sub-section of section 48, and although the other sub-sections ought to be read for the proper understanding of the Act, they do not bear upon the matter now under consideration.

Before going to the settlements we may consider who the landowner is. The vendor or landowner may be a limited owner, and the question arose in the case, which has been cited to me, of *In re Ely's Estates*, [1904] I. R. 66, whether the tenant for life is entitled to receive the bonus for his own benefit, or only as trustee for the settlement under which he took his estate for life. Ross, J., held that the tenant for life selling to his tenants was a trustee, and ought to account for the 12 per cent. to the trustees of the settlement. The Legislature, in consequence of this decision, provided in the following year that whenever the vendor is tenant for life he may retain the bonus for his own use: Land Law (Ireland) Act, 1904.

The question under consideration now is whether the bonus received by the tenant for life belongs to her for her own use, notwithstanding the personal estate settlement, or whether she must bring it into settlement under the covenant for after-acquired property.

The lady was at the time of her marriage tenant in tail of considerable real estate, part of which has been sold and has produced this bonus. She is also interested in a considerable personal estate. Two settlements were executed, a real estate settlement and a personal estate settlement. The real estate has become vested in possession and she is able to sell as tenant for life. The personal estate was settled—I speak in general terms, in the usual way. Then comes the covenant settling after-acquired property. It is in terms: If the said lady "is now, or at any time or times, or her husband in her right, shall become entitled in any manner to any estate or interest whatever, whether in real estate or otherwise. . . ." We have here a provision as to property in which she now is or may be entitled. Now, we have nothing to do in this case with property to which she was entitled at the time of the settlement. Whatever this bonus is which is created by the statute of 1903, it cannot be property to which she was entitled at the time of the settlement. It would be ridiculous even to suggest that it was in embryo. But she is entitled to it now. The Act of 1903 has given it to her, and the Act of 1904 has given it to her for her own use. She has become entitled to it during the coverture. If the question stopped there it would be within the covenant. The only thing is whether it comes within the exceptions. [His lordship then read the exception "besides the property specifically settled and besides her estate or interest in the real estate subject to the will and codicil of the late Henry Viscount Clifden, her interest in which is settled by the real estate settlement before mentioned."]

If this sum of £40,845 falls within the exception then the lady keeps it for herself, and it is not within the covenant. Does the exception exclude this bonus? That depends upon the meaning which I have to give to the words "estate or interest" in the real estates subject to the will and codicil which is settled by the real estate settlement. Is the bonus an estate or interest in that land? It is not an estate, of course, in the strict sense of the word. It is paid by the State out of a fund provided for the purpose. It is never repaid, and there is no liability upon anybody to repay it. It is a gift to the vendor, so that it cannot be said to come out of the land; and, of course, strictly, it is not an interest in the land. But I must give it some meaning. I have much assistance here from the judgment, to which I have referred, of Ross, J., in *In re Ely's Estate*. He was dealing with the question whether the vendor, the tenant for life, could take this bonus for himself. He says on p. 85 of the report: "It is contended for the marquis that the bonus is a gift from the gods and comes to the tenant for life as a *persona designata* I cannot agree. It is impossible to deny that the bonus affects the price. The tenant buys at a lower price because the vendor gets the bonus. The estate loses or is exposed to the risk of loss in order that the man whose duty it is to represent it and defend it may take a benefit."

On p. 86 he says: "With respect to the bonus I am now of opinion, having regard to the nature and the circumstances under which it is acquired, that a court of equity ought not to allow the tenant for life to appropriate this by-product of the sale to his own use. It must fasten a trust upon it in his hand and compel him to hold it for all other parties who take under the settlement as well as for himself."

This is not binding upon me, but it is an authority as to whether the tenant for life holds as trustee for the settlement before the Act of 1904. Therefore the judgment is of great value apart from all other considerations. If Lady Annaly had sold before 1904 and secured this £40,845, she would have been bound to account for it to the estate, because it is part of or connected with the sale of the estate, because she gets something which to some extent can give a value to the estate, or to put it in one word "a by-product" of the sale; she really gets it as a by-product of the estate. If this is so, it is something which she gets by reason of her limited ownership. It is something

so closely connected with the land that I must regard it as an interest in these hereditaments; consequently, it is not affected by the covenant to settle after-acquired property. Of course, under the Act of 1904 she keeps it for herself. Costs of all parties out of the bonus.

Solicitors, *Foyer & Co.*

Chan. Div. } Buckley, J. } Aug. 3, 1904.

In re BLUNT'S TRUSTS.
WIGAN *v.* CLINCH. (*a.*)

Charitable bequest—Proviso of cesser—Gift over—Residuary legatee—Rule against perpetuities—Construction—Education Act, 1902 (2 *Ed.* 7, *c.* 42), *Part III.*

A testatrix bequeathed the income of a sum of money in trust for certain schools so long as they should be carried on under the conditions of the deed of trust of the schools, and declared that if the funds for carrying on the schools should be raised under an Act of Parliament then the payment of the income to the schools should cease, and the fund should fall into her residuary estate.

Held, that as by the operation of Education Act, 1902, *the schools were no longer carried on under the conditions of the deed of trust, and as the funds for carrying them on were to some extent supplied under that Act the trust for the schools had ceased, and the fund fell into the residue.*

Held, also, that the rule against perpetuities did not apply, as the gift over was to the same persons as became entitled under the rules of law.

In re Randell, 36 *W. R.* 543, 38 *Ch. D.* 213, *followed.*

In re Bowen, 41 *W. R.* 535, [1893] 2 *Ch.* 491, *distinguished.*

Originating summons.

This was a summons for the purpose of determining whether a legacy left by Mrs. Blunt in trust for the National Schools at Bicknor, in Kent, had become forfeited by the operation of the Education Act, 1900, upon the schools.

Isabella Dorothea Blunt, by her will in 1891, bequeathed to her trustees such a sum as when invested in the purchase in their names of certain stocks or securities therein mentioned would produce a yearly sum of £20. The will continued: "And I direct my trustees or trustee to pay such income or yearly sum to the treasurer for the time being of the Bicknor and Hucking National Schools for the support of the said schools so long as they shall be carried on under the conditions contained in the deed of trust of the said schools dated the 18th of June, 1873, and the funds necessary for so carrying them on shall be supplied by voluntary contributions. But I declare that this bequest shall not take effect, but shall be null and void if any of the three following events shall happen in my lifetime, *videlicit*: (1) If a school board for the parishes of Bicknor and Hucking shall be formed, or (2) if the funds necessary for carrying on the said schools shall be raised under powers for that purpose contained in any present or future Act or Acts of Parliament, or (3) if a trust shall be created and a sufficient fund shall be set apart for the purpose of carrying on the said schools under the conditions of the aforesaid deed of trust; and I further declare that if either of the two first mentioned events shall happen after my death, then immediately on the happening of such one of these events as shall first happen, the payment of the said income or yearly sum to the treasurer aforesaid under the aforesaid direction in that behalf shall cease and determine and the fund purchased to produce the same shall fall into and form part of my residuary estate." And, after other bequests, the testatrix devised and bequeathed all the residue of her estate to her nephew, E. E. Green.

By the deed of the 18th of June, 1873, the schools were conveyed to the Archdeacon of Maidstone, and his successors, upon trust to be used for the education of children of certain classes mentioned, and it was to be conducted according to the principles of the National Society for Promoting the Education of the Poor in the Principles of the Established Church. The deed contained provisions that the school and endowments should be controlled and managed by the principal officiating minister for the time being of the parish of Bicknor, who was to have the superintendence of the religious and moral instruction of the scholars attending the school, that in other respects the control and management of the school should be exercised by a committee consisting of the principal officiating minister for time being of the said parish, his licensed curate or curates if appointed by the ministers, such of the churchwardens for the time being of the said parish of Bicknor and of the ancient chapelry of Hucking as should be communicants of the Church of England, and of six other persons who were contributors of 20s. each a year at least to the funds of the school, and were communicants of the Church of England, and had a beneficial interest in real property in the parish of Bicknor, or be a resident therein or in a parish adjoining thereto. The deed contained a number of other provisions constituting the qualifications of persons who should have the right to elect the committee. There was also a provision that the provisions of the Elementary Education Act, 1870, which constitute a public elementary school should apply to the school to be constituted under that deed.

The testatrix died in April, 1900. In pursuance of the direction in the will a sum of £800 Midland 2½ per cent. Debenture Stock was purchased by the trustee of the will, and the dividends were paid to the rector for the time being of Bicknor as treasurer of the schools. The schools were now carried on in conformity with the provisions of the trust deed, being supported by voluntary contributions together with the usual Government grants. Upon the passing of the Education Act, 1902, the question arose whether upon Part III. coming into operation the income of the invested sum did not cease and fall into the residue, and the present summons was taken out for the determination of that question by the trustee of the will of Mrs. Blunt against the present managers of the schools and residuary legatee.

Rashleigh, for the trustee of the will.

O. L. Clare, for the present managers of the school.—The period during which the income is payable to the schools has not ended, as voluntary contributions are still necessary for the support of the buildings. The testatrix cannot have meant that the period should end if any funds at all are given under Act of Parliament, as from the first the schools were under the deed of trust, public elementary schools receiving Government grants. Nor has the school ceased to be managed under the conditions of the deed of trust, as the foundation managers are still appointed with reference to the provisions of the deed of trust: Education Act, 1902, ss. 6 (2), 11. In *In re Beard's Trusts*, 52 W. R. 312, [1904] 1 Ch. 271, however, the gift over upon the three events mentioned offends the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

rule against perpetuities, and is void, and consequently it does not matter whether these events have happened or not: *In re Bowen*, 41 W. R. 535, [1893] 2 Ch. 491. The case of *In re Randell*, 36 W. R. 543, 38 Ch. D. 213, does not apply, as there the gift had ceased of itself at the event upon which the gift over was to take effect, but here, upon the true construction of the will, the gift would still be subsisting apart from the gift over, and it is sought to cut it down by the gift over.

F. G. Champernowne, for the residuary estate, was not called upon.

BUCKLEY, J.—I think that the very event has happened on which the testatrix has said that the gift of the annuity is to cease and determine. She gave a certain sum of money to trustees upon trust "to pay such income or yearly sum to the treasurer for the time being of the Bicknor and Hucking National Schools for the support the said schools so long as they shall be carried on under the conditions contained in the deed of trust of the said schools dated the 18th of June, 1873, and the funds necessary for so carrying them on shall be supplied by voluntrry contributions." [His lordship then referred to the provisions of the deed of trust as to the control and management of the school, and the qualifications of the committee, and continued:] The result of the Education Act, 1902, is that this body is displaced. Are the schools carried on under the condition contained in the deed of trust? It is plain that they are not. Then what is to become of the fund? The testatrix declares that the bequest shall be null and void if any of three events should happen in her lifetime. [His lordship stated them.] She also declared that if either of the two first-mentioned events should happen after her death then the payment of the annuity was to cease and determine and the fund purchased to produce it was to fall into and form part of her residuary estate. It was said, on the authority of *In re Bowen*, 41 W. R. 535, such a gift over was void because it came within the rule against perpetuities—that you cannot have a gift over which does not take effect within the prescribed period of a life or lives in being twenty-one years afterwards. That principle is firmly established, but it does not apply to this case. There is here no necessity to resort to the gift over. The gift over is a direction that the funds shall fall into the residuary estate, and that is where it would go by law if the gift failed. Therefore I have only to look at the will to ascertain whether the event has happened on which the annuity is to cease and determine. Has the event happened on which it was to cease? If so the fund by law goes into the residue, and there is no necessity to resort to the gift over; the gift having failed, the law takes the fund into the residue. As North, J., said in *In re Randell*: "If she had said that it would fall into and form part of her residuary personal estate, she would simply have been saying what the law is; and saying that it shall do so is simply saying what the law would do without such a statement. In my opinion a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction cannot be said to be an invalid gift, or contrary to the policy of the law." It results from this that I am entitled to read the defeasance clauses of the will and see whether they have taken effect. One of them is that the bequest of the annuity shall be null and void if the funds necessary to carry on the school shall be raised under any Act of Parliament. That is satisfied to a certain extent, for the funds are now provided under the Education Act, 1902. I am of opinion that the gift of the annuity has ceased to take effect and that the fund has fallen into the residue.

Solicitors, *Wigan, Champernowne, & Prescott.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Phillimore, JJ.) July 13, 1904.

FITCH v. BERMONDSEY GUARDIANS. (a)

Lunacy—Asylum—Charges for maintenance of pauper lunatics not settled within the county or borough to which the asylum belongs—Limit of such charges—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 283, *sub-section* 3.

Section 283, *sub-section* 1, *of the Lunacy Act*, 1890, *provides that "the visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the maintenance and other expenses of each pauper lunatic in the asylum. . . ." Sub-section* 3 *provides that "a committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."*

Held, that the visiting committee in fixing the "greater weekly sum" under sub-section 3 *are not entitled to fix a greater weekly sum than fourteen shillings.*

Appeal from the City of London Court.

This action was brought by the City of London Lunatic Asylum against the Guardians of the Poor of the Parish of Bermondsey to recover from them the sum of £11 15s. in respect of the lodging and maintenance in the asylum from the 30th of December, 1903, to the 30th of March, 1904, of a pauper lunatic whose legal settlement was in the parish of Bermondsey.

The visiting committee of the asylum, acting under the power conferred by section 283, sub-section 1, of the Lunacy Act, 1890, which provides that "Every visiting committee shall fix a weekly sum not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum . . . and such weekly sum may from time to time be altered," had previously to February, 1904, fixed such weekly sum at 12s. 3d. in respect of pauper lunatics chargeable to the union of the City of London.

On the 4th of February, 1904, the visiting committee, acting under the power conferred by sub-section 3 of the above section, raised the weekly charge for the maintenance and expenses in the asylum of pauper lunatics chargeable to unions outside the City of London to twenty-one shillings, and they gave the defendants notice of such increase.

Sub-section 3 provides: "A committee may fix a greater weekly sum not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."

The committee, suing in the name of their clerk, claimed for £11 15s. for lodging and maintenance, such sum being made up as follows: Forty-five days' lodging and maintenance from the 1st of January, 1904, to the 15th of February at the rate of fourteen shillings per week, and forty-five days' lodging and maintenance from the 15th of February to the 30th of March at the rate of twenty-one shillings per week.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The defendants contended that they were only liable at the rate of fourteen shillings for the whole period, and they accordingly paid £9 into court.

The asylum proceeded with their action for the balance.

The learned county court judge gave judgment for the defendants.

From this judgment the committee now appealed.

Danckwerts, K.C. (*Neilson* with him), for the appellants.—"A greater weekly sum not exceeding fourteen shillings" means that the additional sum allowable in respect of out-union patients over and above that allowable for in-union patients is not to exceed fourteen shillings a week. The total sum which may not be exceeded is twenty-eight shillings.

R. C. Glen, for the respondents, was not called on.

Lord ALVERSTONE, L.C.J.—The point raised by Mr. Danckwerts is one of great ingenuity, but section 283 seems to me not to admit of the construction which he has put on it. I was much impressed with the suggestion that this is a Consolidation Act, and I think that it is so, and that the Lunatic Asylums Act of 1853 allowed extra payment. Looking at section 54 of that Act, where the words are "a weekly sum to be charged for the lodging, maintenance, medicine, clothing, and care of each pauper lunatic confined in such asylum," and looking at the words "a greater weekly sum" in sub-section 3 of section 283 of the Act of 1890, I am quite satisfied that in the earlier Act the greater sum was not an additional sum, but was the total sum to be charged. Sub-section 1 of section 283 says: "Every visiting committee shall fix a weekly sum not exceeding fourteen shillings, for the expenses of maintanance and other expenses for each pauper lunatic in the asylum." Mr. Danckwerts has said that the Act dropped out the word "lodging" because there are expressions and sections in the Act showing that the provision of houses or asylums is to be dealt with and defrayed and met in a different way. I do not myself think that was the intention. I think it was intended to introduce the words "maintenance and other expenses" as a compendious form for the words "lodging, maintenance, medicine, clothing, and care." Sub-section 2 says: "If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs may by order" increase it. Now, my view of sub-section 3 is that it gives a power to the committee not to increase the fourteen shillings, but in some cases to fix a greater weekly sum not exceeding fourteen shillings. Does that refer to the expenses of maintenance and other expenses of the pauper lunatics, or does it refer to an additional charge to be made in respect of out-union pauper lunatics. It would have been perfectly competent for the Legislature to have said that the committee may charge in respect of lunatics from other places any sum not exceeding what they thought fit to provide, but it seems to me that the words "a committee may fix a greater weekly sum" refer to the same weekly sum as is mentioned in sub-section 1, and that it would not be in accordance with the proper construction of the language to treat it as being an additional sum. I think it is intended to meet the case which is dealt with in section 54 of the earlier Act—namely, although you do not charge up to the maximum in the case of your own lunatics, you may charge more for the out-lunatics than your own lunatics in respect of maintenance and other expenses provided you do not exceed fourteen shillings. Then with regard to the argument upon the words in sub-section 4, "Any excess created by the payment of such greater weekly sum may, if the visiting committee think fit, be paid over to a building and repair fund." I do not think those words advance Mr. Danckwerts' argument one way or the other; if the committee do not wish to charge more for the out-lunatic than for the home-lunatic within the limit of fourteen shillings there will be no such excess; if they do think right to make a differential rate and there is such an excess, the sub-section gives them the power to apply it for a special purpose. It does not seem to me that that enables us to put a different construction on the words contained in sub-section 3 than I have indicated. I have come to the conclusion that sub-section 3 was only meant to enable the committee to differentiate in respect of the out-lunatic as compared with the home-lunatic within the maximum of fourteen shillings, and that it is not an entirely new clause enabling the committee to make a quite new and separate and different charge in respect of the out-lunatic. I therefore come to the conclusion that, apart from the order made under sub-section 2, no higher charge than fourteen shillings can be made. The appeal must, therefore, be dismissed.

KENNEDY, J.—I am of the same opinion. Sub-section 1 provides that the weekly sum when fixed is not fixed unalterably, but is a weekly sum which may from time to time be altered. The maximum in that sub-section being fourteen shillings, it was considered that there might be a case in which that sum would be shown to be insufficient, and therefore it was provided by sub-section 2 that the local authority to whom the asylum belongs might increase such sum if it were found insufficient for "the expenses of maintenance and other expenses of each pauper lunatic in the asylum." Then comes sub-section 3, which, to my mind, obviously must refer to the greater weekly sum which is still to be fixed by the committee. The committee cannot exceed the sum of fourteen shillings, but supposing that they have to deal with pauper lunatics who do not come from or are "settled in a parish or place within the county or borough to which the asylum belongs," even if they have, say, fixed twelve shillings, they may, if they please, charge a sum not exceeding the total of fourteen shillings; in other words, they may differentiate between the pauper lunatic whose charge they naturally have owing to locality, and the case of pauper lunatics who come to them from outside. Then I presume it might be said, assuming you have this differential treatment, what are you going to do if you do not require the difference? Must the difference be applied to what may be called purposes of everyday life, or may you apply the money to purposes such as building and repair?

Sub-section 4 says: "Any excess created by the payment of such greater weekly sum may"—not "must"—"if the visiting committee think fit, be paid over to a building and repair fund, to be applied by the committee to the altering, repairing, or improving the asylum." It may be that, under the scheme of this Consolidation Act, it might be said that this differential charge being found necessary for the mere purpose of maintenance was a charge which ought not to be made, and that sub-section 4 justified the application for that difference to something which made it reasonable and necessary to have that difference—namely, for the purpose of altering and improving the structure of the asylum which it is not unreasonable to suppose should be to some extent provided for by the extra payment made in respect of paupers coming within the union.

I think the whole four sub-sections should be read as one.

PHILLIMORE, J.—I am of the same opinion. This

is a Consolidation Act, and sections have been collected from various other Acts. Sub-section 4 substantially reproduces section 6 of the Lunacy Acts Amendment Act, 1862. The scheme of this sub-section seems to me to be that the Legislature has assumed that pauper lunatics can as a rule be maintained for something not exceeding fourteen shillings a week, and it says to the managers of an asylum, if by economy and good management, or from the fact that provisions or servants are cheaper in their part of the country, they can maintain the pauper lunatics for twelve shillings a week, they may charge the out-union for out-lunatics up to fourteen shillings a week, and may pay the difference between the twelve and the fourteen shillings into a fund, if they like, for repairing and improving their building, but that if, for any reason whatever, they cannot keep their expenditure down to fourteen shillings, they shall not make a greater charge upon the out-patients than they do upon the in-patients. Then sub-section 2 says that in an extreme case where the fourteen shillings will not suffice, the authority may raise the standard both for out-patients and in-patients to any sum they find necessary, and when such is the case, it is not considered right, fourteen shillings being the maximum, that the outside unions should pay more than the actual charges made for the in-patients.

For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants, *The City Solicitor.*

Solicitors for the respondents, *Arkcoll, Cockell, & Chadwick.*

K. B. Div. (Bruce, J.) March 8, 1904.

BOSTOCK & CO. (LIMITED) v. NICHOLSON & SONS (LIMITED). (a.)

Sale of goods—Breach of contract—Sale by description—Implied condition—Measure of damages—Arseneous sulphuric acid—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 11, 13, 14, *sub-sections* 1, 2; *s.* 53, *sub-sections* 1, 2, 3; *s.* 54.

The defendants contracted to sell to the plaintiffs B. O. V. (sulphuric acid) commercially free from arsenic. The plaintiffs required the acid for the manufacture of brewing sugar. The plaintiffs did not expressly or by implication make known to the defendants the purpose for which the acid was required. The defendants supplied acid which contained arsenic, and which was not "commercially free from arsenic." With this acid the plaintiffs manufactured invert and glucose, which they sold to brewers who used them in brewing beer. The beer being poisonous the brewers suffered loss. The plaintiffs were liable to the brewers for such loss. The plaintiffs by using ordinary care could have discovered that there was arsenic in the acid supplied. The plaintiffs claimed as damages, for the breach of the implied condition that the acid should answer the description—(1) *the amount of the brewers' claims;* (2) *the price paid for the acid which contained arsenic;* (3) *the value of the material spoilt by being mixed with the arseneous acid; and* (4) *compensation for the loss of the goodwill of the plaintiffs' business.*

Held, that the contract was for a sale by description, that there had been a breach, and that the only damages that the plaintiffs were entitled to recover were—(1) *the price of the acid; and* (2) *the value of the material spoilt by mixture with the acid.*

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

Action tried in the Commercial Court.

This was an action to recover damages for fraudulent misrepresentation and breach of contract. The plaintiffs alleged that the defendants negligently and wrongfully supplied to the plaintiffs sulphuric acid containing arsenic and not made from brimstone, and not a pure commercial acid, in breach of a contract to supply the plaintiffs with pure acid made from brimstone and commercially free from arsenic.

The facts as found Bruce, J., were as follows: The plaintiffs' business was in 1888 carried on by Mr. Bostock under the style of Bostock & Co. The defendants seemed to have commenced to supply Bostock & Co. with acid in the year 1888. Bostocks were introduced to defendants by Mr. Fred Carr, who was a traveller for the defendants, and he described Bostocks to the defendants as sugar people whose works were at Garston. Bostock & Co. carried on business at Garston as sugar refiners, and they added to the business of the sugar refinery the manufacture of brewing sugars. From 1888 until 1892 the defendants supplied Messrs. Bostock & Co. with sulphuric acid of the strength of 95 per cent., or what was known in the trade as D.O.V., or double oil of vitrol, to distinguish it from 80 per cent. acid, which is known in the trade as B.O.V., or brown oil of vitrol. Acid made from free or uncombined sulphur did not contain any appreciable quantity of arsenic, but acid made from pyrites did contain arsenic unless it underwent a process to extract from it arsenic and other impurities. The acid supplied by the defendants to Bostock & Co. between 1888 and 1892 was acid made from pyrites, and not from free sulphur, but which had undergone a purifying process to free it from arsenic, and was therefore acid commercially free from arsenic. It was used by Bostock & Co. for the purpose of making brewing sugars in the form of invert and glucose. The defendants never were informed by Bostock & Co. or by their successors of the purpose for which the acid was wanted, or to which it was applied, and the defendants were not aware that Bostock & Co. or the plaintiff company carried on business as manufacturers of brewing sugars. Whether the defendants ought in the circumstances of the case to be fixed with implied notice of the purpose for which the acid was purchased by the plaintiffs or their predecessors is a question to be presently considered. In 1892 Bostocks directed the defendants to cease sending them the strong acid D.O.V., and to send them the weaker acid B.O.V. In February, 1895, Mr. Bostock died, and after his death a suit for the administration of his estate was instituted and a receiver and manager was appointed, who carried on the business until March, 1895, when the business was sold to a Mr. Clarkson. On the 15th of July the business was sold to the promoters of the plaintiff company, which was registered as a limited company on the 17th of July, 1896. In 1892 letters passed between the old firm of Bostock & Co. and the defendants. The defendants wrote on the 9th of July, 1892, to Messrs. Bostock: "We have pleasure in offering you 80 per cent. sulphuric acid at 52s. 6d. per ton made from brimstone, and 47s. 6d. per ton for ordinary acid, less 5 per cent. discount." And on the 15th of July Bostock & Co. wrote: "Please send at once to our works a consignment, usual size, of your 80 per cent. sulphuric acid in carboys. Brimstone at 52s. 6d. is what we want." On the 19th of September, 1892, Bostock & Co. wrote to the defendants: "Please dispatch at once to our works a consignment of 80 per cent. acid as usual." Between September, 1892, and May, 1896, a series of dealings between the defendants' firm and the predecessors of the plaintiffs took place in sulphuric acid. A common form of order was for a consignment of

acid *as usual*, and all this time the acid supplied was made from pyrites, but was commercially free from arsenic. On the 14th of May, 1896, the persons carrying on business under the name of Bostock & Co. wrote to the defendants as follows: "We are continually receiving lower quotations for acid than you charge. After doing with you for so many years, we don't want to change if you would keep us on as good terms as we can get elsewhere. To-day we can get equally good B.O.V. 5 to 10 per cent. under your net figures." This letter was signed "Bostock & Co., A. M." (the initials of Mr. Messer, who, when the company was first formed, became the secretary). In reply, the defendants wrote: "*Re* price of acids.—We beg to assure you that the price we charge you is a very low one for the quality supplied you; this acid is made from brimstone, and really a pure commercial acid, but under the circumstances we will be agreeable to charge future lots at £2 10s. per ton with similar terms and conditions, and trust to secure your continued orders. There are some cheap acids now offering that are made from gas refuse and pyrites; this for your guidance." Bostock & Co., on the 18th of May, 1896, wrote to the defendants as follows: "We are in receipt of your favour and thank you for same. The offers we have had are for genuine acid *ex* brimstone and pure by A1 manufacturers. Your abatement does not quite meet their quote; but perhaps you will not object to an extra 2½ per cent., especially since we purpose paying monthly." This letter is signed by Bostock & Co., and initialled "A. M." (the initials of Mr. Messer). On the 20th of May the defendants wrote to Bostocks as follows: "Yours of the 18th instant which we hope to reply to to-morrow when our principal is here." On the 21st of May the defendants wrote as follows: "In further reply to your favour of the 18th we have consulted our principal in reference to the extra 2½ per cent. discount which you name, and as you propose paying monthly, and under the circumstances explained in yours, we will allow you this." On the 19th of August, 1896, two days after the registration of the limited company, Bostock & Co. wrote to the defendants as follows: "Please dispatch to-morrow a full consignment of sulphuric acid as usual, and oblige." A full consignment meant as many carboys as could be loaded in a railway truck—*i.e.* fifty-three. On the 1st of September, 1896, the plaintiffs ordered of the defendants "a full consignment fifty-three carboys sulphuric acid as usual," and similar orders were sent on the 22nd of September and on the 6th, 16th, and 27th of October. On the 11th of November, 1896, the directors resolved to make contracts for acid and other things for the whole of 1897. On the 24th of November, 1896, the plaintiffs wrote to the defendants as follows: "We are inviting tenders for the undermentioned articles to be supplied as we may require during 1897. The goods to be delivered free carriage at our works at Garston. Terms of payment cash monthly less 2½ per cent. discount. We shall be glad to learn your bottom figures for a contract on these terms for B.O.V. in seller's carboys." On the same date the plaintiffs wrote to the Union Acid Co. inviting tenders for B.O.V. on the same terms. On the 24th of November the defendants wrote in answer: "We thank you for yours of 24th, and have pleasure in quoting you our best B.O.V. quality and strength as hitherto supplied in seller's carboys delivered as now at £2 7s. 6d. per ton less 2½ per cent. for cash in month following delivery for contract over 1897." On the 26th of November, 1896, the Union Acid Co. offered B.O.V. at 42s. 6d. per ton less 2½ per cent. On the 9th of December, 1896, the tenders for 1897 were submitted to the directors, and the selection of the tenders was left to Mr. Pooley, who was appointed managing director of the company. On the 22nd of December, 1896, the plaintiffs wrote to the defendants: "We accept your offer, please send us contract note per return and oblige." On the same 22nd of December, 1896, the plaintiff company wrote to the Union Acid Co.: "We duly received your tender, and beg to thank you. Unfortunately we have had to pass you this time, being able to do better elsewhere." At a meeting of the directors of Bostock & Co. (Limited) on the 23rd of December Mr. Pooley reported that he had placed the contract for the supply of B.O.V. with the defendants. Mr. Guthrie, who was then a director of the company, and afterwards became chairman, had his attention directed to the case of the defendants' contract, because he observed that it was higher than the tender of the Union Acid Co. He thought perhaps there might be some commission in the business, and he wanted an explanation. An explanation was given by Mr. Messer, the secretary of the plaintiff company, who was present. In consequence of the explanation given by Mr. Messer, Mr. Guthrie confirmed Mr. Pooley's action. The B.O.V. which the Union Acid Co. tendered to supply was acid unpurified from arsenic.

A contract note dated the 23rd of December, 1896, was sent to the plaintiffs signed by the defendants. In that note the quantity and description of goods was thus described: "All the B.O.V. buyers may require to use during the year 1897." During the year 1897 the defendants supplied the plaintiffs with all the sulphuric acid they required, and such acid was acid made from pyrites but purified acid, that is commercially free from arsenic. On the 3rd of November, 1897, the plaintiffs wrote to the defendants, "Please quote for best B.O.V. quality as before." On the 5th of November, 1897, the defendants replied as follows: "Best B.O.V. same quality as we are now supplying you with at £2 7s. 6d. per ton in lots of not less than four tons per consignment, put f.o.r. Garston, for contract over next year, 2½ per cent. discount cash monthly." On the 19th of November the plaintiffs wrote to the defendants, "We accept your tender of £2 7s. 6d. for all the acid we require during 1898." On the 20th of November the defendants sent a formal contract note in which the quantity and description of goods was described as "All the B.O.V. buyers may require to use during 1898." During the year 1898 the defendants supplied the plaintiffs with all the sulphuric acid they required, and the acid so supplied was made from pyrites, but was purified acid, that is commercially free from arsenic. In the year 1899 the plaintiffs did not, as in the previous years, enter into a contract with the defendants to supply them with all the acid they might want during the year; but the dealings between them continued. Consignments of acid being sent on Monday and Tuesday in each week, instead of Monday and Wednesday as before. Occasionally the deliveries were suspended for a week or more, but after suspension they were resumed, and business went on much in the same way as before, but without any continuing contract. On the 20th of July, 1899, the plaintiffs wrote to the defendants as follows: "The arrangement is for two loads each week, one on Monday and one on Tuesday, and unless you hear to the contrary please keep to this." On the 22nd of July, the defendants wrote in reply, "You may rely on this being done." On the 17th of January, 1900, the defendants issued a circular, a copy of which was sent to the plaintiffs, which was in substance as follows: "Owing to the advance in the price of raw materials, &c., we have to inform you that on and after the 17th inst. our prices

for acids will be as below—viz., B.O.V. 47s. 6d. per ton net, delivered as now. We would strongly advise you to contract at this figure as fuel and materials are rapidly advancing." The plaintiff company, on the 18th of January, wrote in reply: "We are sorry to receive your notice of advance in price of acid, but beg to say that we do not see our way to place the contract with you for this year's requirements unless you can supply us at the present price—that is, 47s. 6d. less 2½ per cent. for cash in a month, at which figure we have it offered." On the 19th of January the defendants wrote to the plaintiffs: "Yours of the 18th inst. to hand, and the same shall have immediate attention on our principal's return to-morrow." On the 20th of January the defendants wrote to the plaintiffs: "We thank you for your offer, and although the same is exceptionally low considering advances in raw materials, we are agreeable to contract at last year's price, before allowing your orders to pass us; we have, therefore, pleasure in enclosing contract notes, one of which we have signed." The enclosed contract note, which bears the date 20th of January, 1900, described the quantity and description of the goods as follows: "All the B.O.V. buyers may require to use during the year 1900." The defendants under this contract supplied to the plaintiffs sulphuric acid made from pyrites, but purified, and so commercially free from arsenic, until March, 1900, when, without any notice to the plaintiffs, they commenced to supply sulphuric acid unpurified and containing arsenic. The plaintiffs from March to November, 1900, not knowing that the acid supplied to them contained arsenic, used the acid so supplied to them by the defendants in making invert and glucose, which was supplied by them to brewers for making beer. The result was that a large number of persons, who drank the beer for the brewing of which the invert and glucose had been used, were made seriously ill, and some died. The plaintiffs, who had supplied invert and glucose to the brewers, were unable to carry on their business, and in this action they sought to be indemnified by the defendants for the loss which they had sustained.

C. A. Russell, K.C., Danckwerts, K.C., G. Rhodes, and *T. C. Rogerson,* for the plaintiffs.

Sir E. Clarke, K.C., Tindal Atkinson, K.C., Montague Lush, K.C., and *E. O. Simpson,* for the defendants.

It was agreed that the question of damages, if any, should be argued after judgment on the question of the defendant's liability.

Cur. adv. vult.

Feb. 2.—BRUCE, J., in delivering judgment, found that it was possible to construe the words "made from brimstone and really a pure commercial acid" as meaning that the acid was free from arsenic in a commercial sense and was to be distinguished from cheap acids not purified.

In the matter of fraud, on the mere construction of a letter, deceit ought not to be imputed if it was possible to give the words an honest meaning. The representation contained in the letters of 1896 did not amount to a fraudulent representation, and *à fortiori* the representation contained in the letters of July, 1892, was not fraudulent.

The defendants did not know of the purpose for which the acid was used by the plaintiffs.

The defendants never intended to deceive the plaintiffs, and they thought that they were acting within their right in supplying unpurified acid in fulfilment of the contract of the 20th of January, 1900.

As to the question whether the defendants were guilty of a breach of contract when in March, 1900, they began to supply impure B.O.V. in the place of purified B.O.V., having regard to the dealings between the plaintiffs and defendants, "B.O.V." had come to mean 80 per cent. acid purified free from arsenic. B.O.V. must be taken as intended by parties as being the B.O.V. in which they had all along dealt, that was B.O.V. commercially free from arsenic. There was a contract for the sale of goods by description within section 13 of the Sale of Goods Act, 1893—namely, a sale of B.O.V. commercially free from arsenic, and there was an implied condition that the goods supplied should correspond with that description; and when the defendants in March, 1900, delivered B.O.V. which was not commercially free from arsenic there was a breach of the implied condition.

The buyer did not expressly, or by implication, make known to the seller the particular purpose for which the goods were required, so as to bring into operation sub-section 1 of section 14 of the Sale of Goods Act.

The plaintiffs could, by the exercise of ordinary care and due diligence, have discovered the presence of arsenic in the acid before its use by them.

C. A. Russell, K.C., Danckwerts, K.C., G. Rhodes, and *T. C. Rogerson,* for the plaintiffs, contended that damages were recoverable for the price of the acid spoilt, the value of the material spoilt by mixture with the acid supplied, the loss of the goodwill of the business, and for the brewers' claims against the plaintiffs as being the natural and direct result of the breach.

Sir E. Clarke, K.C., Tindal Atkinson, K.C., Montague Lush, K.C., and *E. O. Simpson,* for the defendants, contended that the defendants' whole possible liability was the difference between the value of the acid supplied and the value of the acid which should have been supplied under the contract.

The following authorities were referred to: *Randall* v. *Newson,* 25 W. R. 313, (1877) 2 Q. B. Div. 102; *Drummond* v. *Van Ingen,* 36 W. R. 20, (1887) 12 App. Cas. 284; *Hadley* v. *Baxendale,* 2 W. R. 302, (1854) 9 Ex. 341; *Hydraulic Engineering Co.* v. *McHaffie,* 27 W. R. 221, (1878) 4 Q. B. D. 670; *Wilson* v. *Dunville,* (1879) 6 L. R. Ir. 210; *Randall* v. *Roper,* 6 W. R. 445, (1858) E. B. & E. 84; *Hill* v. *Balls,* 5 W. R. 740, (1857) 2 H. & M. 299; *Mullett* v. *Mason* 14 W. R. 898, (1866) L. R. 1 C. P. 559; *Dingle* v. *Hare,* 8 W. R. Dig. 60(1859) 7 C. B. N. S. 145; *Smith* v. *Green,* 24 W. R. 142, (1875) 1 C. P. D. 92; *Bank of England* v. *Vagliano Brothers,* 39 W. R. 657, (1891) (A. C. 107; *Mowbray* v. *Merryweather,* 44 W. R. 49, 1895) 2 Q. B. 640; *Nichol* v. *Godtz,* (1854) 10 Ex.191, 2 W. R. Dig. 155; *Josling* v. *Kingsford,* 11 W. R. 377, (1863) 13 C. B. N. S. 447; *Wieler* v. *Schilizzi,* 4 W. R. 209, (1856) 17 C. B. 619; *Fitzgerald* v. *Leonard,* (1893) 32 L. R. Ir. 675; *Holden* v. *Bostock,* 50 W. R. 323, 18 T. R. Rep. 317; *Jones* v. *Padgett,* 38 W. R. 782, (1890) 24 Q. B. D. 650; *Jones* v. *Just,* 16 W. R. 643, (1868) 3 Q. B. 197; *British Columbia Sawmill Co.* v. *Nettleship,* 16 W. R. 1046, (1868) L. R. 3 C. P. 499; *Scott* v. *Foley,* (1899) 5 Com. Cas. 53; *Agius* v. *Great Western Colliery Co.,* 47 W. R. 403, [1899] 1 Q. B. 413; *Horne* v. *Midland Railway Co.,* 21 W. R. 481, (1873) L. R. 8 C. P. 131; *Gardner* v. *Gray,* 4 Camp. 144, 16 R. R. 764; Mayne on Damages (7th ed., 1903), p. 10.

Cur. adv. vult.

March 8.—BRUCE, J.—The judgment already delivered found that there was a contract for the sale of goods by description, within the 13th section of the Sale of Goods Act, 1893; that is, a sale of B.O.V.

commercially free from arsenic, and that there was an implied condition that the goods supplied should correspond with that description, and when the defendants, in March, 1900, delivered B.O.V. which was not commercially free from arsenic there was a breach of the implied condition. It was further found by the judgment that the buyer did not expressly, or by implication, make known to the seller the particular purpose for which the goods were required, so as to bring into operation the first sub-section of section 14 of the Sale of Goods Act.

The question now arises, What are the damages which the plaintiffs are entitled to recover against the defendants? The plaintiffs claim, first, the price paid for the acid supplied, which was not commercially free from arsenic. They say that the acid was worse than useless to them, and that the price paid for it was wholly thrown away. Secondly, the plaintiffs claim the value of the material used for the purpose of making glucose and invert, which was spoilt by its being mixed with acid, which proved to be poisonous, at a time when the plaintiffs supposed the acid to be commercially free from arsenic. Thirdly, the plaintiffs claim a large sum of money as compensation for the goodwill of the business which the plaintiffs carried on as manufacturers of invert and glucose, and which the plaintiffs say has been entirely destroyed by the act of the defendants in supplying them with poisonous acid. Fourthly, the plaintiffs, before they discovered the poisonous properties of the acid, sold to brewers for the purpose of being used in the brewing of beer invert and glucose made from the poisonous acid, and they claim from the defendants the amount of damages which the brewers are entitled to recover against them. In order to arrive at the damages which the plaintiffs are entitled to recover, we must consider the provisions of the Sale of Goods Act, 1893. Section 11, sub-section 1 (*a*), enacts that where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty. In the present case the plaintiffs, the buyers, accepted the acid in ignorance that it did not fulfil the condition that it was commercially free from arsenic. Had they known of the breach of condition they might have refused to accept the goods, but having accepted the goods in ignorance of the breach of condition I think the case is one to which section 11, sub-section 1 (*c*), applies. That sub-section enacts that where the property has passed to the buyer the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty in the absence of a special term to the contrary. Section 53, sub-section 1, enacts that where the buyer is compelled to treat any breach of a condition on the part of the seller as a breach of warranty the buyer may (*b*) maintain an action for damages for breach of warranty. Sub-section 2 enacts that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. The third sub-section of section 53, which relates only to a breach of warranty of quality, has, I think, no bearing on the present case. *Nichol* v. *Godts*, 10 Exch. 191, and *Josling* v. *Kingsford*, 13 C. B. N. S. 447, illustrate the distinction between a mere warranty of quality and a condition that the goods shall correspond with the description. Although in circumstances such as have happened in this case the buyer is compelled to treat the breach of the condition as a breach of warranty, yet, in point of fact, the damages for such breach of warranty are different from the damages which follow from a mere breach of warranty of quality. The damages in the present case must, I think, be determined by the rule laid down in sub-section 2, section 53. Before I proceed to consider the meaning and application of this sub-section, I may refer to section 54, which enacts that nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable. These two sections seemed to be framed upon the rules laid down in *Hadley* v. *Baxendale*, 9 Exch., p. 354; the passage is as follows: "Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i.e.*, according to the usual course of things—from such breach of contract itself"—that seems to express the first rule; the following words seem to express the second rule: "or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. The words expressing the first rule have received general acceptance in a number of cases that were decided prior to the passing of the Sale of Goods Act, 1893. The words expressing the second rule have been subject to some criticism in the case of the *British Columbia Sawmills Co.* v. *Nettleship*, and in other cases; and the Legislature, in framing the Sale of Goods Act, which was intended to be a consolidation Act, seem to have adopted the first rule in the second sub-section, section 53. The second rule the Legislature did not adopt; but by the provisions of section 54 left at large the right of the buyer or seller to recover special damages in any case where by law special damages may be recoverable. In the present case no special circumstances were communicated to the defendants so as to make them responsible for damages which would not ordinarily flow from their breach of contract. Therefore it seems to me the question I have to determine in this case must be determined by the rule laid down in the second sub-section of section 53; in other words, what is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. The rule so laid down excludes the element of the defendant's knowledge; his liability is to depend, not upon the state of his mind, but upon the facts of the case. Sulphuric acid is used for a great variety of purposes; among other purposes, it has been used largely, at all events since 1880, for the purpose of making glucose and invert to be used in brewing. Although the proportion of acid thus used for food products is small as compared with the quantity used for other purposes, yet the use of the acid for food products cannot be said to be other than a well-recognized and ordinary use. Although for many of the purposes to which sulphuric acid is applied the presence of arsenic in the acid is not prejudicial, yet, of course, the presence of arsenic in acid renders it wholly unfit to be used in the preparation of food products; and where acid is purchased on the condition that it should be commercially free from arsenic, and in reliance upon this condition the purchaser applies acid supplied to him by the seller to one of the ordinary purposes for which such acid is used—*i.e.*, for the manufacture of food products—and the acid supplied contains arsenic, I think that

the loss occasioned by rendering useless the material with which the acid was mixed for the purpose of making foodstuffs is a loss directly and naturally resulting in the ordinary course of events from the breach of the condition or warranty that the acid should be commercially free from arsenic. It is very difficult to find authorities to throw light upon the meaning of the words "loss," "directly," and "naturally," "resulting, in the ordinary course of events, from the breach of warranty," because, although there are a vast number of reported cases bearing upon the question of damages for breach of contract, yet most of them have been determined with regard to the damages supposed to have been in contemplation of the parties; and although that matter may still form an important factor in determining whether special damages are due under the second rule in *Hadley* v. *Baxendale* or under section 54 of the Sale of Goods Act, yet it seems to me that it is an element that has no place in considering the measure of damages laid down in sub-section 2 of section 53. The judgment, however, of the Court of Exchequer in Ireland, delivered by Palles, C.B., in the case of *Wilson* v. *Dunville*, L. R. Ir. 6, p. 210, has, I think, a direct bearing upon the question. In that case the plaintiff purchased from the defendants, who were distillers, a quantity of grains warranted by the defendants as being good, sound, and merchantable, and as reasonably answering the description of distillers' grains. These grains were ordinarily used in feeding cattle, as the defendants knew, though the sale to the plaintiff was not expressly made for that purpose. The grains delivered to the plaintiff did not answer to the description, and they contained small particles of lead which had become accidentally intermixed with the grains during a fire which occurred at the defendants' premises, and the cattle that were fed with the grains were poisoned. It was held that the defendants were liable in damages for the value of the cattle. Although in that case it is stated as a fact that the defendants knew that grains were ordinarily used in feeding cattle, the decision of the court seems to have been independent of that fact. The head-note states, I think correctly, the substance of the decision in the following words: "For the purpose of rendering a defendant responsible for damages which in the ordinary course of things flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties." The Chief Baron, in delivering the judgment of the court, after referring to the argument urged on behalf of the defendants that the death of the cattle could not have been in the contemplation of the parties at the time of the contract as the probable result, and suggesting an answer to that argument, proceeds as follows: "But for myself, I desire to base my judgment upon broader grounds. For the purpose of rendering a defendant responsible for damages which in the ordinary course of things flow from a particular breach it is unnecessary that the actual breach of contract which ensued should have been within the contemplation of the parties. . . . If the consequences result solely from the act in question and an usual state of things, they are the ordinary and usual consequences of that act, and the defendants are liable. If the consequences flow not from the defendants' act alone, or from the defendants' act operating upon an usual state of things, but from that act, and in exceptional state of circumstances, then a question of much difficulty (and one as to which the cases are not wholly consistent) would arise as to the effect on the defendants' liability of their knowledge at the time of the contract of such exceptional circumstances. Upon the discussion of this latter question I do not propose to enter. It has no application here. The loss of the cattle did not arise from exceptional circumstances, but was a natural result of the ordinary use of the substance sold to the plaintiffs as grains." In *Cory* v. *The Thames Ironworks Co.*, 16 W. R. 456, L. R. 3 Q. B., p. 190, Blackburn, J., says as follows: "I think it all comes round to this: the measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract; not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things and to be the natural consequences of it." In the present case in the ordinary course of events the acid would be used for some purpose it was used for —one of the purposes for which sulphuric acid is ordinarily used—*i.e.*, the making of glucose and invert, and the consequences directly and naturally resulting from the use of acid containing a virulent poison such as arsenic was to destroy and render valueless all the materials with which the acid was mixed for the purpose of making glucose and invert. *Randall* v. *Roper*, E. B. & E., p. 84, was a case in which the defendant suffered judgment by default. The material facts are stated in the declaration which charged that the defendant had sold to the plaintiff seed barley warranting it to be chevalier seed barley, yet the seed barley was not chevalier seed barley, and the plaintiffs being corn factors, having purchased the seed barley of defendant in the way of their trade for the purpose of reselling, did without having any knowledge of the said breach of warranty resell a portion of the same to the persons named in the declaration, and the plaintiffs so resold those portions to those persons respectively by warranting the same to be chevalier seed barley when in fact it was not chevalier seed barley, and those persons respectively, not knowing that fact, sowed the same on their lands as and for chevalier seed barley, and the same, not being chevalier seed barley, produced inferior crops of an inferior quality of barley, and thereby the purchasers respectively sustained and incurred damages by means and in consequence of the plaintiffs' said breaches of the said warranties to them so made by the plaintiffs and by their sowing the said seed on the faith of the same being true, and the plaintiffs have become and are liable to compensate and make good to them respectively the damages by them so sustained as aforesaid. There is no allegation in the declaration that the defendants at the time when they sold the barley to the plaintiffs had any notice or knowledge that the plaintiffs bought the barley to be resold, or indeed that they had any notice or knowledge that the plaintiffs were corn factors, although the fact that they were corn factors is alleged in the declaration. It was held that in assessing the damage on the execution of a writ of inquiry the jury ought to include the amount to which they considered the plaintiff had become liable to his purchasers in respect of the difference of the crops. Erle, J., in delivering judgment, said: "The warranty is that the barley sold should be chevalier barley; the natural consequence of the breach of such a warranty is that the barley which has been delivered having been sown and not being chevalier barley an inferior crop has been produced. This damage naturally results from the breach of warranty; and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley—*i.e.*, not inconsistent with *Hadley* v. *Baxendale*." In that case the court, no doubt, concluded that in the ordinary course of

things barley sold as seed barley would be sown, and when sown if it were inferior barley the direct and natural result would be an inferior crop, and the loss resulting from the inferior crop so became the proper measure of damages for the breach of warranty, quite irrespective of any question as to what was in the contemplation of the parties. An observation made by Lord Herschell in the case of *Drummond* v. *Van Ingham*, 12 App. Cas., p. 293, was relied upon by the defendants' counsel. That was a case in which it was held that there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character would be used; in other words, that goods described as "coatings" should be fit to be made into coats and other garments. The observation made by Lord Herschell was as follows: "It was urged for the appellants by the Attorney-General, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials. But no such question arises here. There seems nothing unreasonable in expecting that the maker of coatings should know that they are to be turned into coats and other garments, and that he should further know what coatings will and what will not be capable of use for this purpose in the ordinary methods." I have quoted this observation of Lord Herschell because it was relied upon by the defendants, but it seems to me to have no bearing upon the points presented in the present case. The question in *Drummond* v. *Van Ingham* was whether the defendant who supplied the goods knew the purpose for which they were required. No such question arises in the present case. In that case the question arose whether there was an implied warranty or condition as to the fitness for a particular purpose of the goods supplied. No such question arises under section 13 of the Sale of Goods Act, 1893.

In my opinion the plaintiffs are entitled to recover, first, the whole price paid by them for the impure acid, because the acid being worthless to the plaintiffs there was an entire failure of consideratfon, and by virtue of section 53, sub-section (1) (*a*), Sale of Goods Act, where there is a breach of warranty by the seller, the buyer may set up against the seller the breach of warranty in extinction of the prices: see *Poulton* v. *Lattimore*, 9 B. & C., p. 259. Second, the value of the goods that were rendered useless by being mixed with the poisonous acid at a time when the plaintiffs were ignorant of the poisonous character of the acid. That, I think, is a loss directly and naturally resulting in the ordinary course of events from the breach of warranty. The claim of the plaintiffs for the loss of the goodwill of their business is not, I think, recoverable. It does not seem to me to be a loss directly and naturally resulting in the ordinary course of events from the breach of warranty. It did not arise directly from the act of the defendants, but arose from the act of the plaintiffs in selling the poisonous glucose and invert to brewers for use in the brewing of beer. The poisonous glucose and invert were not supplied by the defendants to the plaintiffs, but were manufactured by the plaintiffs; the damage to their credit arose not directly from any act of the defendants, but arose from the act of the plaintiffs in manufacturing glucose and invert by means of poisonous acid and selling the glucose and invert so made as fit to be used in the brewing of beer. In *Randall* v. *Roper* there was an allegation in the declaration that the plaintiffs had been and were by means of the premises injured in their credit, in their said trade, and otherwise, and had been and were otherwise injured. And no doubt in point of fact the selling of inferior barley would tend to injure the credit of the plaintiffs in their trade as corn factors, yet no one seems to have contended that the damages under that head were recoverable. So in *Fitzgerald* v. *Leonard*, Irish Law Reports, vol. 32, Q. B. D., 1893, p. 675, it was held that damages for loss of trade could not be recovered. Further; I think the plaintiffs are not entitled to recover against the defendants the sums which the brewers to whom the plaintiffs sold the glucose and invert made from the poisonous acid are entitled to recover against them. I think the rule is correctly laid down in Smith's Leading Cases, in the note to *Vicars* v. *Wilcocks*, that no liability is incurred in the ordinary case of a separate and distinct collateral contract with a third person uncommunicated to the original contractor or wrongdoer, although the non-performance of this contract may in one sense have resulted from the original wrongful act or breach of contract. In my opinion there are no special circumstances to entitle the plaintiffs to claim special damages under section 54 of the Sale of Goods Act. The damages therefore will be confined to the two items I have mentioned—(1) the price paid for the impure acid, (2) value of the goods spoilt by being mixed with the impure acid. I have not gone into the figures, but I understand they can easily be agreed upon.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Grundy, Kershaw, Samson, & Co.*

Solicitors for the defendants, *Helder, Roberts, & Co.*, for *Simpson & Co.*, Leeds.

House of Lords.

From C. A. (England). July 7, 1904.

ROBINSON GOLD MINING CO. AND OTHERS v. ALLIANCE INSURANCE CO. (*a*.)

Insurance, Marine — Policy — Warranty "free from capture, seizure, and detention"—Detained by foreign government before war.

Gold bullion, the property of a Transvaal company, was insured during transit from the mines to the United Kingdom by a policy which covered the risks of "arrests, restraints, and detainments" of rulers. The policy contained the following clause: "Warranted free of capture, seizure, and detention and the consequences thereof . . . whether before or after declaration of war." While in transit the gold was seized under orders from the Government of the South African Republic, within its own borders and in accordance with its laws, whilst war was impending but before the outbreak of hostilities.

Held, that the gold had been seized within the meaning of the warranty, and that the insurers were not liable.

Decision of the Court of Appeal (51 *W. R.* 105, [1902] 2 *K. B.* 489) *affirmed.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy,

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

L.JJ.), dismissing the judgment of Phillimore, J.: 50 W. R. 109, [1901] 2 K. B. 919.

The appellants were ten mining companies incorporated under the laws of and carrying on business in the late South African Republic, and claimed to recover under a policy for a loss of gold commandeered by the Government of the Republic on the eve of the war of that state with this country.

Under the policy the gold was insured against arrests, restraints, and detainments of kings, princes, and people while in transit from the companies' mines at Johannesburg to the United Kingdom. The policy contained the following exception clause: "Warranted free of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of riot, civil commotions, hostilities, or warlike operations, whether before or after the delaration of war."

Consignments of gold to which the policy attached were on the 2nd and the 9th of October, 1899, seized in the Transvaal by officers of the Transvaal Government acting under orders of the executive. No resistance was offered, and the war broke out on the 11th of October of the same year. The seizure was found by Phillimore, J., to be legal according to the aw of the republic.

Lawson Walton, K.C., and *J. A. Hamilton, K.C.* (*Bigham* wi'h them), for the appellants.

Janson v. *Driefontein Consolidated Mines*, 51 W. R. 142, [1902] A. C. 484; *Cory* v. *Burr*, 31 W. R. 894, 8 A. C. 393; *Miller* v. *Law Acccident Insurance Society*, 51 W. R. 420, [1903] 1 K B. 712, were cited.

Lord Robert Cecil, K.C., Scrutton, K.C., and *T. Mathew*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—I cannot help thinking that if this had been a question of some trifling contract that we were construing, not involving a very enormous sum of gold, it would not have occupied a day and a half to argue it; nor do I think that the distinction which has been urged from time to time on the words of the warranty would have been so insisted upon. I confess I cannot entertain the least doubt in the world that the language here is used in its plain and natural senee; and if it is construed in its plain and natural sense I think the judgment of the Court of Appeal is absolutely right.

What can be the value of an argument upon some technicality or some narrow construction of the whole contract between the parties where the truth is that the word "seizure" is intended to be used in a general sense? This gold was seized, taken away, and ultimately used by the Boer Government. It was taken. I do not care whether they had authority according to their law or not—as a matter of fact it was taken; and that was one of the things excluded from the losses insured against. The bargain between the parties, put in plain terms, is: "I, the underwriter will not be responsible if this gold is taken away and seized by any authority whatsoever." That is the plain meaning of the bargain. Why am I to put any technical or narrow construction upon those words? That is the bargain which the parties have agreed to. I decline to go into the ingenious argument which has raised every kind of supposed distinction that could apply to such a case, when to my mind these words are absolutely plain. The words seem to me to take out of the perils insured against the particular thing that has happened. I decline to go into it further than this—that this gold was seized.

Subtle distinctions have been raised by counsel for the appellant (I congratulate him upon his ingenuity), but it seems to me that he wants to divide a plain transaction into two different sets of proceedings so that the first stoppage, detention. or seizure (whatever word is used) was not intended to be an absolute seizure, but only to keep the gold in safe custody. Now I can only say, in the first place, I do not agree that that is the natural meaning of the transaction which is described. I think the Boer Government meant and intended to appropriate the gold from the first; but whether that was their intention or not, they seized it, and took care that it should be within their power and control if they thought proper to use it.

Under these circumstances, it seems to me that the terms of the warranty clearly apply; and, that being so, I decline to go into this very long series of authorities or into those ingenious subtleties which have been put before us.

It appears to me to be a very plain case, and I move your lordships that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. I do not think the question which has been argued is really arguable. If this is not "seizure" within the meaning of the warranty in the policy, and indeed in every possible sense of which the word is capable, I really do not know what "seizure" is. The view of the appellants, if I rightly apprehend their argument, seems to be that what happened just fell short of a voluntary offering, because there was, or ought to have been, a recognition of legal obligations; that it just lacked the grace of a freewill contribution by patriotic citizens to the pressing needs of the country, and that there was no sense or consciousness of force present to the minds of the owners of the gold which is alleged to have been seized or those in whose hands it was at the time, though, as the learned counsel observed, force lies behind and is the ultimate sanction of every law. Nothing, to my mind, could be a greater travesty of the real facts of the case. The gold was not given up by the owners or by the persons authorized by the owners to give it up. It was taken with a high hand from the carriers to whom it was entrusted for safe carriage, and diverted from the course which it was intended to pursue. That, in my opinion, was "seizure" in its plainest form.

Lord JAMES OF HEREFORD.—I am of the same opinion. It seems to me to be clear upon the question of fact that the orders given by the Boer Government on the 2nd of October, when carried out, amounted to "seizure," and therefore came within the warranty.

Lord LINDLEY.—I am of the same opinion, and I cannot usefully add anything. I agree. It appears to me to be quite a plain case.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors for appellants, *Ingle, Holmes, Sons, & Pott.*

Solicitors for respondents, *Walton, Johnson, Bubb, & Whatton.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) } Nov. 15, 17, 18, 21, 22; Dec. 5.

SAUNDERS v. NEWBOLD. (a.)

Money-lenders Act—Re-opening transactions—Harsh and unconscionable—Excessive interest—Absence of risk—Default clause—Re-opening former account—Relevancy to transaction sued on—Power to order repayment—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1 (1) (2).

A transaction may be harsh and unconscionable within the meaning of section 1 (1) *of the Money-lenders Act,* 1900, *merely by reason of an excessive rate of interest, but a rate not in itself excessive may become so through a total absence of risk, especially when coupled with a condition making a loan immediately repayable on an instalment falling into arrear.*

The power of the court under section 1 (1) "*to re-open any account already taken*" *refers only to an account relevant to the transaction sued on; but a court having jurisdiction under section* 1 (1) *can, under section* 1 (2), *at the instance of the borrower, surety, or other person liable, re-open a transaction at any stage, and, if the loan has been repaid, can, if necessary, order the money-lender to refund.*

This was an appeal by the plaintiffs from a judgment of Kekewich, J. (reported 20 Times L. R. 620), reopening transactions, under the powers given by section 1 (1) of the Money-lenders Act, 1900, and directing accounts to be taken not only in respect of the loan sued upon, but also of a previous transaction which had been entirely closed.

The action was commenced in the King's Bench Division, under order 14, but was transferred to the Chancery Division in consequence of administration proceedings there pending.

The plaintiffs, a firm of money-lenders, sought to recover from the defendant, the executor of H. T. Alton (who died the 18th of November, 1903), the balance due on a promissory note for £3,300 given to the plaintiffs by Alton on the 3rd of October, 1903, in respect of a loan of £2,000, with £1,300 interest. The whole debt was payable by monthly instalments of £275, only one of which had fallen due, and been paid, before Alton's death. There was a condition that if any instalment should be in arrear the whole balance should immediately become payable. The defendant had refused any further payment except on the footing of a loan of £2,000, with 10 per cent. interest, but the plaintiffs refused those terms.

There had been a previous loan by the plaintiffs to Alton, secured by a promissory note for £1,400 (of which £400 was for interest), dated the 6th of July, 1903, Alton having, on that occasion, been introduced to Philip Samuel, a member of the plaintiff firm, by another money-lender named Sagar, with whom Alton had already had dealings.

In September, 1903, Alton applied to Sagar to lend him £2,000, and Sagar thereupon communicated with the plaintiffs, with the result that the loan now sued on was made by a cheque which was not cleared till the loan of July had been paid off and the note for £1,400 returned. Before advancing the £2,000 the plaintiffs obtained, from an agency, a report on Alton's financial position, which is quoted in the judgment of this court. It was to the effect that he was a man of substantial means, though somewhat slow in his payments, and that he was understood to be a large shareholder and director of a brewery company at Derby. In consequence of the action being tried without pleadings there was no mention, by counterclaim or otherwise, of the July loan until the trial, nor was any application then made for leave to amend, nor any point made as to that loan being harsh and unconscionable.

As to the October loan the defendant's case was that Alton, who was addicted to excessive drinking, was not, at the time of the transaction, in a fit state to do business, as must have been evident to the money-lenders, and, further, that the rate of interest was excessive, and the transaction consequently harsh and unconscionable within the meaning of section 1 (1) of the Act, and one that ought to be re-opened.

Kekewich, J., came to the conclusion that there was nothing apparent in Alton's condition to prevent the plaintiffs from dealing with him as a man capable of transacting the business of a loan. He thought it impossible to deny that the rate of interest was a very severe one, and, according to his construction of the section, which gave a very large discretion to the court, and in view of the case of *In re A Debtor*, 51 W. R. 370, [1903] 1 K. B. 705, there was no reason why the court should not consider that an excessive rate of interest by itself made a transaction harsh and unconscionable. Still, he could not go so far in the present case. There were, however, other circumstances to be looked at, and the principal one was the total absence of risk. He thought that the knowledge possessed by Samuel of Alton's financial position, coupled with the default clause, had the effect of rendering excessive a rate of interest which by itself might not be so, and made the bargain harsh and unconscionable. He considered that 10 per cent. would be sufficient interest under the circumstances, and directed accounts to be taken on that footing, not only in the transaction sued on, but in respect of the previous transaction in July.

The plaintiffs appealed.

Lawson Walton, K.C., and *Hohler*, for the plaintiffs, maintained that the relief given by section 1 (1) was confined to the transaction sued on, and did not extend to a former transaction entirely closed so that the relation of lender and borrower no longer existed. As to section 1 (2), the use of the phrase "person liable" showed that that sub-section did not apply to a case where repayment had been made in full, for in such a case no one was liable. Moreover, the defendant had not counterclaimed.

P. Ogden Lawrence, K.C., and *M. M. Macnaghton*, for the defendant, argued that the wording of section 1 (1) showed that the court had power to re-open a former account as well as the transaction sued on. This was evident from several of the expressions used.

Lawson Walton, K.C., replied.

THE COURT reserved judgment, which was delivered on the 5th of December by

VAUGHAN WILLIAMS, L.J., as follows: This is an action brought by "P. Saunders" (a firm) against James William Newbold (the executor of H. T. Alton, deceased), defendant. The action, as appears from the affidavit of Philip Samuel, a partner in the plaintiff firm, sworn in support of a summons under order 14, is for the sum of £3,025, the balance of £3,300 the amount of a promissory note made by Alton, dated the 3rd of October, 1903, in favour of the plaintiffs or order, repayable by twelve consecutive monthly instalments of £275 each, the first to be paid on the 3rd of November, 1903, with a default clause whereon default was made. An order was made on the summons directing that the action be

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

set down for trial without pleadings, the defendant to be entitled to raise any defence at the trial. The defendant by his affidavit alleged (as is the fact) that the sole consideration for the promissory note was a sum of £2,000, and not £3,300, the balance of £1,300 being charged in respect of interest, which amounts to more than 100 per cent. per annum. The defendant's affidavit further stated that at the date when the promissory note was signed Alton was suffering from loss of will power, and not in a fit condition, owing to intemperate habits of long standing, to transact business, and further stated that the deponent verily believed that Alton did not thoroughly understand and appreciate the effect of the transaction in question, and that his condition was known to the plaintiffs, and that they took undue advantage of him having regard thereto. In addition to the promissory note for £3,300 of the 3rd of October, 1903, made and given by Alton in respect of the loan transaction mentioned in the affidavit, there was another loan transaction of the 6th of July, 1903, in respect of a loan of that date to be repaid by instalments amounting to £1,400, secured by promissory note for that amount. Of the £1,400, £400 was interest. The instalments were to be five monthly payments of £250, the first to be paid on the 6th of August, 1903, and the balance of £150 on the 6th of January, 1904, the entire sum to become payable forthwith in case of default. Kekewich, J., gave judgment for the defendant, declaring that all the transactions and acts of the plaintiffs Braham Samuel and Philip Samuel (carrying on business as money-lenders and suing under the registered name of P. Saunders) and Alton ought to be re-opened and set aside, and that the executor of Alton ought to be relieved from payment of any sum in excess of the sums actually advanced to Alton, and interest thereon at the rate of 10 per cent. per annum, and that, if any such excess had been paid by Alton or by the defendant, the plaintiffs ought to repay the same to the defendant. The judgment also ordered the following account—viz., of all sums actually advanced by the plaintiffs to Alton, and of all sums received by the plaintiffs from Alton in respect of any such advance, and that in taking the account the defendant be charged with interest at the rate of 10 per cent. per annum on the sums from time to time owing to the plaintiffs, and that the balance due from either party to the other be satisfied. The judgment ordered the plaintiffs to pay defendant's costs. Kekewich, J., by his judgment, says in effect that, although "Alton, from an active, shrewd man of business, had fallen into a state of considerable neglect of business and inability to grapple with matters of business," and that this condition was induced by excessive drinking, resulting in liver disease, yet this was not noticeable to the ordinary observer, and therefore that knowledge of this state of things could not be attributed to Philip Samuel, and that Samuel was justified in dealing with Alton as a man of ordinary capacity quite competent to negotiate a loan, and to deal with him as a money-lender. Kekewich, J., then goes on to point out that the rate of interest was very high and the terms severe, since they included a default clause which made the whole sum charged for principal and interest payable on default in payment of any instalment. But he does not hold that this rate and these terms alone made the transaction "harsh and unconscionable" within the meaning of the Act, although he suggests that he might have been justified in so doing. That upon which the learned judge really does base his judgment is the absence of risk which ought to have been present to the mind of the money-lender. He comes to the conclusion that the absence of risk made the rate of interest excessive, especially when coupled with the default clause, and that therefore the transaction was "harsh and unconscionable" within the meaning of the Act. The learned judge, in coming to the conclusion that there was no risk, although the note was secured by nothing but the note of hand, relies upon the report of Stubbs, obtained by the plaintiffs, which ran thus: "He is regarded as a man of the highest respectability, and is understood to be a large shareholder and director in the firm of Alton & Co. (Limited), brewers of this town, Derby. He is reputed to be well-to-do, but at times is inclined to be slow in his payments. He is, however, the owner of property, and is considered a desirable man to deal with in the ordinary way of business. It is not thought that any unreasonable risk would be incurred in granting credit to the extent named." The learned judge also points out that if the plaintiffs had chosen to make inquiries at Alton's bankers they would have discovered that Alton's position was such that lenders for much larger sums than £3,000 would run no risks whatever. The learned judge concludes thus: "It seems to me impossible with that before me to consider that Mr. Saunders dealt reasonably with this gentleman. He exacted these very extreme terms from a man who was perfectly competent to pay, and against whom the only thing that any one suggested as regards business was that he was inclined to be slow in his payments; but there was substance behind, and a little slowness was not any very great disadvantage. It seems to me that here I have a case of a money-lender charging a rate of interest which was extremely high; which, if it is not 'harsh and unconscionable' in itself, is 'harsh and unconscionable' when exacted from a man who could obtain money at the ordinary current rates from a banker, or a man who had money at command. On these grounds I think that upon my construction of the Act I ought to have no hesitation in holding that the transaction is 'harsh and unconscionable,' and ought to be set aside." Several points have been argued before us. Some relate to the transaction of the 3rd of October, some to the transaction of the 6th of July. We propose, in the first instance, to deal with the £2,000 loan of the 3rd of October. The learned judge has, as we have pointed out, found in favour of the plaintiffs that they were justified in dealing with Alton as a man of ordinary capacity, competent to negotiate a loan, and has preferred to base his judgment, not merely on the fact of the interest being excessive, but on the fact that the absence of risk, having regard to facts as to the financial position of Alton which Philip Samuel knew, or by proper inquiries might have known, rendered the terms of the loan harsh and unconscionable. It seems to us that we have in the Court of Appeal had our attention called to facts, to which the learned judge does not expressly refer, which confirm his view as to the absence of risk and the amount of knowledge of Alton's financial position which ought to be imputed to the plaintiffs. In the first place, the cash ledger produced before us and at the trial shows that Sagar and others who (whatever may have been the position of Philip Samuel) had had previous financial dealings with Alton, shared in the bonus or profit of £1,300 in proportion to their contributions towards the £2,000 actually advanced to Alton. We think that the proper inference from this is that all these men were co-adventurers in this loan transaction, and that the knowledge of any of the co-adventurers ought to be imputed to the rest of the party. We know it is said that the plaintiffs made their advance by giving their cheque for £2,000 before getting these contributions, since the crossed cheque was given on the 3rd of October and the contributions were not given, and the

division of the bonus was not made, until the 5th of October, and that the credit balance of the plaintiffs at their bank was sufficient to meet the cheque when given. We do not think that the credit balance was sufficient, but, even assuming it was, it is impossible to suppose that the arrangement for contribution to the loan fund and the sharing of the bonus was not made before the 5th of October, and probably it was made before the 3rd. None of the contributors were called as witnesses, although some of them were in court, and must have heard Philip Samuel's evidence and appreciated the importance of the sequence of events as stated by him. Moreover, Philip Samuel knew that Sagar was the agent of Alton to come and ask for the loan and carry back to Alton the terms upon which it would be made. He knew, moreover, that Sagar was receiving commission from Alton for obtaining the loan, although he might not know the exact amount, and, knowing this, Philip Samuel agreed to allow, and with the concurrence of his co-adventurers did allow, Sagar £57 10s. commission for introducing the Alton £2,000 loan to the co-adventurers, of whom Sagar was one. Now, having regard to Sagar's position and to his many financial transactions with Alton, as evidenced by Alton's pass-book and the correspondence between Sagar and Alton between January and October, 1903, and Sagar's knowledge of Alton's means to be inferred from all these facts, we cannot doubt but that the money-lenders were fully aware of the absence of risk, and that the rate of interest was excessive, having regard to the risk or absence of risk, and that the terms, having regard to what the money-lenders knew of Alton, were "harsh and unconscionable, and we think that the 10 per cent. allowed by the order of Kekewich, J., is amply sufficient. The case of the loan of the 6th of July is more difficult. Kekewich, J., has reopened this transaction, and has ordered it to be included in the account. We cannot accept the argument of Mr. Lawrence that the provision of sub-section 1 of section 1, that the court may, in cases where proceedings are taken by the money-lender for the recovery of money lent, and there is evidence to show that the interest charged in respect of that sum is excessive, and the transaction (*i.e.*, the transaction in respect of which the money-lender brings the action) is harsh and unconscionable, reopen not only that transaction, but also reopen any account already taken between the same parties, includes an account taken in any matter, however foreign to the transaction sued on. We think that the account reopened must be relevant to the transaction in respect of which the action is brought. The section seems to us intended to give the defendant relief by way of defence in the action which the money-lender has brought. This seems to be rather confirmed than otherwise by that part of the section which says that the defendant may reopen that transaction, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and to create a new obligation. Sub-section 1 of section 1 of the Act seems to us to give relief only in respect of the transaction the subject of the money-lender's action, and we think that, as the power to reopen is limited to that transaction, so the account can only be taken in that transaction or in some transaction part and parcel of the same, or which, even though it may include new obligations, yet comprised what purported to be a close of the dealings in respect of which the money-lender is taking proceedings. We should point out that Kekewich, J., in his judgment, does not go into the question whether the £1,400 transaction was harsh and unconscionable. It is true that sub-section 2 provides that any court in which proceedings might be taken by a money-lender may, at the instance of the borrower, or surety, or other person liable, exercise the like powers as may be exercised in an action by a money-lender for the recovery of money lent, and that in our judgment this sub-section applies even to a case where the loan has been repaid. This limitation is not a limitation to cases in which the money-lender has an unsatisfied cause of action, or there is some one liable to be sued; the limitation is only to a court in which proceedings might be taken by a money-lender for recovery of money lent. Given such a court—*i.e.*, given a court having jurisdiction—that court may exercise at the instance of the borrower the powers given by the first sub-section. Such powers clearly cover a power to order repayment by the money-lender, and we cannot see that this power is in any way excluded by the words at the end of the section, "notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived." Mr. Hohler, in arguing the contrary, relied very much on the word "liable" in sub-section 2 of section 1. The words of this section are: "The court . . . may, at the instance of the borrower, or surety, or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent," and he relied also upon the words at the end of this section as to the court entertaining an application "notwithstanding that the time for repayment of a loan may not have arrived." As to the force of the word "liable," it seems to us that "liable" cannot be read as meaning liable in fact. So to read it would be to exclude from the power of the court given under sub-section 2 the power which the court clearly has under sub-section 1 to order repayment by a money-lender. Moreover, one must not forget that the Money-lenders Act, 1900, is an amending Act, amplifying the powers heretofore exercised by the Court of Chancery, and it is clear that the Court of Chancery did not allow the fact of repayment to prevent the reopening of a transaction entered into by a borrower whom the court deemed from the circumstances of the case unable to protect himself. As to the words at the end of the section, we think they only mean that the borrower may obtain relief, not only when he is sued, but before he is sued. But, assuming as we do that the defendant, by taking proper steps, could, notwithstanding payment, have obtained an order reopening the transaction, provided he had counterclaimed, or upon due notice made an application in the action to that effect, he did not do so. Neither did he make any application at the trial to amend. The fact is that the case of the loan of the 6th of July being "harsh and unconscionable" was not made at the trial, and the judgment of Kekewich, J., does not deal with the question, and in these circumstances it is impossible for us to allow an amendment now. The order made under order 14 is limited to the defences of the defendant. We think, therefore, that the judgment ought to be amended by striking out so much of it as refers to the loan of £1,400 which was repaid, but this should be without prejudice to the right of the defendant Newbold, as executor of Alton, to bring an action to reopen that transaction if he be so advised. With regard to costs, we think that justice will be done by not disturbing the order of the court below as to costs, and giving no costs of the appeal.

Appeal dismissed as to the loan of October but allowed as to that of July.

Solicitors, *B. Barnet; Fowler & Co.*, for *Eddowes & Sons*, Derby.

From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) Oct. 28.

MILLARD v. BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL. (a.)

Local government—Private street works—Recovery of expenses—Liability of owner of premises—Change of ownership before demand—Continuing liability of former owner—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

The expenses of private street works executed by the urban authority under section 150 *of the Public Health Act,* 1875, *are recoverable from the person who was owner of the premises abutting on the street when the notice was served and the work completed, although he had ceased to be owner of the premises before the expenses were demanded.*

Decision of the Divisional Court (90 *L. T.* 489, 52 *W. R. Dig.* 143) *reversed.*

Reg. *v.* Swindon Local Board, 27 *W. R.* 732, (1879) 4 *Q. B. D.* 305, *not approved.*

Appeal by the Urban District Council of Balby-with-Hexthorpe from a decision of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) upon a case stated by justices of the West Riding of Yorkshire, sitting at Doncaster, before whom a complaint had been preferred by the appellant council against Mr. Millard under the Public Health Act, 1875, for non-payment of £45, paving expenses in respect of a street called Carr-hill, Balby.

The facts stated in the case so far as material were these: On the 8th of June, 1899, the appellants served upon all the owners (including the respondent) of premises fronting, adjoining, or abutting on such parts of the street called Carr-hill within their district as required to be sewered, levelled, &c., notices in the form prescribed by the Public Health Act, 1875. The notices were not complied with and the local authority then did the work, which was completed on the 4th of December, 1901.

On the 25th of April, 1902, the respondent sold his premises in Carr-hill to the Tadcastle Brewery Co. (Limited).

On the 18th of November, 1902, formal notice of the apportionment was given to the respondent, and on the 20th of May, 1903, the appellants made a formal demand for payment.

The respondent denied that he was any longer liable, and the present proceedings were then commenced against him to enforce payment.

The justices considered that the respondent was liable and made an order against him for payment, but at his request stated a case for the opinion of the High Court.

The Divisional Court considered that they were bound by the decision in *Reg.* v. *Swindon New Town Local Board,* 27 W. R. 732, (1879) 4 Q. B. 305, and with reluctance reversed the order of the justices, but gave leave to appeal.

The district council appealed.

Macmorran, K.C., and *Joshua Scholefield,* for the appellants.—The words in section 25 of the Act of 1875 expressly make the expenses a charge on the premises recoverable summarily from the person who was the owner of the premises when the work was executed and the debt accrued, although not enforceable until after the apportionment had been finally made and the money demanded: *In re Bettesworth and Richer,* 36 W. R. 544, 37 Ch. D. 535; *Hornsey Local Board* v. *Monarch Investment Building Society,* 37 W. R. 556, 22 Q. B. D. 149; *Stock* v. *Meakin,* 48 W. R. 420, [1900] 1 Ch. 683; *In re Allen and Driscoll's Contract,* 52 W. R. 680, [1904] 2 Ch. 226. It is true that in *Reg.* v. *Swindon New Town Local Board* Cockburn, L.C.J., used language implying that the expenses were not recoverable summarily unless the defendant continued to be the owner when the demand was made; but this opinion was merely *obiter,* as that case was decided on other grounds.

Israel Davis.—Nothing has been said to shake the authority of *Reg.* v. *Swindon New Town Local Board,* and to disregard that decision would be to work injustice in many cases, as sales of property take place upon the faith of it. Since that case was decided in 1879 it has never been questioned, and the principle there laid down has been repeatedly followed. The whole scheme of the Act is to throw the burden of such payments upon the property. The person who is the person enjoying the benefit of the improvement for the time being is the person who ought to be called on to pay. Moreover, if a man is to be liable after he has sold the property, it might very well be that the notice of apportionment might not reach him in time to question the apportionment under section 257, or he might leave the neighbourhood and never get the notice at all. The view taken by the Divisional Court was right, because in order to make an owner liable for expenses under sections 150 and 257 of the Act of 1875, he must be owner both when the works were completed and when the demand was made. Although that view of the statute gave rise to this difficulty, that no one would be expressly made liable under the statute where there was a change of ownership between the two dates, the charge remained on the premises, and, the expenses being thrown on the premises, the owner at the date of the demand would be liable.

COLLINS, M.R., after stating the facts, said: Now, in those circumstances the court below held, following—perhaps I ought not to say the decision; but following the observations of the court in the case of *Reg.* v. *Swindon New Town Local Board,* decided in the year 1879, and in deference to the opinion therein expressed, though contrary to their own opinion—that the respondent was not liable to pay the sum apportioned on him. That obliges us to look at the provisions of the Public Health Act, 1875, the statute under which this obligation is imposed. The first material section is section 150, the second paragraph of which enacts that "if such notice"—that is, the notice to perform the work in the street—"is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority." Now, that section does contemplate a default, and that default is presumably, taking the section alone, a default in not doing that which he or they have been ordered to do. If they think fit they may execute the works mentioned themselves, and may recover in a summary manner the expenses incurred from the owners in default. That default, from the context, clearly must mean failure to perform the works they have been called upon to perform. So much for the 150th section.

Then we come to the 257th section, which introduces a specific provision under which this gentleman is liable if he is liable at all: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

may be recovered, together with interest at a rate not exceeding 5 per cent. from the date of the service of a demand for the same until payment thereof, from any person who is the owner of such premises when the works are completed, for which such expenses have been incurred and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." Now, that section in absolutely unambiguous language defines the person who is liable to pay this sum. It may be recovered and so on from any person who is the owner of such premises when the works are completed. Millard here was unquestionably the owner when the works were completed, although he ceased to be the owner before the demand for the apportioned sum was made. On the language of this section, if it stood alone, there can be no doubt whatever that he would be the person liable. The only suggestion of any argument to the contrary is that the 150th section, which I have read, does contemplate a default, and it does from the context look as if that default was regarded as being a liability for payment of money: "and may recover in a summary manner the expenses incurred by them from the owner in default." But that default is the failure to perform the work, and that would apparently contemplate, on the terms of that section standing alone, that as soon as the owner had committed the default by not doing that which he had been ordered to do, a liability was laid on him to be made to pay in a summary manner those expenses. Whether that makes that person liable or not, apparently it is not necessary for us to say, because when we come to section 257 the language of that is perfectly clear and unambiguous, since that section has made the person who is the owner when the works are completed liable to pay the apportioned sum. Whether or not any other person is liable under the other section does not arise for discussion, and it is not necessary for us to decide it.

Now, coming to the authority on which the court below thought themselves bound to decide this case as they did, although they expressly said they did not agree with it, and that if the matter were *res integra* they would not have arrived at the same conclusion, they in fact felt themselves bound, not by the decision, but by the *dicta* which they had thought formed really the *ratio decidendi* of that decision. The cardinal distinction between that case and this is that the person who was there sought to be made liable was a person who had ceased to be the owner before the works were completed, and therefore it is absolutely clear that he did not come within the provision of section 257, which is the section which lets in the obligation on the present respondent. Therefore, the person who in the *Swindon case* was sought to be made liable was clearly outside that section, and free from any liability to pay imposed by it, but Cockburn, L.C.J., said this: "I cannot think that it was ever intended by the Legislature that when the owner has parted with his property or someone else is in the possession of it, and therefore getting the benefit of the work done, and ought therefore to pay the expenses incurred, it should be competent for the local authority to follow him up wherever he may have gone and hold him personally liable. I think that defect is remedied by the 257th section, which treats owners upon whom notice was originally served and who are the owners at the time the work is completed and the expenses demanded, as the persons upon whom the local board shall be able to come upon for expenses. I cannot suppose that it was intended that both should be liable—the owner who made default originally in not doing the work, and the owner who is the person who has become the owner at the time the work is completed. What was meant was this—if the owner who is called upon to do the work and who makes default in doing it, continues the owner at the time the work is executed and when the money laid out upon it is demanded, then he is liable under section 150, but if in the meantime he has ceased to be owner, he cannot be said to be the owner in default at the time the money is demanded and when another has stepped into his shoes and become the owner." That, as has been pointed out in the court below, is a *dictum* properly so-called, inasmuch as it was not essential to the decision of that case, because it was giving an opinion which would cover immunity unless the person continued to be owner up to the time of the execution of the works as is expressly enacted in the statute, but up to the demand of the expenses, as to which time there is no provision at all in the Act, and therefore it certainly was a *dictum* in my view, and not a decision. Therefore we are not bound to give effect to that opinion in a case where the facts do not raise that point.

In this case Millard had not ceased to be owner until after the crucial date—the execution of the work—and therefore on the express terms of the statute he is liable. We cannot exclude him from liability by virtue of a *dictum* that was not necessary to the actual decision of the case in which the person sought to be charged had ceased to be owner before the crucial date.

In my judgment, therefore, we must give effect to what was really the view and intention of the court below, and for the reasons I have stated reverse their decision.

STIRLING, L.J.—I am of the same opinion. The question we have to decide is, What is the default which is spoken of in section 150? It appears to me that it is a default in executing the works which the urban authority have required to be done. The section provides for giving notice to the owners of land adjoining highways, and it proceeds, "If such notice is not complied with" then the "urban authority may recover in a summary manner the expenses incurred by them in so doing from the owners in default"—that is, those owners who had not complied with the notices served upon them. The learned judges of the Divisional Court thought that they were constrained to give effect to what is laid down by Cockburn, L.C.J., in the *Swindon case*, where the question to be decided was different to that which we are now considering. The person there sought to be made liable did not come within section 257 at all, and the decision does not form a precedent for our decision in the present case. If we were satisfied that the *ratio decidendi* there was right, it might be right to follow it, but not being satisfied, I do not think that we are bound to give effect to that observation of Cockburn, L.C.J.

I think, therefore, that this appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. I concur in what has been said by my lord and my brother Stirling.

Appeal allowed.

Solicitors, *Speechly, Mumford, & Craig; Halse, Trustram, & Co.*, for *A. Muir Wilson*, Sheffield.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) July 12, 13; Aug. 11, 1904.

WERNER MOTORS (LIMITED) v. A. W. GAMAGE (LIMITED). (a.)

Design—Registration—Patent for same article—Application for patent before registration of design—Patents, &c., Act (46 & 47 *Vict. c.* 57), *ss.* 13, 47.

The grant of a patent and the statutory right of the proprietor of a design are different in their legal nature and effect, and though in most cases it is difficult for the two rights to co-exist, yet if the circumstances allow they may co-exist, the second right in point of time being subject to the other. And if this be so, the fact that they are both vested in the same person will not prevent his enforcing either right.

Decision of Byrne, J., *affirmed.*

This was an appeal from a decision of Byrne, J. (reported [1904] 1 Ch. 264, 52 W. R. Dig. 48). On the 8th of November, 1901, the plaintiffs applied for a patent for a frame for motor cycles. The provisional specification contained no drawings. On the 18th of November, 1901, the plaintiffs applied for and obtained registration of a design for motor cycles. On the 8th of August, 1902, the plaintiffs filed the complete specification of the patent, which contained a plan identical with the registered design. The patent was granted on the 23rd of October, 1902, as of the date of the application, *i.e.*, the 8th of November, 1901. In August, 1902, the plaintiffs brought the present action for an injunction to restrain the defendants from applying for the purpose of sale to motor cycles the plaintiff's registered design or any fraudulent or obvious imitation thereof.

The defendants by their defence contended that by registering the design, as well as taking out the patent, the plaintiffs had committed a fraud on the Crown and that the registration was invalid.

Byrne, J., overruled this objection and granted an injunction to restrain the infringement.

The defendant appealed.

Cripps, K.C., T. Terrell, K.C., and *Graham* for the defendants. *Walter* and *Kerley*, for the plaintiffs.

The arguments used appear sufficiently from the judgments.

VAUGHAN WILLIAMS, L.J.—This is an appeal in an action brought for infringement of a registered design for motor cycles against a decision of the late Byrne, J., whereby he gave judgment against the defendants, and granted an injunction against the defendants, together with an agreed sum for damages.

The plaintiffs became, by a registration dated the 18th of November, 1901, the registered proprietors of a design for motor bicycles, and by their statement of claim claimed an injunction to restrain the defendants from applying for the purpose of sale to motor cycles, without licence or written consent from the plaintiffs, the said registered design or any obvious imitation thereof, and from selling or offering for sale such motor cycles in infringement of plaintiffs' registered design. The defendants denied infringement, and alleged that the registration was invalid for want of novelty, and alleged that the sales made by them before action had been made without knowledge of the registration of the design, and denied the intention to do any wrongful act, and by the last clause in their defence set up that the registration for the design was invalidated because a patent had been applied for on the 8th of November, 1901 (*i.e.*, ten days before the registration of the design) for a frame for motor cycles the same as that shown in the design, and that the patent having been granted on an application made before the application to register the design. At the trial the defendants also contended, although the defence was not pleaded, that the copyright of the plaintiffs had ceased because the plaintiffs registered another design practically identical with that sued on, and sold machines made according to the latter design without the number of the design on them. There was no amendment of the pleadings, but Byrne, J., disposes of this defence by finding that it was not proved in fact. Byrne, J., found that the design was novel, "That the defendants had infringed, that the fact of registration was unknown to the defendants before action, and that their acts until then were protected as far as penalties or damages were concerned, but, having regard to the subsequent sales and the position taken up by the defendants on the motion and subsequently, absence of knowledge of registration at the date of the writ did not protect defendants as to such matters but, that plaintiffs were entitled to an injunction and the agreed damages."

I agree with all the findings of fact by Byrne, J., and therefore the only question which has to be disposed of is the question of law raised in the last clause of the defence—viz., is the registration of the design invalidated by the grant of the letters patent? Now, section 13 of the Patent Act, 1883, provides that every patent shall be dated and sealed as of the date of application, provided that no proceedings shall be taken in respect of an infringment committed before the publication of the complete specification. The dates in the present case are—Date of application, the 8th of November, 1901. Complete specification left the 8th of August, 1902. Accepted the 23rd of October, 1902. The registration of the design was the 18th of November, 1901, and therefore after the date of application but before the leaving of the complete specification. Now, on these dates does the date of the letters invalidate the registration of the design? It is said that it is invalidated because the Crown cannot grant the sole right of manufacturing an article to two different persons, and can by the Statute of Monopolies only grant it to the first and true inventor. It is argued that, having regard to the dates in this case, the Crown had before the date of the registration of the design already granted the sole right to make the article before the design was applied for. A purchaser, it is said, from the patentee is entitled to do what he likes with the article he has bought, and ought not to be prevented by the proprietor of a registered design from so doing. This contention has at first sight considerable force, but I think the answer is that the logical result of this argument, if sound, is that there cannot be a patent and a design for the same article. This, I think, is not supported by authority. The grant of letters patent and the statutory copyright of the proprietor of the design are different in their legal nature and effect. There is only one grant, and that is of the letters patent, not of the copyright. The copyright only gives protection to the shape and configuration, although the result of such protection may be to secure important advantages such as attend mechanical contrivances which might be good subject-matter for a patent: see *per* Lord Herschell in *Hecla Foundry Co.* v. *Walker Hunter & Co.*, 14 App. Cas. 550-555, 38 W. R. Dig. 65. The fact that the design is calculated to serve some useful purpose leaves it open to every member of the public to attain the same end by using an article which differs from it in shape and configuration: see *per* Lord Watson, *ibid.*, 557. Byrne, J., says that the

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

patent right and the copyright may so exist. I think this is right, but I do not mean to say that registration of a design which happens to serve mechanical advantages may not as an anticipation prevent the grant of subsequent valid letters patent. I think it might do so, whether the applicant was the proprietor of the design or a stranger. It is suggested in this case that the grant of the letters patent, having regard to the date of application and therefore of sealing prevents the design being new and original within the meaning of section 47 of the Act of 1883. Now, in the case of a stranger to the letters patent this clearly would not be the result. Can it be the result in the case of a patentee who registers the design between the date of a provisional specification without drawings, and a complete specification with a drawing identical with the design, that he cannot obtain a statutory copyright? I think not, unless one can say that the patentee is in some way estopped from asserting the truth that the design at the date of the application to register was new because he subsequently obtained letters patent having a statutory date prior to that of the application to register the design. I have had some doubt on this point, but on the whole I regret to say I cannot find an estoppel, or any ground for putting plaintiffs to an election between the letters patent and the copyright of the design, because I think what has been done here is an abuse of that part of the Act of 1883 relating to designs. The Legislature never intended that the copyright of designs should be used to protect monopolies, the subject of letters patent. For the reason I have given I think that the appeal must be dismissed.

ROMER, L.J.—In most cases it will be very difficult for a patent right in respect of a new article, and the right to a design registered under the Act for the shape of the article, to co-exist. For example, if the patent is first and the patented article is published to the world, a design of that article cannot afterwards be held novel so as to justify a subsequent application for registration under the Act. If the design of the article was first registered and published, there could not be a subsequent patent merely for that article without any substantial alteration; but in some circumstances the two rights may, I think, co-exist, as in the present case, where there is first the provisional specification and no publication of the patented article before registration of the design of the article under the Act, and that is followed by the final specification.

Under such circumstances I think the two rights, being not necessarily the same, may exist together, though no doubt to a certain extent they may overlap and interfere the one with the other; but I think the difficulty is met by saying that the second right, in point of time, must be held subject to the first right. In the case of a patented right, seeing that the patent dates as from the provisional specification, that gives rise, as in the present circumstances, to some, but, I think, no insuperable difficulty. After the provisional specification, and before the design was registered, there was no publication of the patented article. Take, then, the case where there is an independent inventor of the design ignorant of the provisional specification, and, of course, there being no publication, wholly ignorant of the patented article, and his design, at the date of his application for registration, being novel, he obtains registration of his design. It appears to me that in that case he would be entitled to say that he had a good registered design under the Act, and though, when the patent was subsequently protected by the final specification, so that the patented right dates from the date of the provisional specification, the effect would be that the owner of the registered design must take subject to the patentees' rights. But I cannot see in such a case as I have stated why the grant of the patent—the subsequent filing of the final specification—should destroy the effect of the registration of the design, which, as I have pointed out, was, at the date of the registration, perfectly good.

It was suggested, however, that though two independent persons might, under the circumstances I have indicated, have independent rights in the patent and the design, yet the same person could not hold both. I do not, on consideration, see sufficient reason for so holding. If two independent persons could hold the rights, I do not see why one person should not also hold both. Consider the case of the patentee who files his provisional specification. He may be in doubt whether his patent will ultimately be held good, though he hopes and believes that it is good; but he is perfectly certain at any rate that, so far as the design of the article is concerned, it is perfectly novel, and that he is entitled to have that design registered. Therefore, after filing his provisional specification, he applies for the registration of the design, and the design is duly registered, and he acquires rights under that registration. Then suppose that, contrary to his hopes, his patent was held bad, is there any reason, under those circumstances, why he should not still hold the rights he obtained by the registration of the design? Is he to be held to have lost his right to the design, which is otherwise good, merely because, under the circumstances I have indicated, the patent is held bad? I think not. No doubt there may be difficulties arising about damages in a case where an infringer of the patent is sued both by the patentee for infringing the patent and by the owner of the registered design for infringing the design. I think any difficulty that arises with regard to damages in such a case will be adequately dealt with by the court when the difficulty arises. I have no doubt the court, in such a case, will see its way to do substantial justice, and I think it will be borne in mind by the court, in dealing with such a case, that one of the two rights must of necessity be held subject to the other, *inter se*. I think, therefore, that in this case, the appeal must be dismissed, as I cannot differ from the conclusion arrived at in the court below that there was good subject for the registration of the design belonging to the plaintiffs, and that the right of the plaintiffs, in respect of that registered design, has been infringed by the defendants.

COZENS-HARDY, L.J.—This is an appeal from a decision of Byrne, J., who has granted an injunction restraining the defendants from infringing a registered design.

On the 8th of November, 1901, Messrs. Werner, through whom the plaintiffs claim, applied for letters patent for improvements in frames for motor cycles and other vehicles. The provisional specification of that date contained no drawing, but the essential feature of the invention seems to have been to secure a space or opening in the angle formed by the lower frame member and saddle tube in which the engine could be placed. Ten days later, that is to say on the 18th of November, 1901, Messrs. Werner registered the design in question. On the 8th of August, 1902, their complete specification was filed, and it contained a plan identical with the registered design. On the part of the appellants three points have been raised. (1) It is said that the right acquired by registration of the design on the 18th of November is in some way lost or affected by the grant of the letters patent which, when granted, bore date the 8th of November, 1901, inasmuch as

protection of the design for five years is inconsistent with the protection they acquired by the patent for fourteen years from an earlier date. I do not think this argument can prevail. It seems to me that a monopoly right was acquired by registering the design on the 18th of November, and that this right was in no way prejudiced or affected by the application in the final specification of this registered design to the patent article. The patent is not for the registered design. The patent may be used or infringed in many ways not involving the use of the registered design. The plaintiffs in this action do not complain of an infringement of the patent, but solely of an infringement of the registered design. (2) In the second place it is contended that the design is not a new or original design within the meaning of the Act of 1883. This really depends upon a comparison between the registered design and Chappelle's motor bicycle, a print of which was published in the *Motor Car Journal* of the 18th of July, 1900. At first I was impressed by the similarity of the two, but on consideration I think the objection ought not to prevail. No doubt it is a question to be judged upon a view of the two, but regard must be had to the fact that each represents a motor cycle. I think there is sufficient peculiarity in the position of the engine in the lower part of the plaintiff's drawing to distinguish it from Chappelle's. I do not attach so much importance to the different position of the cross bar, though this cannot be wholly disregarded. Upon the whole, I see no sufficient reason for differing from the decision of the learned judge on this point. (3) In the third place, it was contended that by reason of 51 of the Act of 1883 the plaintiffs were not entitled to an injunction, inasmuch as, after action brought and before trial, cycles to which the registered design had been applied, had not been marked with the prescribed mark before delivery on sale. This point was not raised in the pleadings, but it arose on the cross-examination of the manager and secretary of the plaintiff company. It is suggested that the plaintiffs registered a second design only colourably differing from the first registered design and attached the second number only to the cycles so sold. But in my opinion the evidence is not sufficient to prove the facts alleged. The second registered design was not put in evidence in the court below, and I am not satisfied that it differs from the first only in colourable details. No proof of an actual sale was given, and I think it would be dangerous to allow the plaintiffs' title, if otherwise unimpeachable, to be defeated by means of evidence so loose and unsatisfactory. In my opinion this appeal must be dismissed with costs.

Solicitors, *Ward, Perks, & McKay*; *J. B. & F. Purchase.*

High Court of Justice.

Chan. Div. Kekewich, J. } Dec. 9.

WILLS *v.* PALMER. (*a.*)

Mortgage—Evidence—Presumption of death—Solicitor's books.

The court will presume the death of a person after seven years, although there be strong evidence to show that the person has reason to keep his identity concealed.

A deceased solicitor's books are evidence if he charges himself therein with receipts on his client's behalf, as being entries against his interests, whether or not the entries were made in the ordinary course of his business as a solicitor.

A third mortgagee in an action to enforce his charge, having obtained judgment, an inquiry was directed to ascertain the date when the first mortgagee entered into possession. The first mortgagee admitted that he had been in possession since 1892. *The third mortgagee claimed that the first mortgagee must account as from the year* 1881, *when the transferor of the first mortgage to the present first mortgagee became entitled. There was evidence to show that the transferor, who herself took a transfer of the mortgage, went into possession in* 1881, *and the only evidence to rebut it was contained in the books of an absconding solicitor, who had not been heard of since* 1896. *The books were in the possession of the official receiver, the said solicitor being a bankrupt.*

Held, that the books were admissible evidence, inasmuch as the entries, which it was sought to give in evidence, were against the interest of the solicitor, whose death must be presumed.

Adjourned summons.

By an indenture dated the 20th of June, 1881, a first mortgage of certain premises was transferred to one Martha Olley to secure the repayment of the sum of £400.

Subsequently the aforesaid premises were mortgaged at various dates between the years 1889 and 1899 to secure various sums of money to Frederick Danby Palmer, one of the defendants in this action, the other defendant being John Palmer, the mortgagor.

By an indenture of mortgage dated the 17th of March, 1893, the aforesaid premises were mortgaged to George Wills, the plaintiff, due notice having been given to Martha Olley, the first mortgagee, and Frederick Danby Palmer, the second mortgagee.

On the 22nd of April, 1902, Frederick Danby Palmer took a transfer of the first mortgage from the executors of Martha Olley.

The plaintiff George Wills having obtained the ordinary judgment in a mortgagee's action, this summons was adjourned to the judge to determine as from what date the first mortgagee was in possession of the mortgage premises.

P. O. Lawrence, K.C., and *Fuller*, for the defendant Frederick Danby Palmer.—The master has held that we should account as from the year 1881, inasmuch as Martha Olley, from whom we took a transfer of the mortgage, must be deemed to have entered into possession in that year. We have, however, discovered entries in the books, now in the possession of the official receiver, of Thomas Matthias Baker, an absconding solicitor and bankrupt, which, if admitted in evidence, would show conclusively that the defendant in the person of his transferor first entered into possession in 1892. *Rawlins* v. *Rickard*, 28 Beav. 370, is an authority to support the admissibility of such evidence.

Stewart Smith, K.C., for the plaintiffs.—There is no evidence of the death of Baker. You can presume the death of a person after seven years, but not if he has any object in keeping out of the way. Now Baker is an absconding solicitor. Occasionally your lordship will direct advertisements before presuming the death of a person interested in a fund in court, but of course an advertisement in this case would have just the opposite to the desired effect. Again, there is no evidence to show that the entries are in the handwriting of Baker or that of his clerk, or that they were made contemporaneously. The ruling in *Rawlins* v. *Rickard* has been dissented from in *Hope* v.

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Hope, W. N. 1893, p. 20, and see Taylor on Evidence (9th ed.), vol. 2, at p. 455. The account in the books is an account between Palmer and Olley and kept by Baker as an accountant. There was no duty upon him as solicitor to keep it. He must have had instructions from somebody, but there is no evidence of such instructions.

KEKEWICH, J.—An inquiry has been directed to determine when Martha Olley entered into possession of the premises the subject-matter of the mortgage. The defendant says: "I admit a certain date; you say a prior date. You must prove it." The plaintiff, accepting the burden of proof, says: "My duty is discharged because I have an admission of possession at an earlier date. For the firm of solicitors acting for the defendant stated, in a letter to a Mr. Brewer dated the 2nd of January, 1902, before the present dispute arose, that the mortgagee was in possession prior to 1881, and when he transferred his mortgage to Olley in that year, Olley retained possession." This, then, is an admission that Olley entered into possession upon the transfer to her, and that the possession continued up to the transfer to Mr. Palmer in 1902, and up to date. That standing alone is conclusive, and Mr. Palmer must be charged as from the year 1881. But an admission may, of course, be rebutted. Mr. Palmer says he can contradict it, and that raises a nice question—the admission of evidence.

John Matthias Baker was the solicitor, apparently, both for John Palmer, the mortgagor, and Martha Olley, the mortgagee, certainly for Mrs. Olley. He kept certain accounts, a copy of which has been taken from the books in the hands of the official receiver. Baker was an absconding solicitor, and, it is stated, would not face the ordeal of a public examination in respect to his bankruptcy. He went away in 1896. I must presume him to be dead. Mr. Stewart Smith says there is reason to think he is not dead, as it is his interest to conceal himself from both friends and enemies, and therefore his death is not to be presumed. But I do not understand that to be the law. In *Phené's Trusts*, 5 Ch. App. 139, Gifford, L.J., in a long and instructive judgment, after having referred to three cases decided by Kindersley, V.C., says: "They were all decided on the same general principle that the law presumed a person who has not been heard of for seven years to be dead." You may introduce evidence to rebut that presumption. But even though in this case the presumption arises, am I entitled to admit the accounts? In the first place it is said that there are no proofs that they are in his handwriting. It would be difficult to get any proof either of his handwriting or that of his clerk, which would be sufficient. The accounts are taken from the official receiver from books of Baker in his possession, being books concerning the bankrupt's affairs and business. That being so, I think I ought not to insist on proof that they were written by him, a fact in itself unlikely. I ought to take it that they were his books kept by someone under his direction. Next it is said that the books cannot be admitted in evidence because they were not books kept in the discharge of a duty in the course of his business, and I have been referred to a case which treats as doubtful the case decided by Sir John Romilly in 28 Beav. But that is only to do with entries made in the ordinary course of business. It is not necessary for me to decide that they are not admissible on that ground, because I think they are admissible on another ground, as containing entries against interest. The account is headed "Mr. John Palmer in account with Mrs. Martha Olley." He kept the account for Olley. There are items which go to show he charged himself with receipts. On the 6th of April, 1902, there is an item by cash for rent, and there are similar items in September and October of that year. I read that as so much cash due to a mortgagee in possession for which he was accountable. If there are any doubts on the question, there is another item, the final item in the account: "August 18th—Remitted by Thomas Matthias Baker, and paid by him out of his own pocket—£15 19s. 10d." It balances the account. That exact sum was required to make the account right, and that money had to be paid by somebody, and Mr. Baker pays it. He received so much cash and charged himself with it, and if he charged himself with a single item it is an entry against interest. The result is that the account is available. What its effect is is another matter. I have now an admission by Mr. Frederick Palmer in the person of his solicitor on the one hand, and evidence which I have admitted on the other. My duty is to contrast them. In comparing the evidence of the account with that of the admission, I must bear in mind that the admission was only a statement of belief of which the writer could have had no personal knowledge. On the other hand I look on this account and I believe it. It is of course possible that the cash received by her was paid directly to her by the tenants through her agent, Mr. Baker, but that is not the way it was treated. It is impossible to suppose that Mr. Baker had in his mind to show that Olley was not mortgagee in possession prior to that date. He was keeping the account in a more or less accurate form, and the only conclusion I can come to is that Mrs. Olley was not in possession prior to 1892, and that, therefore, I must make the defendant account as from the 6th of April, 1902.

Solicitors for defendants, *Gribble, Oddie, Sinclair, & Johnson.*

Chan. Div. }
Buckley, J. } Aug. 5, 12, 1904.

FINANCE AND ISSUE (LIMITED) v. CANADIAN PRODUCE CORPORATION (LIMITED). (a.)

Company—Company registered before 1900—*Minimum subscription—Prospectus—Irregular allotment—Voidability of allotment—Period of voidability—Return of application moneys—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 4, 5, *and* 12.

If in breach of the provisions of section 4 *of the Companies Act*, 1900, *a company registered before the Act allots shares, a right of rescission of the contract to take the shares arises, although the limit of time imposed by section* 5 *for avoidance of the contract does not apply, and the contract remains voidable without such time limit.*

If a company states in its prospectus the number of shares as the minimum upon which it will proceed to allotment, that is a condition upon which an applicant takes his shares, and if that condition is not complied with the applicant is entitled under the general law to repudiate the contract. A company having fixed in its prospectus a minimum number of shares upon which it would proceed to allotment, inadvertently allotted shares before the minimum number had been applied for. The company was registered before 1900, *but the allotment was after* 1900, *and was the first allotment to the public. Upon the mistake being discovered its directors proceeded to return the application moneys and cancel the allotment.*

Held, that, although the limitation of the period during which an allotment is voidable, imposed by section 5 *of the Companies Act*, 1900, *could not apply, yet the contract*

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

to take the shares was voidable, both as a breach of section 4 of the Act and also under the general law, as in breach of the conditions mentioned in the prospectus, and consequently a motion to restrain the company returning the allotment and cancelling the shares failed.

Motion.

This was a motion by the plaintiff company that the defendant company might be restrained until judgment or further order from returning to the allottees of shares in the defendant company money paid by them in respect of the shares, and from cancelling the shares.

The defendant company was incorporated in 1897 with a capital of £1,000 in £1 shares. In 1898 it increased its capital to £200,000 in £1 shares. Down to May, 1904, it had made no allotment beyond seven shares to the subscribers of the memorandum of association. In 1904 it was minded to offer its capital for subscription.

With a view thereto an agreement was, on the 12th of May, 1904, executed between the defendant company of the one part and the plaintiff company of the other part, the effect of which was that the plaintiff company agreed to pay the expenses of issuing and advertising the prospectus, and agreed to pay certain other sums, and in consideration of those payments the defendant company agreed to pay the plaintiff company a sum of £21,000, partly in cash and partly in fully-paid shares, at certain dates, calculated from the date of the first general allotment.

On the 13th of May, 1904, the prospectus was issued, offering 186,000 out of the 200,000 shares, at par, payable 1s. on application and 1s. 6d. on allotment. At the head of the prospectus it was stated that "of this issue the directors and their friends have applied for 23,726 shares," and in the body of the prospectus it was stated that "the minimum number of shares upon which allotment will be made is 40,000."

On the 20th of May, 1904, the defendant company went to allotment and allotted 40,003 shares, of which 5,000 were allotted to the plaintiffs. Of these 40,003 the 3,000 shares presently mentioned formed part. The facts as to the 23,726 shares which the prospectus stated had been applied for were that 20,726 of them had been applied for in England, and the 1s. on application paid upon them, and that the directors were told that the remaining 3,000 had been applied for in Canada and the application money paid also upon these. The real facts as to the 3,000 shares as subsequently ascertained were that the applications were largely for preference shares, whereas the defendant company had no preference shares and was not offering any such for subscription, and that all applications were made conditional upon an allotment being made by a date prior to the issue of the prospectus, a condition which was not complied with, and, further, that as regards 2,425 only of that number had the application money of 1s. a share been paid, leaving 575 upon which nothing had been paid on application. The directors learned about the 30th of June, 1904, the fact that upon the 575 shares the application money had not been paid. They immediately took legal advice, and as the result on the 14th of July, 1904, sent to the allottees a circular stating that upon the 575 shares the application money had not been paid and offering the allottees the option of having the money paid by them repaid and the allotment concelled. It was stated, though not proved, that the holders of some 24,000 shares availed themselves of this option. This circular went to the plaintiffs amongst others, and on the 19th of July they, by their solicitors, wrote a letter threatening proceedings if the circular was not withdrawn. The directors, conceiving that the course which they had taken was the only honest course open to them, did not accede to this demand, and in the result the present action was brought, claiming specific performance of the agreement of May, 1904, and damages for breach, or (in the alternative) an injunction to restrain the return of the money paid on application or allotment; and the above-mentioned motion was made.

Buckmaster, K.C., and *A. Houston*, for the plaintiff company.—The allotment of the shares may have been improper, but it is not either void or voidable. Section 4 of the Companies Act, 1900, does not give the allottees any right to rescind for non-compliance with its provisions. It only gives them a right of action against the directors. This was decided with regard to section 38 of the Act of 1867 (*Gover's case*, 24 W. R. 125, 1 Ch. D. 182), and section 4 of the last Act is similar to that section in this respect. Section 5 of the Act of 1900 gives the allottees a right of avoidance within a certain period, but it is only applicable to a company registered after 1900. Neither the company nor the subscribers can cancel the shares, and the circular of the company of the 14th of July is *ultrà vires*, and should be restrained.

Astbury, K.C., and *G. Henderson*, for the defendant company.—The allotment of the shares being the first allotment offered to the public, and, being after 1900, came within section 4 of the Act of 1900, and was in contravention of its provisions, as the whole of the 40,000 shares were not subscribed for. The allotment, therefore, was *ultrà vires* and void, and the directors were bound to return the application moneys, and treat the shares as unallotted.

Cur. adv. vult.

Aug. 12.—BUCKLEY, J. (after stating the facts), said: The agreement of May, 1904, does not, in my opinion, give the plaintiff company any right to dictate to the defendant company in any way as to going to allotment, although, if the defendant company did not go to allotment, the plaintiff company might have some right to damages. For the purposes of the present application the agreement is, I think, one which gives the plaintiff company no right in respect of the order for which they are asking. The question to be decided involves an important point arising upon the Companies Act, 1900. The defendant company is one registered in 1897, and to which, therefore, section 11 of the Act of 1900 does not apply. It is a company which could not hold a statutory meeting within that section. The definition in section 5 of the point of time within which an applicant can seek to avoid an allotment is consequently inapplicable to the present case. But for the purpose of construing the Act I must, of course, regard the case of all companies to which the Act applies. By reason of the facts which I have stated the conditions mentioned in section 4 of the Act of 1900 had not been complied with, for the amount named in the prospectus as the minimum subscription had not been subscribed, and the sum payable on application upon that amount had not been paid. The provision, therefore, of the Act had taken effect that "no allotment should be made" of the share capital in question. The defendant company argues that the result is that the allotment was altogether void. In my judgment, that contention rests upon a wrong construction of the Act. An allotment in breach of section 4 cannot be void, for section 5 provides that such an allotment shall be voidable within a certain time and not later. It is, therefore, not a void but a voidable allotment. It is true, however, that the time within which section 5 provides that it shall be voidable

is, for the reasons which I have given, not applicable to this case. Under what circumstances, then, is it voidable in this case, or is it not voidable at all? Upon this point it is argued on behalf of the plaintiff company that it was long ago decided, under section 38 of the Companies Act, 1867, that that section gave rise only to rights as against the directors or others who issued the prospectus, and did not give rise to any right of rescission, and it is said that the same is true of section 4 of the Act of 1900. It is contended that section 5 of the Act of 1900 is an empowering section creating a right of avoidance in the cases to which it applies, and that, inasmuch as section 6 cannot apply to the present case, the allotment is not voidable. This contention, in my judgment, cannot be supported. Section 38 of the Act of 1867 is addressed to the representation which induces the contract. Section 4 of the Act of 1900 is addressed to an essential constituent of the contract itself. If the allotment be successfully attacked the contract is gone. A breach of the veto which the Act imposes in certain events upon proceeding to allotment gives rise, I think, to a right of rescission of the contract. Then section 5 imposes a limit of time within which that right of rescission must be enforced. It is a limit which is not applicable in the present case. It follows, I think, that the voidable contract remains a contract voidable for breach of the statutory provision that the company shall not go to allotment unless a condition is satisfied which has not been satisfied. I am conscious that this conclusion must have a very far-reaching effect, for, as regards companies registered before the commencement of the Act of 1900, it leaves such companies exposed for an indefinite time in consequences from which companies registered after that date are in a short time relieved by section 5. Probably the remedy is to be sought in the fact that a small amount of acquiescence after knowledge would bar any right of rescission. It follows from the foregoing that the plaintiff company has no right to sue. If the defendant company were acting *ultrà vires*, any shareholder, could no doubt enjoin them. But if the Act of the company is not *ultrá vires*, and only in breach of a statutory provision, the neglect of which renders the contract voidable, the plaintiff company has no right to an injunction. A further point is this. The statement as to the 23,726 shares at the head of the prospectus, though innocently made, was, in fact, untrue. For the purpose of rescission the fact that the misrepresentation was innocently made is not material. Upon the general law, apart from the statute, it seems to me that persons who applied upon the faith that that statement was true would be entitled to relief. This goes to show that, even if the plaintiff company could sue at all, the notice of motion is at any rate too wide. There remains a third point. The words in the prospectus that "the minimum number of shares upon which allotment will be be made is 40,000" form, in my judgment, a condition upon which the applicant makes his application. If that condition is not complied with, he is entitled (if he has done no act to affirm) to repudiate the allotment on the ground that his offer could not be accepted upon the terms under which the condition attached to the offer was not complied with. From which again upon the general law it would result that he would be entitled to rescission. Upon all these grounds I think the motion fails.

Motion dismissed.

Solicitors, *H. P. Becher; J. S. Wilkinson.*

Chan. Div. Warrington, J. June 29, 1904.

In re LINSLEY.

CATTLEY *v.* WEST. (*a.*)

Trustee— Co-trustees — Solicitor-trustee — Unreasonable conduct— Action against the trustees — Indemnity— Costs of lay trustee.

Where one of two trustees is a solicitor who takes an active part in the administration of the trust estate, the other trustee is entitled to expect the solicitor-trustee to act as a solicitor in a reasonable and businesslike manner, and if he does not do this, and an action is in consequence brought against the trustees by the beneficiaries, the solicitor-trustee must indemnify his co-trustee both against any costs he may have to pay the plaintiffs in the action and also against his own costs as between solicitor and client, even where there has been no loss owing to the breach of trust.

Action.

This was an action against two trustees for accounts upon the footing of breach of trust.

By her will and codicil, Sarah Linsley, who died in 1872, gave certain property to two trustees, one of whom was the defendant W. R. West, upon trust for Martha Klockmann for life, and after her death (in the events which happened) for her children equally.

In 1879, the defendant J. F. Hartley was appointed trustee of the will and codicil jointly with West, in the place of the other trustee, who had died. West was a solicitor, Hartley was a retired surgeon. West was the active trustee, and he invested part of the trust funds upon equitable mortgages by deposit of deeds. There was a dispute as to whether he informed his co-trustee, Hartley, of these advances.

Martha Klockmann had four children. She died in November, 1901. Shortly afterwards the three surviving children—one of whom was the executor of one who had died—who were the plaintiffs in the action, applied to the trustees for information as to the trust funds and for accounts. Hartley also pressed West for information and accounts. They learned that part of the trust funds had been invested upon certain equitable mortgages, one of which, a mortgage to one Piggott, subsequently turned out to be a legal mortgage, but neither the beneficiaries nor Hartley were able to obtain at any time any accounts from West.

At last, after waiting more than a year, this action was commenced by the surviving children of Martha Klockmann against the trustees West and Hartley, alleging breaches of trust, and claiming accounts upon the footing of breach of trust, and costs, and other incidental relief.

West and Hartley put in separate defences. West denied that the investment upon the mortgages was a breach of trust, and stated that the securities were sufficient, and that there would be no loss to the estate. Hartley also delivered to West a statement of claim in the action claiming to be indemnified by West against liability and costs in the action.

The trust fund was, so far as necessary, made good by West.

The arguments and judgment upon this latter claim were as follows:

Rowden, K.C., and *A. Adams*, for the plaintiffs.

Norton, K.C., and *Romer*, for the defendant Hartley.—West was the active trustee, and was, moreover, a solicitor. Hartley was innocent of the breaches of trust and of any neglect. Even if he is liable to the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

beneficiaries, yet as between himself and West the latter is alone responsible, and should indemnify Hartley for the consequences of the breaches of trust and the costs of the action: *Lockhart* v. *Reilly*, 4 W. R. 438, 25 L. J. Ch. 697; *In re Turner*, 45 W. R. 495, [1897] 1 Ch. 531. The principle is also recognized in *Bahin* v. *Hughes*, 34 W. R. 311, 31 Ch. D. 395.

Nepean, for the defendant West.—The cases where a trustee has been made to indemnify his co-trustee for breaches of trust where both are responsible to the beneficiaries are cases where has been loss to the trust estate. Here there has been none. Moreover, West has made no profits in the dealings with the trust estate, and no profit costs. Fry, J., says (34 W. R., p. 312, 31 Ch. D., p. 398): "This part of the appeal is based upon some notion that one trustee is liable to indemnify his co-trustee against loss or injury for his acts, but I cannot think that any such liability exists, for if it did exist the books would be full of authorities bearing upon the point."

WARRINGTON, J., after holding that in the absence of receiving any accounts from West the plaintiffs were justified in their action, and that both West and Hartley must pay them their costs of the action, continued: Next their arises a serious question as to what I am to do as between the two defendants. West is a solicitor and Hartley is not. The investments, with the exception of Piggott's mortgage, were made by way of loans to the clients of West. It is stated that Hartley was informed of the investments when they were being made, and assented to them. I accept that statement, but I do not think that it affects the question. The active person in making the investments was West, and if he had kept reasonable records of what he had done there need have been no difficulty, when he was asked for information as to the state of the trust estate, in furnishing the next day information of what had taken place and how the estate was invested. West was asked for a whole year by the *cestuis que trustent* for this information, and Hartley also, upon being pressed by them, took up the matter and pressed West for the information, telling him that he himself was being pressed by the *cestuis que trustent*. In the result this action was brought. As I have already said in the course of the argument, I acquit West of any dishonesty. But I think that he acted in an unreasonable and an unbusinesslike manner. If he acted as a solicitor in this way, would he not have been liable to his clients? It is recognized in several cases, especially in *In re Turner*, following *Lockhart* v. *Reilly*, that as between two trustees, if one of them is a solicitor, that fact makes a difference in considering the question whether the trustee is liable to indemnify his co-trustee. And I think that is properly so, because a trustee who is not a solicitor reasonably and properly looks to the trustee who is a solicitor to do that which a solicitor acting in a businesslike manner would do. That is where I think West failed, not only in his duty to his *cestuis que trustent*, but also in his duty to his co-trustee, who has properly trusted him as his solicitor, and as the trustee managing the business of the trust estate. Fortunately there has been no loss from the breach of trust. The conclusion to which I come is that West must pay not only the costs of the plaintiffs, but must also indemnify Hartley against any costs he may have to pay to the plaintiffs, and also against his own costs as between solicitor and client.

Solicitors, *Burch, Whitehead, & Davidsons; Sharpe, Parker, Pritchards, Barham, & Lawford; Prichard, Crossman, & Block*, for *S. Wise & Son*, Ripon.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Nov. 18.

ASH *v.* NICHOLL.
COX *v.* MERRIMAN. (*a.*)

Election law—Registration—Parliamentary and municipal franchises—Disqualifications—Non-payment of poor rates—Meaning of expression "poor rate" for registration purposes—Sums chargeable on, or payable out of, the poor rate—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3 (4)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-section* 2 (d) (e)—*Poor Rate Assessment Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 20—*Education Act*, 1902 (2 *Ed.* 7, *c.* 42), *s.* 18.

Non-payment in full, on or before the 20th of July in the qualifying year, of all poor rates that have become payable, in respect of the qualifying premises, up to the preceding 5th of January, disqualifies the occupier from being entitled to be registered either as a Parliamentary or as a local government elector.

The expression "poor rate," so far as registration is concerned, is not limited to the assessment for the relief of the poor, but includes assessments for other purposes chargeable thereon according to law—e.g., the education rate and the burial rate.

These were cases stated by the Revising Barrister for the Borough of Scarborough and the Revising Barrister for the County of Wilts, respectively; the question raised in each case being whether the non-payment by a ratepayer of that portion of the poor rate applicable to education purposes disqualified the ratepayer from being registered either as a Parliamentary, local government, or parochial elector. The cases were heard together.

ASH *v.* NICHOLL.

The case stated by the Revising Barrister for the Borough of Scarborough, in this case, was as follows:

"The borough of Scarborough is a Parliamentary and a municipal borough, and has a borough fund, for which a borough rate is levied. A poor rate for the said borough for the year 1903-4 had been duly made and signed by the overseers, and had been duly signed by the justices on the 24th of April, 1903. A demand note for payment of the said poor rate had been duly made upon the appellant. The said poor rate included, among other charges, an education rate of one penny in the pound, and a burial rate of one penny and one halfpenny in the pound. No separate rate had been levied for the education rate under section 18 of the Education Act, 1902, and no separate rate had been levied for the burial rate under section 1 of the Burial Act, 1860. The said education rate and the said burial rate were not collected with the poor rate for the sake of convenience. The name of the appellant and of thirty-nine other occupiers, all of whom were known by the name of 'passive resisters,' had been omitted by the overseers from the list of inhabitants householders on the ground that the poor rate on the qualifying property due on the 5th of January, 1904, had not been fully paid on or before the 20th of July, 1904. The inhabitant householders' list is made out in three divisions, carrying the following franchises: Division 1, both Parliamentary and burgess; Division 2, Parliamentary only; and Division 3, burgess only. It was admitted that the appellant had refused to pay and had not paid that portion of the poor rate

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

levied for the purposes of education in the said borough, and that the amount of 1s. 6d. was due thereon on the 5th of January, 1904, and had not been fully paid on or before the 20th of July, 1904. The appellant and the thirty-nine other persons whose names had been omitted, claimed to have their names inserted in the said list of inhabitant householders under similar circumstances. The claims were duly objected to. Three points of law were taken: (*a*) That the education rate was not a poor rate, and that non-payment of poor rates alone and of no other rates disqualified an inhabitant householder in a Parliamentary and municipal borough from being inserted in Division 1 of the list of voters; (*b*) that the education rate was not a borough rate for the purpose of the Registration Acts; (*c*) that non-payment of the burial rate did not disqualify an inhabitant householder in a Parliamentary and municipal borough from being inserted in Division 1 of the list of voters. On the first point I decided that the education rate was chargeable to the poor rate according to law, that it formed part of the poor rate, and that the said poor rate as made and demanded was one rate and indivisible. 'Poor rate' is defined in section 20 of the Poor Rate Assessment Act, 1869, in these words: 'Poor rate shall mean the assessment for the relief of the poor and for other purposes chargeable thereon according to law,' clearly indicating that there may be poor rates other than those to be expended simply for the relief of the poor. Statutes dealing with education point to the conclusion that the education rate is part of the poor rate. By section 18 of the Education Act, 1902, the expenses of an urban district council other than a borough are to be raised in the manner provided by section 33 of the Elementary Education Act, 1876—that is, they are to be paid out of a fund to be raised out of the poor rates for the parish or parishes for which the committee of management act, and as to a borough by the same section 18 of the Education Act, 1902, the expenses are to be paid out of the borough fund or rate, and by section 145 of the Municipal Corporations Act, 1882, the council of a borough has power to order a parish within the borough to pay its contribution to the borough rate out of the poor rate. I further decided that in a Parliamentary and municipal borough an unpaid poor rate was not the only disqualifying rate; that payment on or before the 20th of July, 1904, of all borough rates as well as poor rates due on the 5th of January, 1904, was essential to registration in Division 1 of the said list of inhabitant householders—as to the Parliamentary franchise by section 3, sub-section 3, of the Representation of the People Act, 1867, and as to the burgess franchise by section 9, sub-section 2 (*d*) and (*e*), of the Municipal Corporations Act, 1882; and I also decided that these disqualifications operated respectively in regard to the insertion of the name of the appellant either in Division 2 or in Division 3. On the second point I decided that the education rate was a borough rate payable out of the borough fund for the purposes of the Registration Acts. The point seemed to me unarguable, having regard to section 18 of the Education Act, 1902, as the words 'the expenses under the Act shall be paid out of the borough fund or rate' seem to me to admit of no other construction. On the third point it was contended that by section 1 of the Burial Act, 1860, the burial rate was levied as a separate rate, and, therefore, non-payment of it did not disqualify the appellant from being inserted in the said list, and that, as the amount due on the burial rate (1½d. in the pound) exceeded by one halfpenny in the pound the amount due on the education rate (1d. in the pound) it followed that the education rate had been fully paid, and that no part of the poor rate remained unsatisfied. I decided that the true construction of section 1 was that for the purposes of the Burial Acts the local authority had an option to levy either a general or a separate rate, and that in the present case the said authority had levied a general and not a separate rate, and that the said burial rate was a borough rate, the non-payment of which disqualified the appellant from being inserted in the said list of inhabitant householders by virtue of section 3, sub-section 3, of the Representation of the People Act, 1867 (Parliamentary), and of section 9, sub-section 3 (*d*) and (*e*), of the Municipal Corporations Act, 1882 (burgess). I also decided that the appellant had not on or before the 20th of July, 1904, *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that had become payable by him in respect of his said premises up to the preceding 5th of January, 1904, and that he was disqualified thereby from being inserted in the said list by section 3, sub-section 4, of the Representation of the People Act, 1867. I accordingly disallowed the claims of the appellant Frederick Ash and the said thirty-nine other persons to be inserted in the said list of inhabitant householders. Due notice of appeal from my decision was given, and I ordered the appeals in all the beforementioned cases to be consolidated. If the court should be of opinion that all my decisions were wrong, the register is to be amended by inserting the names of the appellant Frederick Ash and of the said thirty-nine other persons on the said list of inhabitant householders, but if the court should be of opinion that any one of my decisions were right, the said list shall stand without amendment."

COX v. MERRIMAN.

The case stated by the Revising Barrister for the County of Wilts, in this case, was as follows:

"Edward Cox (the appellant), of 24, Herd-street, Marlborough, duly made a claim, dated the 17th of August, 1904, to have his name inserted in the Occupiers' List (Division 1) as a duly qualified voter for the parish of St. Mary, Marlborough, entitling him to vote at a Parliamentary election and also at any county council or parochial election held in and for the said Eastern Division of Wiltshire, in respect of a certain dwelling-house situate at 24, Herd-street, Marlborough, aforesaid, of which the said Edward Cox was the occupier. It was proved by the assistant overseer of the said parish upon oath that the whole of the poor rate due on the 5th of January, 1904, in respect of the said dwelling-house had not been paid either on or before the 20th of July, 1904, as required, or at all. The trustees of the Primitive Methodist Chapel in the said parish were rated as owners of the said premises, and the overseers of the poor of the said parish demanded from them payment of the poor rate made on the 20th of October, 1903, to meet expenses which would be incurred before the 25th of March, 1904, and of the arrears of former rates. The rates as demanded amounted on the 5th of January, 1904, to 6s. 0½d., made up of 4s. 6d., being an instalment of the rate made on the said 20th of October, 1903, and 1s. 6½d. arrears of former rates. The said rate due, however, on the 5th of January, 1904, was reduced to 5s. 4½d. by reason of the chapel trustees having compounded for the said rates as owners of the premises. The said owners paid on account of the said rates 3s. 5½d. on the 26th of February, 1904, leaving a balance still due of 1s. 11d., which was still unpaid on the 20th of July, 1904. The demand notes show how the rate of 1s. 6d. in the pound is made up, and is as follows:

Relief of the poor and other expenses of the guardians, 6½d.; county contributions, 10½d.; expenses of the overseers, 1d.—1s. 6d. With the exception of the said demand note, no evidence whatever was given or tendered to me as to what part of the said rate was unpaid, but it was contended by the party agent that the amount so left unpaid was in respect of the rate for education, and that that part was included in the 10½d. for county contributions. I invited evidence of these contentions, but none was forthcoming. Eight other persons claimed to have their names inserted in the said list under similar circumstances. I decided as a fact that the whole of the poor rate due on the 5th of January, 1904, and duly demanded by the said overseers in respect of the said premises, had not been paid on or before the 20th of July, 1904, and I therefore disallowed the claim of the said Edward Cox and of the eight other persons to be put upon the said list. Due notice of appeal from my decision was given, and I ordered the appeals in all the before-mentioned cases to be consolidated. If the court be of opinion that my decision was wrong, the register is to be amended by inserting the names of the said Edward Cox and of the said eight other persons in the said list."

The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), by section 3, sub-section (4) provides that every man claiming to be put on the Parliamentary register of a borough shall have (*inter alia*) "on or before the 20th of July," 1904, "*bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding 5th day of January."

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), by section 9, sub-section 2 (*d*) (*e*), provides that a person shall not be entitled to be enrolled as a burgess unless he is qualified as follows (*inter alia*): "(*d*) has been rated in respect of the qualifying property to all poor rates made during those twelve months (*i.e.*, the twelve months preceding the 15th of July in any year) for the parish wherein the property is situate; and (*e*) has on or before the 20th of the same July, paid all such rates, including borough rates (if any) as have become payable by him in respect of the qualifying property up to the last preceding 5th of January."

Cyril Dodd, K.C., for the appellant Ash.—The two points raised on this appeal are—(1) That the education rate was not a poor rate; (2) that the education rate was not a borough rate. It was never intended by the Legislature that every new charge put upon the poor rate should, if not paid, form a disqualification for franchise, and thereby by a side route make the qualification for franchise more difficult. The qualification for franchise was the payment of poor rate, which was a poor rate properly so called, and did not depend on the payment of a charge which, although collected with the poor rate, was not in fact a poor rate in the ordinary sense of the word. At the time the franchise was given there was nothing in the nature of an education rate which was put upon the poor rate. If this was a question of a contract between a landlord and a tenant whereby the landlord agreed to pay the poor rate, there was authority for saying that it did not follow that every new charge put upon the poor rate would have to be borne by the landlord under such a contract. [He referred to *Earl of Cork* v. *County Council of Cork*, [1903] 2 Ir. Rep. 490.] Another Irish case, *McDaid* v. *Galbraith*, [1901] 2 Ir. Rep. 49, where it was held that the poor rate was an indivisible rate, could be distinguished from the present case, on the ground that the wording of the Irish Act in that case was materially different.

W. J. Jeeves, for the respondent Nicholl (the town clerk of Scarborough) did not argue.

R. Mortimer Montgomery, for the appellant Cox, contended that on the facts stated the appellent was not disqualified from being on the lists as a county and parochial elector, even if the court should think that he was disqualified as a Parliamentary elector. Further, as he was a tenant and the burden of the rate was on his landlord, the appellant did not become disqualified by reason of his landlord's neglect to pay the rate unless notice of that neglect had been served on him by the overseers; there has been no decision upon this point in England; in Ireland it has been held that the omission of the landlord to pay the rate disqualified the tenant, even although no notice of the rates being unpaid had been given to the tenant (*Clark* v. *Buchanan*, 20 L. R. Ir. 244); but in Scotland the contrary has been held: *Neilson's case*, 18 Rettie 338.

Lord ALVERSTONE, L.C.J.—On the substantial point raised in these cases I have no doubt. The contention, broadly stated, is that although a demand made, in proper form as poor rate, upon a person or persons liable to pay that poor rate, yet because the rate is made not only for poor rate properly so-called but also for other purposes which could not properly be so described, the ratepayer may say, "I decline to pay that portion of the poor rate which is not for the purposes of poor rate properly so-called," and that in doing so, he does not become disqualified from being on the list of Parliamentary, local government and parochial voters. It is not necessary to go through the various statutes that have been referred to in argument. It is only necessary to refer to section 3, sub-section 3, of the Representation of the People Act, 1867, and to section 9, sub-section 2 (*d*) (*e*), of the Municipal Corporations Act, 1882. [His lordship here read those sections, and continued: The same question arises under both these sections—namely, whether a person who objects to part of the purposes to which a rate is to be put can decline to pay that part of the rate and yet incur no disqualification under the Registration Acts? I think it important to point out that these cases do not depend merely on the particular objection raised by the persons described as "passive resisters." Soon after 1867, at all events, poor rate has been levied for a number of purposes which are not poor rate properly so called; and in the Poor Rate Assessment Act, 1869, poor rate is defined (section 20) as "the assessment for the relief of the poor and for other purposes chargeable thereon according to law." I think, moreover (as was pointed out by my brother Kennedy) that that fact was recognized by sub-section 2 (*e*) of section 9 of the Municipal Corporations Act, 1882. The same question that was raised in these cases might have been raised by any ratepayer contending that he would only pay so much of the poor rate as was referable to the objects of the rate as they existed in 1867, but that he declined to pay the balance, which was for other purposes. I am of opinion that a ratepayer cannot refuse to pay part of the rate. With regard to the borough rate, I agree with the revising barrister (in *Ash* v. *Nicholl*) that the point is unarguable, having regard to section 18 of the Education Act of 1902, by which the expenses under the Act are to be paid out of the "borough fund or rate." It seems only common sense that a man should not be able to embarrass the local authorities by saying he would not pay the whole of the rate because he objected to the burial rates, or to some other portion of the rate included in the poor rate. As had been pointed out in a recent case, such objections could not be raised even on an appeal from the

rate itself; and to say that a person who was liable to pay, and who was properly assessed, could decline to pay more than he liked in the pound, was a contention, so far as I know, without any authority, and it certainly had no principle to support it. I am therefore of opinion the decision of the revising barrister in each of these cases was right, and that these appeals should be dismissed.

With regard to the point, raised by Mr. Montgomery for the appellant in *Cox* v. *Merriman*, as to the position of the appellant as the tenant, I do not think that the court ought to assume that a notice had not been served on the appellant by the overseers to the effect that the landlord had not paid the rate; neither ought the court to assume that this point had been taken before the revising barrister. This court, therefore, did not decide what would have been the result had such notice not been given.

KENNEDY, J.—I am of the same opinion, and have little to add. I think it is important to point out that poor rate is levied as one and indivisible rate, and not the less so because the separate purposes for which it is levied are set out in the demand note. The ratepayer has no right to apportion any part payment for particular purposes; nor, in my judgment, could any such part payment be properly accepted by officials. In my opinion the poor rate is one indivisible rate, and I think it therefore impossible to say, under the circumstances, that the appellants in these cases have paid the poor rate.

RIDLEY, J.—I agree, and have nothing to add.

Appeals dismissed.

Solicitors for the appellant Ash, *Jaques & Co.*, for *Richardson*, Scarborough.

Solicitors for the appellant Cox, *Lloyd-George, Roberts, & Co.*

Privy Council.

(*From the Supreme Court of New South Wales.*)
May 6, 1904.

CITIZENS' LIFE ASSURANCE CO. (LIMITED) *v.* BROWN. (*a.*)

Company—Libel—Servant of company—Publication—Agency—Scope of employment.

A limited company is responsible for a libel published by one of its officers, where the act is done in the course of employment which is authorized by the company.

This was an appeal from the Supreme Court of New South Wales. The facts are given in their lordships' judgment.

Asquith, K.C., and *Frank Russell*, for appellant.

H. Drysdale Woodcock, for respondent.

The judgment of their lordships (Lords Macnaghten, Davey, Lindley, and Sir Arthur Wilson) was delivered by

Lord LINDLEY.—The question raised by this appeal is whether a limited company is responsible for a libel published by one of its officers. The action has been tried three times. The plaintiff obtained a verdict and judgment every time, with damages which have been every time increased. Counsel for the company feel that it would be useless to send the case back for another trial, and they therefore ask that the last verdict and judgment should be set aside and judgment entered for the company. The facts are shortly as follows: The appellants are an assurance company incorporated with limited liability and carrying on business in New South Wales. From January, 1900, until June, 1900, the respondent Brown (the plaintiff in the action) was in the service of the company as an insurance agent at Tamworth. Brown was introduced to the company by Fitzpatrick, who was employed by the company as a superintendent of agencies under the terms of an agreement dated the 12th of June, 1899. His duties will be referred to presently. Shortly after leaving the employment of the company—namely, in the month of July, Brown entered the service of a rival company called the Standard Life Association, and while in the service of such company Brown visited divers of the policy-holders in the appellant company, and endeavoured to induce such policy-holders to leave the appellant company and to insure in the Standard Life Association, and for the purpose of bringing about such a result made statements derogatory to the appellant company. Fitzpatrick learned that such statements had been and were being made, and he published the libel complained of. It was a circular letter sent to several persons insured in the appellant company in answer to inquiries made by them. It was plainly defamatory. Some statements contained in it were not true, and Fitzpatrick knew they were not true. There was evidence of express malice on the part of Fitzpatrick. There is no note of the learned judge's summing up, but the jury found a verdict for the plaintiff, gave him £650 damages, and found that "Fitzpatrick was acting in publishing the libel within the scope of his employment and in the course of his employment." Judgment was accordingly entered for the plaintiff for this sum and costs; and the Supreme Court refused to set aside the verdict and enter judgment for the defendants and refused to grant a new trial. Hence the present appeal.

Counsel for the appellants contended, first, that the verdict was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and, secondly, that even if he did, yet the malice with which he wrote it cannot be imputed to the company. In support of this proposition reliance was placed on the well-known judgment of the late Lord Bramwell in *Abrath* v. *North-Eastern Railway Co.*, 32 W. R. 50, 11 A. C. 247, see p. 250.

It will be convenient to dispose of the second question first. There is no doubt that Lord Bramwell held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth in *Addie* v. *Western Bank of Scotland*, L. R. 1 H. L. Sc. 145, 15 W. R. H. L. Dig. 14, had expressed a similar opinion as to the liability of corporations for frauds. But these opinions have not prevailed, and their lordships are not prepared to give effect to them. If it is once granted that corporations are for civil purposes to be regarded as persons, *i.e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency, and of master and servant, are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their lordships to be contrary to sound legal

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

principles. To talk about imputing malice to corporations appears to their lordships to introduce metaphysical subtleties which are needless and fallacious. Their lordships concur with the view of the Acting Chief Justice in this case, that if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and not being privileged the letter must be treated as any other libel written and published by an officer of the company.

There remains, however, the important question whether there was evidence on which the jury could properly find that the publication of the letter was within the scope of Fitzpatrick's authority or, what is the same thing, within the scope of his employment. He was engaged by a written agreement; he was a superintendent; he was to act under instructions given to him by properly authorized officers and in accordance with the rules and regulations of the company. He was to devote his whole time to furthering the company's business. He was to receive and pay money, keep proper accounts, and to supervise various agencies under him. He was to be paid a salary of £5 a week and a commission on policies procured by him. The written agreement did not state more precisely what his duties were. Witnesses were called to throw further light upon the subject. Mr. Eedy, the general secretary of the company, said that if policy-holders wanted to know why the company did not prosecute Brown for his statements about the company, Fitzpatrick should have communicated the matter to the head office before taking action. "It would have been his duty." Another witness said his duty was to appoint and look after agents, and "to stand as an intermediate between the assured and the office. His authority is to secure business and save business, and to visit policy-holders whose policies have lapsed or are likely to lapse. In the district itself there is no one above him." It is clear that the scope of Fitzpatrick's authority and employment was wide, and by no means clearly defined. In considering the scope of his authority and employment their lordships agree with the Acting Chief Justice in thinking that the jury were entitled to act on their own knowledge of Colonial business and habits. They were entitled to consider the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision and what would naturally be done in the colony by a person in his position. He had no actual authority express or implied to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said: "Although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant." This doctrine has been approved and acted upon by this Board in *Mackay* v. *Colonial Bank of New Brunswick*, 22 W. R. 473, L. R. 5 P. C. 394; *Swire* v. *Francis*, L. R. 3 A. C. 106, and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint Stock Bank*, 15 W. R. 877, L. R. 2 Ex. 259, which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, L. R. 5 A. C., at p. 326, and has been followed in numerous other cases.

Such being the evidence, their lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write to policy-holders in order to counteract the mischief which Brown was doing to the business of the company; and although Fitzpatrick went too far and made charges against Brown which he knew were not true, their lordships are of opinion that the company are legally responsible for what he wrote.

As regards the verdict being against the weight of evidence, it must be borne in mind that Simpson, J., who tried the last action, was satisfied with the verdict, and he reports that the judges who tried the two previous actions were also satisfied with the verdicts given in them. Their lordships see no reason for thinking the verdict wrong on the evidence adduced.

Their lordships will therefore humbly advise his Majesty to dismiss the appeal, and the appellant company must pay the costs.

Solicitors for the appellant, *C. Russell & Co.*

Solicitors for the respondent, *J. H. Galbraith.*

Lunacy.

Appeal.
Vaughan Williams, Romer, and Cozens-Hardy, L.JJ. } Oct. 31; Nov. 7.

In re E. V. W., A PERSON OF UNSOUND MIND SO FOUND BY INQUISITION. (*a*.)

Lunacy — Illegitimacy — Disposition of property after death—Deed of trust executed by lunatic after inquisition—Application to test validity or perpetuate testimony—Rights and duties of the Crown—Conflict of control—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 120.

The court cannot recognize, or regard as otherwise than void, a deed executed by a lunatic, after inquisition, disposing of his property after death; and therefore will not, at the lunatic's instance, order a trial for testing the validity of such deed, or for perpetuating testimony of capacity to execute it.

Ex parte Sir Benjamin Wright, 1 *Vern.* 155, *discussed.*

Appeal from the order of a Master in Lunacy.

The applicant was an unmarried lady, fifty-six years of age, who had been found of unsound mind by inquisition on the 8th of April, 1869, and had been in an asylum till some two years ago, since which she had lived in various houses hired for her, and had been kept under proper supervision.

She suffered still from occasional fits of violence, and was subject to strong delusions, but when free from these was clear-headed and capable of forming a rational opinion.

She was possessed of, or entitled in reversion to, sums aggregating about £80,000 invested in New Consols, which were in court, and as she was of illegitimate birth and her interest in the property was absolute, it was desirable, as she was well aware, that some disposition should be made to prevent the property passing to the Crown at her death, and to secure it to certain persons who were relations of one or other of her parents, and who were in some degree dependent upon her, she being in the habit of making them certain allowances out of her income with the sanction of the court.

(*a*) Reported by R. HILL, Esq., Barrister-at-Law.

With this view she made application through the committee of her estate to the master, asking that she might be at liberty to execute a will and deed-poll, by which latter she desired to declare herself trustee of her property, as to the income, for herself for life, and as to the capital, for the persons above-mentioned in various shares, certain charitable gifts being also included, and asking that, on such deed being executed, she might be at liberty to bring an action by her committee as her next friend, against the Attorney-General, for the purpose of deciding as to the validity of the instrument. The master, after several hearings, came to the conclusion that she had no power to execute such a deed, and he made no order except as to costs.

In the meantime, in the absence of any prohibition by the master, the applicant had executed the will and deed-poll, and she now gave notice of appeal, asking that the order might be discharged and that she might be at liberty to bring an action in the Chancery Division, by the committee of her estate as her next friend, against one or more of the other beneficiaries under the deed, for a declaration that the deed was valid, or that such other directions might be given as might be proper for the institution of proceedings for establishing the validity of the deed, or, alternatively, that such directions might be given as might be proper for the institution of proceedings to set it aside.

The appeal was by arrangement adjourned into court without being heard by the Lord Justice in chambers.

Upjohn, K.C., and *MacSwinney*, for the applicant.—The object of the application is to have the question of validity set at rest in the applicant's lifetime, which will be a great relief to her mind. If she be refused and left to make her dispositions by will, their validity can only be determined after her death, when perhaps all those who could have testified as to her capacity at the time of execution may be dead too. The desired object might be attained by allowing her to bring the proposed action through her committee, and at the expense of her estate, or by intimating that if those interested under the deed should undertake litigation, the court would accede to it, and allow the proceedings to be carried on at the expense of the estate, and with the approval of the master, so that no improper costs might be incurred. The action might be brought to try the direct issue of capacity as in *Sir Benjamin Wright's case*, 1 Vern. 155, or it might be merely one for perpetuation of testimony. The latter is not mentioned in the notice of appeal, but we ask that the notice be read as if such an action were expressly referred to therein. This deed is like a will made in a lucid interval, and which would be admitted to probate. The language of Sir William Grant in *Hall* v. *Warren*, 9 Ves. 605, 610, shows that an absolute conveyance by deed in a lucid interval is on the same footing as a will. [VAUGHAN WILLIAMS, L.J.—That was not a case of a lunatic so found by inquisition. ROMER, L.J.—I was thinking of a case we have all heard of, where a lady was in the habit of recklessly getting rid of her property, and was afterwards found lunatic by inquisition. Do you say that finding made no difference? Is not a lunatic's power of dealing with his property taken away by the inquisition?] The effect of the finding is to shift the burden of proof, which previously was on those impugning the validity of the lunatic's act, to those who assert its validity. [COZENS-HARDY, L.J.—Can it be that there are two persons who can dispose of the same property—the lunatic and the committee?] There is nothing in the deed to withdraw the property from the control of the committee. He can at any time exercise, as to part or the whole, by order of the court, the power of revocation which the deed contains. The instrument has been expressly framed so as to pass nothing before the lunatic's death. The principle laid down in *Beverley's case*, 4 Rep. 123, 127*b*, relates to alienations during the life of the lunatic. There is nothing in the Lunacy Act, 1890, to vest a lunatic's property absolutely in his committee, as the Bankruptcy Act vests a bankrupt's property in his trustee. The committee's powers are purely administrative. It is difficult to see on what ground the capacity to execute a deed can be denied, when there is capacity to make a will. This difficulty occurred to Lord Cranworth in *Elliot* v. *Ince*, 5 W. R. 465, 482, 7 De G. M. & G. 475, 484. The object in view is to ensure the peace of mind of this lady by bringing the matter to a conclusion in her lifetime. In the words of Cockburn, L.C.J., in *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, 566, 18 W. R. Dig. 101, it cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged.

They also cited *In re Tayleur*, 19 W. R. 462, L. R. 6 Ch. 416; *In re Stoer*, 32 W. R. 1005, 9 P. D. 120.

The case stood over for a week, that the Court might have an opportunity of looking at the record in *Sir Benjamin Wright's case*.

Nov. 7. — VAUGHAN WILLIAMS, L.J., read extracts from the record in the above-mentioned case, which had been furnished from the Record Office, and the particulars of which will be found in his lordship's judgment. They showed that Sir Benjamin had been found a lunatic with lucid intervals in 1681, that he executed a settlement on the 29th of March, 1683, while the inquisition was still in force, and that the Lord Keeper, on his application, afterwards directed that an issue should be tried, but whether as to his sanity generally or as to his capacity to execute the settlement on the 29th of March was not clear.

Sir R. Finlay, A.G., and *R. J. Parker*, for the Crown.—We submit that the issue to be tried in *Sir Benjamin Wright's case* was as to his sanity, and not as to the validity of the deed which he had already executed—a fact which was not mentioned to the court. It is quite possible to reconcile that case with sound principle in this way. The Crown's rights in lunacy depend on the Crown's prerogative, which is asserted by the inquisition, and so becomes matter of record. In any proceedings founded on a bond or contract of a lunatic so found—*e.g.*, a fine levied—the Attorney-General would intervene and put a stop to the action. What the Lord Keeper did was done for the purpose of superseding the inquisition. The lunatic was to plead to the inquisition that he had recovered, and the Attorney-General, instead of demurring to the plea, was to join issue. The further direction which is mentioned in Minute A on the record, but of which no entry can be found, was, we submit, intended to be (supposing Sir Benjamin should be found to have recovered) a direction that a writ of *supersedeas* should issue, and so the inquisition would be vacated, just as it would have been after petition to the Crown in the usual way. So long as an inquisition stands it is inconsistent that any document should be executed by the lunatic transferring his property, because this is vested in the committee. The Statute of Prerogatives (17 Ed. 2, stat. 1, cc. 9, 10 (Ruffhead)) shows what is the position of the Crown with regard to the property of an idiot and a *non compos* respectively. [VAUGHAN WILLIAMS, L.J.,

referred to Viner's Abridgment, vol. 15, p. 135 (2nd ed.), D. 2, and asked if there was any case raising the question of the validity of a lunatic's deed executed after the inquisition.] The only possible case is this of Sir Benjamin Wright. *Mansfield's case*, 12 Rep. 123, shows that a fine levied by an idiot before inquisition cannot be avoided because it is matter of record; but after inquisition, we submit, any conveyance, however solemn, is absolutely void. It is laid down in *Beverley's case*, 4 Rep. 123, 126*b*, 127*b*, that after inquisition the acts of an idiot are absolutely void, and that those of a *non compos* are in exactly the same position. The more one looks at the consequences of the deed now in question before your lordships, the more inconsistent they appear with the control of her property vested in the Crown. The lady is to be made trustee, but she would be an unfit trustee, because a lunatic, and the other beneficiaries could apply for the appointment of a new trustee. They would also have the right to require that the trust fund should not be improperly invested. Again, the lady might alter her mind and desire to make new dispositions; she might revoke the deed, execute a fresh one, and come again to the court for leave to test its validity. Moreover, any action brought as she suggests must be collusive—for all the parties would be in the same interest—or unnecessary, if brought to set aside the deed, for the committee can revoke it at any time. Her object will be best attained by revoking it and disposing of her property by will. This she can re-execute from time to time as witnesses to her capacity die off, and so she can herself practically ensure perpetuation of testimony.

MacSwinney in reply.—The suggestion that the lady might dispose of her property by a will to be re-executed *de anno in annum* as witnesses to her capacity die off is a most unpractical one. As to the evidence of the Lord Chancellor's visitors, it was held in *Roe* v. *Nix*, [1893] P. 55, 41 W. R. Dig. 200, that production of their reports cannot be compelled by subpœna, they being confidential. The propositions in *Beverley's case* relied on by counsel for the Crown are merely *obiter*. We rely on *Elliot* v. *Ince*, where an issue was directed to try the validity of instruments executed by a lunatic; the only difference between that case and this being that there the execution was before the inquisition. [COZENS-HARDY, L.J.—Is not that a vital distinction?] Lord Cranworth in that case seems to have considered that a deed and will executed during a lucid interval were on the same footing. A will so executed is valid subject only to proof of the lucid interval by the parties interested, and it makes no difference whether the execution is before or after the inquisition. As to *Sir Benjamin Wright's case*, it is important to notice who were the parties, and also who was not a party, to the litigation in the Common Pleas consequent on the Lord Keeper's direction. The parties to the fine were the trustees of the settlement which the lunatic had executed, the lunatic himself and his wife and son, beneficiaries under the settlement, but the Attorney-General was a party neither to the fine, which was levied in Easter term 1683, nor to the recovery, which was suffered in the following term, and there is no trace of any plea by him nor of any vacation of the inquisition. As to the conflict of control which it is alleged would result from Miss W.'s deed, I say that the powers of the Crown delegated to the committee are analogous to powers of sale conferred on trustees of a settlement, which put an end to the estate when executed, no doubt, but not until then. So in the present case, until the committee exercises his powers under section 120, there is something left in the lunatic, and of this she can declare a valid trust.

VAUGHAN WILLIAMS, L.J.—This is an appeal from what was originally the order of the master made on the 25th of July in this year. There was an appeal from the master to Mathew, L.J., who was the Lord Justice acting in lunacy, and he referred the matter to this court. Now, the application to the master was an application that E. V. W., a lunatic so found, might be at liberty to commence an action, by her committee as her next friend, in the Chancery Division of the High Court, against one or more of the other beneficiaries under the deed-poll exhibited to the committee's affidavit of the 12th of July for a declaration that the deed-poll is valid, or that such other directions may be given as may be proper for the institution of proceedings for establishing the validity of the said deed-poll; or, alternatively, that such directions may be given as may be proper for the institution of proceedings to have the said deed set aside.

Now, the master refused that application, and what we have to consider in this case is whether he was right in so doing. This lady was found a lunatic on an inquisition as long ago as 1869. We were told that she was not born in wedlock, and is therefore *nullius filia* and can have no kin. We were also told in the course of Mr. Upjohn's opening that there have been various examinations of this lady, both by the Lord Chancellor's visitors and by other doctors qualified to form an opinion as to her mental condition, and we were told that the view of these gentlemen was that generally this lady, apart from the unfortunate delusions which resulted, and I must take it properly resulted, in her being found a lunatic is of such mental capacity that she could generally be expected to deal with her property in a reasonable and sensible manner. We were told that the object of the deed was to make a reasonable provision for the children and other relations of her mother and of the gentleman who was her father in fact—a provision suitable for the condition in life of these people. We were also told that, there being a very large sum of money to which this lady was entitled, even after making this provision for these people who are not her relations in law, whatever they may be in blood, there would be a considerable surplus; and I rather gathered from the opening that this deed disposed of the surplus by giving it to hospitals or other charitable institutions.

Under these circumstances, the state of mind of this lady being that which we have been informed, and the provisions of the deed being such as I have mentioned, we are asked to say that the master was wrong in refusing this application, which was an application for the purpose, to put it shortly, of testing the validity of this deed thus executed by the lady. The deed, I ought to have mentioned, is one that gives nothing away during her lifetime, but only disposes of her estate after giving her the benefit of it for the whole of her life. Now we have to ask ourselves whether we ought to recognize that deed in any way—that is to say, to recognize it sufficiently to justify us in making some order by which the validity of this deed and the present mental capacity of this lady can be immediately determined. The conclusion that we have come to is that we ought not to do so. We think we ought to treat this deed as being absolutely void and of no effect whatsoever. It was suggested in the course of the argument of Mr. Upjohn that even although we might not think we had jurisdiction to make such an order as that which is suggested in the notice of appeal, yet we might make some order for the perpetuation of testimony. I may say, once for all, that we are of opinion that if we take the view which we do take, that this deed is absolutely void, it

follows (and I need not go into the authorities upon it) that we ought not to make any order for perpetuation of testimony.

In order to judge whether we ought to recognize this deed in this court at all, we have had to consider what is the position of the Crown with reference to lunatics so found. Of course the Lunacy Act of 1890 makes a quantity of provisions with regard to persons who are not lunatics so found, but who are incapable of managing themselves and their property. This case is one of a lunatic so found, and I only propose to deal with such a case; but it must not be supposed that by so doing I mean to limit my reasoning entirely to such a case. It may very well be that when one comes to look at the provisions of the Act of 1890 in the case of a person not a lunatic so found, but who has been made subject to an order under this Act, the same reasoning which brings the court to the conclusion that it has done, with reference to a lunatic so found, might bring one to the same conclusion with reference to a person who is subject to an order under the Act, who is not a lunatic so found. But I say nothing about that one way or the other. I may as well at once read the terms of one portion of section 120, which deals with powers exercisable by a committee under the order of the judge. It is in these terms: "The judge may by order authorize and direct the committee of the estate of a lunatic to do all or any of the following things—(1) Sell any property belonging to the lunatic." Then when one looks at section 341, which is the definition section, one finds that property "includes real and personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest and any undivided share therein." I thought it convenient to refer to those provisions of the Act of 1890 before I said anything about the relation of the Crown to lunatics. Generally it may be taken that the Crown is the custodian of the property of a lunatic so found. I think it may be said in general terms that property only passes out of the control of the lunatic, and comes under the control of the Crown for the purpose of the lunatic having the protection which a lunatic is entitled to from the Crown. Therefore, when one has to consider the question as to whether this deed is void, one cannot dispose of it by saying that that which was the property of the lunatic has ceased to be the property of the lunatic, and has become the property of the Crown. But during the whole period of history of which we have reports, the Crown has always had the prerogative, although it was not always defined as it was later by statute, of dealing with and controlling the property of a lunatic. It is quite sufficient, it seems to me, to dispose of the case that we have now to dispose of, to say that the Crown has such control, as distinguished from property, of the property real and personal of the lunatic; because the moment one sees that the committee, as representing the Crown, has the rights which I have just referred to in reading a portion of the 120th section of the Act of 1890, it is perfectly plain that those rights cannot be effectively exercised by the Crown in the interest and for the benefit of the lunatic, if someone else is to have the control during the same period of time of this same property. In such a case there would be a conflict of control which would be entirely inconsistent with the exercise by the committee of the Crown's rights which have been delegated to him.

It is said against this that it is plain that, if a lunatic is of sufficient mental capacity to execute a will, he can execute a will, and that that will can be proved if the court before whom the application for probate is made is of opinion that the lunatic at the time of the making of the will was of testamentary capacity and understood what he or she was doing. As to that there is no doubt.

Then it is said, if the lunatic has this capacity to make a will which can be proved after her death, why should she not also have the power to execute a deed which is only, on the face of it, to take effect upon her death, and only creates reversionary interests arising after her death. It does seem a little inconsistent, at first sight, that the law should recognize the capacity of the lunatic to make a will and refuse to recognize the capacity of the lunatic to execute a deed which is intended only to take effect after the death of the lunatic. But the answer to this is, that the beneficiaries under the will have no interest, and no *locus standi* whatsoever, until the death of the testator or testatrix as the case may be. The will is ambulatory, and may be revoked by the maker of it at any time before death, and the result of that is that the execution of a will gives no immediate interest whatsoever to the beneficiaries. It gives neither interest in possession nor interest in reversion; it is a mere ambulatory document which is of no effect whatsoever until the death of the maker of it, and the consequence of that is that the making of such a will does not give rise to any conflict of control whatsoever. The beneficiaries under the will cannot, when orders are being made in respect of the lunatic's property, or in respect of the property the subject of an alleged deed like the present, come forward and claim to interfere in any way, whereas those claiming under a deed could insist upon a *locus standi* to be heard, and successfully insist upon it, and immediately, therefore, the conflict of jurisdiction would arise. It is said that this deed is in such a form that that could not arise. I do not think we ought to look at the deed, but it is suggested hypothetically that it might be in such a form as, in substance, to make any rights given under it subject to the rights of the Crown, but even that would not take away the *locus standi* of those claiming under the deed to be so heard. They would have a voice, for instance, in the appointment of a trustee if the grantor made herself the trustee under the terms of the deed. Under those circumstances, it seems to me that the argument which is based upon the state of the law being such that the lunatic's will would be given effect to if it turns out that she executed it during a lucid interval, she being of sufficient testamentary capacity, does not carry us to the conclusion that because she has such a testamentary power she ought also to have power to deal with property by a deed *inter vivos*.

I really do not think that it is necessary for me to say much more with regard to the present motion than that we ought not to recognize this deed in any way, and the court ought to treat it as entirely void on the plain and simple ground that the execution of that deed is inconsistent with the control which the Crown has the right and duty of exercising over the property of a lunatic, and that that itself is sufficient reason for the conclusion to which the court has come.

But then it is said that, although it is inconsistent with the powers and duties which the Crown has always exercised in reference to lunatics, powers and duties which are recognized by the Legislature by the statute of 1890, there is authority to show that, notwithstanding the fact that the Crown has such control, custody, and power, notwithstanding the fact that the Crown has the right to exercise, and has constantly exercised, the power of selling and disposing of the property of a lunatic, both real and personal, for the benefit of the lunatic, yet the court ought to recognize such a deed, however inconsistent with such powers of the Crown, because it is said that the

authorities bind us to do so. I do not propose to go through the authorities at any length, because it really would only be wasting time. I may say generally of *Beverley's case* that, having regard to the passage which Mr. Parker read to us this morning with regard to lunatics as distinguished from idiots, it does not favour the argument of those who presented this motion, but rather favours the proposition of the Attorney-General that such a deed is absolutely void. But it is said that although *Beverley's case* is against the propositions which have been urged in support of the motion, *Sir Benjamin Wright's case* is an authority for the proposition that if a lunatic so found does, between the date of the inquisition and the death—that is to say, during the continuance of life, execute a deed, the court ought, and is bound, to make such an order as will result in the issue of the sanity of the lunatic, or the capacity of the lunatic at the moment of the execution of the document in question, being tried and disposed of and put on record in some shape or other. One would be glad to arrive at any conclusion which might mitigate the sorrows of the position of a lunatic so found. No one can doubt but that many a lunatic properly so found chafes very much under the restrictions which prevent him from dealing with property, and doing other acts, which his mere mental capacity would probably suffice to enable him to do, and to do reasonably; but if it is necessary for the protection of lunatics generally that they should be debarred from the exercise of such powers, one must, however regretfully, refuse to accord them to lunatics who are under the protection of the Crown. Still, if one could have found a means of doing it consistently with what is essential for the protection of lunatics, the court would have been glad to do so. We have not found any such means; and, when one examines the case of Sir Benjamin Wright, I do not think that it would justify us in saying that it is an authority for the proposition that the court ought to decide upon the validity of a deed *inter vivos* executed by a lunatic so found, and while the inquisition still stands unvacated or superseded.

The report is a very short one. It states: "A motion was made that a man, who was found to be a lunatic, being now by his confinement become of sound mind, might be inspected, and might make a settlement of his estate. But the Lord Keeper refused to make any order in it; but directed them, that if he made any settlement of his estate, the same should be done before the justices of the Common Pleas by fine, that so they might examine him and inspect him. And directed, that for as much as now he was found a lunatic on record, they should reply to it that he was now restored to his understanding; that so issue might be taken upon it and tried in the Common Pleas."

We have had the opportunity of examining the original record in the Record Office with regard to this case. The request was made by the court to the Record Office that they would supply us with copies of all documents which might throw any light upon *Sir Benjamin Wright's case*, so that we might be informed at once of what really was the meaning of the order in that case. I want to take this opportunity of saying how extremely carefully and well and quickly those in the Record Office have made the necessary search and provided us with every document throwing any light upon the matter. We have got these documents now before us, and with them in our hands we can follow pretty well (I do not say with absolute certainty) what was done in the case. It is plain upon the report in Vernon that it is consistent with either of two possibilities. An issue was to be tried of some sort. What was the issue? It may have been an issue as to whether the soundness of mind of Sir Benjamin Wright had been restored, so that the inquisition ought to be vacated or superseded, or it may have been an issue, as those who support this motion say that it was, to try the question of the capacity of Sir Benjamin Wright to execute this particular settlement. It may have been the intention to direct an issue to try that question, which was consistent with the continuance of the inquisition finding Sir Benjamin Wright a lunatic. When one looks at these documents one finds that the commission seems to have gone in 1681. The inquisition finding Sir Benjamin Wright a lunatic is dated the 3rd of October in that year, and runs thus: "Inquisition finding him a lunatic for one month last past with lucid intervals." Now, it is possible that, as far as the report in Vernon is concerned, the object of the issue was to try whether the deed was executed in such a lucid interval. Then on the 29th of March, 1683, the settlement seems to have been executed by the lunatic, Sir Benjamin Wright, and it conveyed the Manor of Wokinden to Nathan Wright, who was the son of the lunatic, and who covenanted to convey the same to trustees upon certain trusts. I do not know that it is really material to mention the trusts, but that being so, that deed was acknowledged on the 2nd of April, 1683. On the 25th of April the deed was enrolled. On the 16th of April, in Hilary term, there were two minutes made by Mr. Registrar Devenish, which minutes are marked for our convenience "A" and "B." I do not know that there is very much difference, if any, in the effect of them. "A" runs thus: "Mr. North would have a reinspecon of Sr Benn. Hee is now better and there is a settlement to bee made on the sonn. Mr. Attorney-General: The King doth only take care and is not otherwyse concerned and there must bee a method of trying it." "It" may mean either the question of the lucid interval, to put it shortly, or the question of the general sanity of Sir Benjamin. Then it goes on—"By the Court: Let there be a plea put in to the inquisition and Mr. Attorney-Generall to join yssue in it and let it bee tryed as soon as may bee and then will give further direction." It does not appear that any record of the further direction after the trial of the issue can be found anywhere in the Record Office. Then minute "B," which is of the same date and is obviously the same order, runs thus: "Mr. North: This comes upon the point of lunacy, wee pray that it may be put in some way that may plead to the *inquisicio* Mr. Attorney Cur plead to the *inquisicio* lett Mr. Attorney joyne issue and if any settlement to be made the fine and recovery shall be in open cort in the Cort of Common Pleas." I rather gather from all this that the issue was to be tried in the Common Pleas. There is nothing to show that the issue was an issue upon what I call for shortness the lucid interval point. The objection which occurred to my own mind to holding that the inquisition as to the state of mind generally of the lunatic, Sir Benjamin Wright, could not be tried in the Court of Common Pleas in these proceedings of fine and recovery, was met by Mr. Parker by saying that you would, as a result of those proceedings, have a finding of record, and it might be that that finding would go to the general condition of the mind of the lunatic at that time, and that if the Attorney-General was present, and that state of mind was put on record, it would be sufficient record to enable the Crown and its officers to deal with the Crown's office, or office and title, whatever it may be called, and if the finding in the Common Pleas of such a record was favourable to the sanity of Sir Benjamin Wright, then the Crown could thereupon order the inquisition to be vacated or superseded. I am not

prepared to say that that is not sound. It is not, of course, the same thing as the commission which originally issued, upon which the finding in lunacy was based. There has been, in such a case, no second inquisition with a finding thereon justifying a superseding or vacation. But still there would, or might, be in the proceedings in the Common Pleas, a finding of record that might be sufficient to determine the state of mind of the lunatic to enable the original inquisition to be vacated or superseded at the instance of the Crown. It is sufficient that I should say about this case that now we have got all the particulars we have been able to get of it, it is not possible to say that it is a clear authority for the proposition which is put forward by those who are making this motion, that if a deed is executed by a lunatic so found the court ought to recognize that deed sufficiently for the purpose of determining and putting on record either the decision of the validity of that deed or a finding as to the capacity of the lunatic executing it at the date of the deed. Under those circumstances I can only say that we are bound in this state of authority to refuse to recognize this deed, even for the purpose of testing its validity, and we are bound to treat it as void, and to make no order for any trial to test its validity or for the perpetuation of testimony in view of any future action. Therefore the appeal will be dismissed.

ROMER, L.J.—I also think that this application ought not to be acceded to. It is admitted on behalf of the appellant that the court cannot be asked to approve the provisions of the so-called deed which is in question before us, nor can the court be asked to sanction the committee on behalf of the lunatic executing that deed or a similar deed. But it is said on behalf of the applicant that the court ought to sanction or recognize the document to the extent of authorizing some proceedings on the basis of it, by which either evidence could be preserved or an issue found in favour of the lunatic having, at the date of the document, either testamentary power or some power of dealing with her estate to a certain extent. I cannot see my way to accede to that suggestion. The lady is a lunatic so found, with a committee appointed. An application of this kind is a mere experiment, and I think, had there been any real ground for it, we should have had some authority to justify such an application.

To my mind there are two fatal objections to this appeal. In the first place, having regard to the rights of the Crown and the provisions of section 120 of the Lunacy Act, 1890, it is clear to me that this so-called deed, purporting to bind the lady's property as from its date, and pending the lunacy, is wholly inoperative and void, and ought not to be recognized by us in any way. In the second place, I cannot see how any practicable and proper proceedings could be sanctioned by us which would have the effect desired by the applicant. I can see how certain collusive proceedings could be taken, but those certainly the court could not sanction. On those grounds I think the application fails.

I will only add one word with regard to the case of Sir Benjamin Wright. That case is not satisfactorily reported, nor easy to follow, but at any rate it is to my mind no authority which we can recognize as justifying this application. I cannot help thinking that the case only shows that the court at that date, 1683, adopted the course it did in order to allow an issue to be in effect tried whether the lunatic had wholly ceased to be so, and ought no longer to be treated as one; in other words, as a method of obtaining a *supersedeas*. Fine and recovery being hypothetical proceedings, and of record, it appears to have been considered that a finding of sanity in those proceedings might have had the desired effect of superseding the finding of the inquisition, which is also of record, and could have, of course, only been effected by matters of equal force. In the present case it is open to the lunatic to take the recognized proceedings by way of *supersedeas* if she think fit to do so. In that case, if she took these proceedings and succeeded, she would then of course be able to deal with her property in any way she thought fit. But she has not taken those proceedings, nor indeed do I gather that it is considered that she could do so successfully. At any rate she has not taken them, and I cannot think that the present application, the lunacy remaining, as it does, in full force, ought to be in any way or on any ground acceded to, and it must accordingly fail.

COZENS-HARDY, L.J.—I am of the same opinion. We are bound to treat the deed executed by this lady as absolutely void and of no effect. I can see no answer to the argument which Mr. Parker presented to us, derived from *Beverley's case*, which seems to me to be a clear authority. Lord Coke, after dealing with the case of an idiot from birth, and pointing out that his alienation is absolutely void both of lands and of goods and chattels, proceeds to say there is no difference in the case of a lunatic after office found. He says: "And therefore, after the office found thereof, the alienation, gift, &c., of him who is *non compos mentis* are in equal case with the alienation or gift of an idiot." Then he goes on to say: "So that it appears that in judgment of law *fatuus et idiota* include as well *non compos mentis*, as *idiota a nativitate*, and therefore they are in the same case as to the alienation of their lands and tenements, goods and chattels."

Now is there any authority to the contrary of that? *Sir Benjamin Wright's case*, to which we have devoted a good deal of attention, seems to me to be only a suggestion by the Lord Keeper as to a mode of deciding the issue whether Sir Benjamin Wright was or was not of sound mind; whether, in short, in some subsequent proceedings a *supersedeas* could be granted. Our attention has been called to various authorities in which the courts have directed an issue whether a deed executed by a person of unsound mind was or was not valid. But when the cases are examined it will be found that in every single case the deed in question was one executed before inquisition found and not after inquisition found. That being so, there was not that conflict of control which in point of principle enables us to decide this case. It cannot be right that the Crown, or the committee representing the Crown, should have the control and management of this estate, and, at the same time, that the lunatic should have power to dispose of her estate as she thinks fit. I think this deed ought to be treated as absolutely null and void.

Appeal dismissed; costs to come out of the estate, including costs of preparing the deed and of an application for leave to stamp it, though the stamping had not been proceeded with.

Solicitors, *Ridsdale & Son*, for *J. H. Simpson*, Dewsbury; *Solicitors to the Treasury*.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Dec. 3.

THE KING v. JUSTICES OF KENT. (a.)

Highway—Diversion—Notices on highway—Time for affixing—Resolution of district council—Refusal of two justices to certify—Jurisdiction to apply to two other justices—Certificate—Consent of landowner—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 84, 85.

Where a highway is proposed to be diverted, the notice required by section 85 *of the Highway Act,* 1835, *to be affixed at each end of the highway need not be affixed at such a date as to leave a period of four weeks before the issue by the justices of their certificate.*

Where, pursuant to a resolution of a district council, the surveyor has applied to two justices to view a highway which is proposed to be diverted, and the justices refuse to certify, the surveyor may, without a fresh resolution of the district council, apply to two other justices to view, who, if they approve of the proposed diversion, may certify. The consent of the owner of the land through which the proposed new highway lies need not appear upon the face of the certificate.

Judgment of the Divisional Court ([1904] 2 *K. B.* 349), 52 W. R. Dig. 63 *reversed.*

Appeal by the Tonbridge Urban District Council from the judgment of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Kennedy, JJ., reported [1904] 2 K. B. 349) making absolute a rule for a *certiorari* to bring up and quash a certificate of two justices and an order of quarter sessions for the diversion of a highway in the parish of Tonbridge.

By a notice in writing dated the 25th of April, 1903, and addressed to the Tonbridge Urban District Council, certain owners of land in the district stated that they were desirous that a footpath across their land leading from Douglas-road into Brook-street should be in part diverted and a more commodious highway across their land substituted therefor, and they required the urban district council to summon a meeting to consider their wish and proposal.

The council on the 1st of July resolved that the owners' proposal be agreed to, and directed their surveyor to make application to two justices to view.

On the 3rd of July the surveyor applied to two justices, who had a view and declined to make any order. Without any fresh resolution of the council the surveyor on the 9th of November applied to two other justices, who had a view on the 11th of November, and directed the surveyor to affix a notice in the form or to the effect of schedule (No. 19) of the Highway Act, 1835, at the place and by the side of each end of the highway from whence the same was proposed to be diverted, and to insert the same notice in a newspaper for four successive weeks from the 11th of November, and to affix a like notice on the church doors on four successive Sundays next after the same date. The notice, which was dated the 11th of November, was affixed at each end of the highway on the 14th of November, and it stated that the justices' certificate would be lodged with the clerk of the peace on the 7th of December, and that an application would be made on the 7th of January to the quarter sessions for an order for diversion. The notice was inserted in the *Tonbridge Free Press*, a newspaper published once a week in the district, on the 14th, 21st, and 28th of November, and the 5th of December, and was affixed to the church doors on Sundays, the 15th, 22nd, and 29th of November, and the 6th of December.

On the 7th of December, twenty-three days after the notice was first published, the two justices who had viewed on the 11th of November gave a certificate, which was on the same day lodged with the clerk of the peace. The certificate stated that proof had been given to them of the publication of the notices required by the statute, and that they had viewed the highway proposed to be diverted and also the proposed new highway, and that upon that view they found that the proposed new highway would be more commodious to the public "because the said old highway is a mere footpath across an open field, which is very wet and muddy in winter and very inconvenient to the liege subjects of our lord the king using and travelling along the said highway, whilst the proposed new highway will be of a uniform width of 6ft., and will be formed with a solid bottom and with a 3in. top course of tar paving. It is understood that such 6ft. pathway will eventually form part of a new 36ft. roadway to be ultimately lighted and taken over by the urban district council of Tonbridge." The consent of the owners of the land through which the proposed new highway would pass was not stated on the face of the certificate. Notice of appeal to quarter sessions against the certificate was given by the Tonbridge Rural District Council and Mr. Charles Eastwood. On the 7th of January, 1904, the quarter sessions dismissed the appeal as being out of time, and made an order that the certificate should be enrolled and that the diversion should be made and the old highway stopped up.

The rule for a *certiorari* was obtained on the grounds, *inter alia*—(*a*) that the request of the 25th of April, 1903, and the resolution of the urban district council of the 1st of July, 1903, having been acted on and the justices having viewed pursuant thereto and having refused a certificate under section 85, further proceedings on the same request and resolution were incompetent; (*b*) that section 85 was not complied with as regards notices; (*c*) that the written consent of the owners was not shown on the face of the certificate; and (*d*) that the reasons given by the justices in their certificate were insufficient and bad. The Divisional Court held that it was a condition precedent to the justices' granting a certificate for the diversion of a highway under section 85 of the Highway Act, 1835, that the notices should have been affixed at each end of the highway proposed to be diverted at a date which would leave twenty-eight days between that date and the date of the issue of the certificate. The court further held that the justices who issued the certificate had jurisdiction to do so without a fresh resolution of the urban district council, and that the written consent of the owner of the land through which the proposed new highway would pass need not appear on the face of the certificate. The court accordingly made the rule absolute to quash the certificate and the order of quarter sessions. The Tonbridge Urban District Council appealed.

Macmorran, K.C., and *R. Cunningham Glen*, for the appellants.—Section 85 of the Highway Act, 1835, does not prescribe any date for affixing the notice at each end of the proposed diversion, nor that it shall remain affixed for any length of time. The section requires the surveyor to "affix" the notice. That is done once for all. It is not an apt expression to denote the maintaining of a notice. The words "for four successive weeks" apply only to the insertion of the notice in the newspaper. The decision of the Divisional Court was therefore wrong.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

They referred to *Reg.* v. *Surrey Justices*, L. R. 5 Q. B. 466, 18 W. R. C. L. Dig. 48.

Danckwerts, K.C., and *C. F. Hohler*, for the respondents.—The words "for four successive weeks" in section 85 of the Highway Act, 1835, apply both to the affixing of the notice on the highway and to insertion of it in the newspaper. Otherwise there is no time prescribed before the issue of the certificate for affixing the notice on the highway. The object is to give those who do not read the local newspaper, and who do not see the notice on the church door, the opportunity of seeing it posted up on the highway. That is the most likely place where persons who use the highway will see it. The section means that the notice must be affixed on the highway, and must remain affixed for four successive weeks next before the issue of the certificate. The diversion of a highway is a taking away of a public right, and the section authorizing it should be construed strictly against those who seek to take away that right. The Divisional Court were therefore right upon that point. Secondly, the Divisional Court were wrong in the three other points raised. In the first place, as the two justices who were first applied to by the surveyor refused to certify, the surveyor could not apply to two other justices to view without a fresh resolution of the district council. The resolution of the council was exhausted when the first application was made. The council might have changed their minds if the matter had been brought before them again. If that were not so, the surveyor might go round to every justice in the county until he got two who would certify. The legislature cannot have intended that. In the next place, the certificate does not state that the consent in writing of the owner of the land through which the proposed highway lies has been given. Section 85 requires the consent in writing of the landowner as a condition precedent to the diversion, and the certificate must state all the preliminaries necessary to give the justices jurisdiction to certify: *Reg.* v. *Worcestershire Justices*, 3 E. & B. 477, 2 W. R. C. L. Dig. 128; *Reg.* v. *Harvey*, 23 W. R. 231, at p. 232, L. R. 10 Q. B. 46, at p. 50. Section 118 provides that the forms must be followed, and a form of consent is given in Form 18 in the schedule to the Act. A material variation from the forms is fatal: *Davison* v. *Gill*, 1 East 64. In the third place, the reasons given by the justices in their certificate were bad. The reasons why the new road is more commodious than the old one must appear "upon such view"; *Reg.* v. *Wallace*, 28 W. R. 149, 4 Q. B. D. 641. The reasons assigned in the certificate were that it was intended to make the new road of more solid foundations, and that it was likely to be taken over by the district council. These alleged benefits could not appear upon view. The commodiousness must not depend upon the mode in which the road will be made up in the future, but upon looking at the *locus in quo* whether the proposed road is shorter or more accessible or less steep, or such like, than the old road. The *certiorari*, therefore, was rightly issued.

Macmorran, K.C., in reply upon the first point.—The notice here was affixed to each end of this highway so as to cover the period during which the notice was inserted in the newspaper and was affixed on the church door. That, at any rate, is sufficient. [He was not called upon on the other points.]

COLLINS, M.R.—This is an appeal from the judgment of the Divisional Court upon a very technical point raised under section 85 of the Highway Act, 1835. That section imposes certain conditions before an order can be made for the diversion or stopping up of a highway, and the main question raised is whether a certain condition has been fulfilled so as to satisfy the section. Section 85 provides that "when it shall appear upon such view of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand, or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (No. 19) to this Act annexed, in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted and turned or stopped up, either entirely or subject as aforesaid (as the case may be), shall lie for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie on four successive Sundays next after the making such view; and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices . . . the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public." I assume that all the conditions other than the one referred to above have been fulfilled. The appellants raised certain objections upon them which the Divisional Court overruled. Those objections have been again raised here, but I am content to say that I agree with the decision of the Divisional Court upon them. The Divisional Court, however, have held that one particular condition had not been fulfilled—namely, that the notice had not been affixed at each end of the highway at the place where it was proposed to divert it, as required by the section, the Lord Chief Justice saying that the justices' certificate must be quashed because that statutory provision as to the exhibition of the notices on the road had not been complied with. The notice was in fact affixed at each end of the road, but in the notice itself a day was named, which was less than four weeks from the day on which the notice was affixed, as the day on which the justices' certificate would be given, and on the day so named the justices' certificate was given. It is contended on behalf of the appellants that unless the notice was affixed at those places four weeks before the certificate was given, and remained so affixed during those four weeks, the condition required by the statute has not been fulfilled, and the certificate is bad. That depends upon whether the statute requires that to be done. If there is any such requirement it must be found in the statute, within the four corners of the statute. There is nothing of the kind to be found there. The word is "affix." The section makes no provision for the time during which it is to remain affixed. Then follows the other requirements of the section. The surveyor is to insert the notice in one newspaper, published or circulating in the county, for four successive weeks next after the view. The Divisional Court were satisfied that that requirement was satisfied by the insertion of the notice in four issues of a newspaper which was published once a week. Then comes the further pro-

vision as to affixing the notice on the church door on four successive Sundays next after the view. That was done. The section then goes on to provide that, "the said several notices having been so published," the justices were to proceed to certify. Nothing is there said about maintaining the notice for any time at each end of the highway. The condition as to time relates to the insertion of the notice in a newspaper for four successive weeks, and the affixing of the notice on the church door on four successive Sundays. I cannot find any connection between the words "for four successive weeks" and the provision as to affixing the notice on the highway. The word "affix" is not an apt word to describe the duty of keeping up a notice when once it has been affixed. We should have to read words into the section if we were to hold that a notice on the highway was bad because it named a day for the issue of the justices' certificate which was within the period of twenty-eight days. I have no alternative in the circumstances but to differ from the decision of the Divisional Court upon this point. I do not find that it is made a condition of the issue of the certificate that the notice shall remain affixed on the highway for four weeks.

STIRLING, L.J.—I am of the same opinion, and as we are differing from the Divisional Court I desire to state my reasons in my own words. The question is whether the proper procedure necessary for the diversion of a highway has been followed in the present case. The procedure is laid down in sections 84 and 85 of the Highway Act, 1835. Shortly put, section 84 provides for a view by two justices, and section 85 deals with what is to happen after such view. If upon such view it appears to the justices that the highway may be diverted so as to make it nearer or more commodious to the public, and the landowner through whose land the proposed new highway lies consents, the justices are to give certain directions to the surveyor. Those directions are "to affix a notice in the form or to the effect of schedule (No. 19) to this Act annexed, in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be diverted . . . and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted . . . shall lie for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted . . . shall lie on four successive Sundays next after the making of such view." The question really is, at what date can the justices, after the view, resume the consideration of the matter and proceed to certify. There is a limit of time imposed by the section. The justices are to direct the surveyor (1) to affix a notice at each end of the highway; (2) to insert the notice in a newspaper for four successive weeks next after the view; and (3) to affix the notice on the church door on four successive Sundays next after the view. As to the insertion in the newspaper, it is open to the surveyor to insert it in a newspaper published once a week, and that insertion is to be for four successive weeks next after the view. The notice must also be affixed on the church door on four successive Sundays next after the view. So far as those two requirements are concerned, it does not appear that either of them involves the suspension of proceedings by the two justices for a period of twenty-eight days. The insertion of the notice in a weekly newspaper for four successive weeks and the affixing of the notice on the church door on four successive Sundays can be, and was in this case, completed within the twenty-eight days. But it is contended that the Act requires that the notice, which is to be affixed at each end of the highway, shall remain affixed there for a period of not less than four successive weeks next after the view. The question is whether the Act imposes that obligation. I am unable to see that it does. All that the Act directs is that the notice shall be affixed at a certain place on the highway, and that it shall be inserted in the newspaper for four successive weeks and affixed on the church door on four successive Sundays next after the view. It is said that the words "for four successive weeks" must be read so as to apply to the previous words as to affixing the notice on the highway. That is not a grammatical way of reading the words. One does not speak of "affixing" a notice for four successive weeks. A notice is "affixed" once for all. The Act does not say that the notice must be kept so affixed. While it is important to see that the Act is complied with in such cases, at the same time we are not justified in imposing conditions not required by the Act. All that the Act requires is that the proceedings by the two justices shall not be resumed until after the notice has been affixed on the highway, and the other requirements have been complied with within the periods specified, and it was not thought to be important that any provision should be made as to keeping the notice up on the highway. The justices, before proceeding to issue their certificate, have to be satisfied that the notice has been properly affixed on the highway, and that the notices have been properly published for the requisite periods in a newspaper and on the church door. For these reasons I am of opinion that the appeal should be allowed.

MATHEW, L.J.—I am of the same opinion. It is said that the diversion of a highway is the taking away of a public right, and that therefore the Act must be construed strictly against those who propose the diversion. But the Act contemplates the diversion of a highway as a matter of public convenience and in the interests of the public, and therefore that constitutional argument may be disregarded. In my opinion there is nothing in the Act which requires the notice, when once affixed, to be retained on the highway for four weeks. The Act only requires the notice to be affixed. We are not dealing with a case where the notice, having been once affixed, has been wilfully pulled down by those who put it up, when other considerations would arise. The two other requirements, that relating to notice in the newspaper and on the church door, can be complied with within the period of four weeks, and yet it is said that the Act requires the notice to remain affixed on the highway for four successive weeks before the certificate can be issued. In my opinion the Act does not require that.

Appeal allowed; rule for a certiorari *discharged.*

Solicitors for appellants, *Neve, Beck, & Kirby*, for *Neve & Williams*, Tonbridge.

Solicitors for the respondents, *Collyer-Bristow, Hill, Curtis, Dods, & Booth*, for *Stone, Simpson, & Mason*, Tunbridge Wells.

High Court of Justice.

Chan. Div.
Warrington, J. } Dec. 13.

In re EASTERN INVESTMENT CO. (LIMITED). (*a.*)

Company—Winding-up—Voluntary liquidation—Approaching dissolution—Stay of proceedings—Postponement of dissolution—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 89, 143.

The voluntary winding up of a company continues after the meeting has been called and the return made to the registrar under sections 142 *and* 143 *of the Companies Act,* 1862, *and during the three months appointed by the latter section, at the expiration of which the dissolution of the company takes place; and the court has during those three months, under sections* 89 *and* 138, *jurisdiction to stay the proceedings in the winding up for the purpose of keeping the company on foot and preventing the operation of section* 143, *and will in a proper case make such an order.*

Semble, *such an order as above-mentioned will prevent the dissolution of the company at the expiration of the three months.*

Motion.

This was a motion to stay the proceedings in the voluntary winding up of the above company for the purpose of preventing its approaching dissolution.

The above company was incorporated in 1895, primarily to carry on financial, mercantile, and mining operations.

The Associated Share and Investment Co. (Limited) was incorporated in 1899 for similar objects.

It was resolved to amalgamate the two companies, and in April, 1903, an agreement was entered into between them for the Eastern Investment Co. (Limited) (called in the case the "old company") to sell certain specified property to the Associated Co. in consideration of receiving a certain number of fully paid-up shares in that company. Part of the property sold consisted of interests or participations in various mining claims and other property in the Transvaal, South Africa, all of which were entered upon the local registry in trust for the persons equitably entitled thereto (including the old company) in various shares.

In May, 1903, the old company resolved to wind up voluntarily. The liquidator, in pursuance of the agreement of sale, transferred the assets of the old company to the Associated Co., which had then changed its name to the New Eastern Investment Co. (Limited). The winding up was then supposed to be complete, and on the 21st of September, 1904, the final meeting of the company was held pursuant to section 142 of the Companies Act, the liquidator made out his account, and on the 22nd of September, 1904, he made the return to the Registrar of Joint Stock Companies of the result of the meeting. The consequence was that on the 22nd of December, 1904, the three months limited in section 143 would expire, and the company would become automatically dissolved. For the purpose of completing the transfer of the participations and claims of the new company the liquidator of the old company gave directions to the parties who held them to hold them in the future on account of or in trust for the new company. It was, however, discovered that this course would not work, and that to satisfy the requirements of the revenue laws of the Transvaal it was necessary that the persons who held the mining rights on the registry should transfer them to the old company, who should in their turn transfer them to the new company. There was not, however, time to carry out these transactions before the 22nd of December, 1904, when, if the dissolution took place, the old company would no longer be in existence.

Under these circumstances a motion (which as amended was by a contributory of the old company) was made to the court to stay the proceedings in the winding-up under sections 89 and 138 of the Companies Act, 1862, and thus postpone the dissolution of the company so as to enable the necessary transfers to be carried out.

A. H. Jessel, for the applicant.—The court has power under section 89 of the Companies Act, 1862, to stay the proceedings in the winding up. This will prevent the completion of the winding up and the dissolution of the company: *In re Crookhaven Mining Co.*, 15 W. R. 28, L. R. 3 Eq. 69. Unless this is done the company will be dissolved on the 22nd of December, and the transfers to the New Eastern Investment Co. cannot be effected. In the *Scottish Fluid Beef Co. (Limited)* v. *Auld*, 25 Rettie 1056, the application was not made under section 89 to stay the proceedings, but to stay the dissolution, and this was held to be beyond the jurisdiction of the court.

WARRINGTON, J.—This is a peculiar application. It is an application which, when amended, will be by a contributory under section 138 of the Companies Act, 1862, asking the court to put in force the powers given by section 89 in a compulsory winding up. It is admitted on the authority of *The Scottish Fluid Beef Co. (Limited)* v. *Auld* that the court has no jurisdiction to stay the dissolution of the company, which takes place automatically under section 143 of the Companies Act, 1862; and that part of the application is therefore not pressed. But the applicant asks the court, in the alternative, to stay proceedings in the winding up, suggesting that if this is done the company necessarily continues, and the operation of section 143 will be prevented. There is some authority for that view in *In re Crookhaven Mining Co.* In that case the application, which was for an order in the winding up, was made before the expiration of the three months which commenced on the 4th of June, but the matter actually came before the court after the three months had expired. Lord Romilly made the order asked for, and I think that it is plain that he considered that he had jurisdiction to make the order on the 4th of June, and I think that he must have considered that the dissolution of the company would then not have taken place, as otherwise the order he made would have been wrong. That case, although not an authority for the order I am asked to make here, is, I think, an authority as to the effect of that order when made. The words of section 89 are very strong and seem to me to cover everything. If the winding up is in operation until the dissolution of the company has taken place, then if I am at liberty to stay all proceedings in relation to the winding up, I think these words are wide enough to keep the company on foot, as the applicant desires. I propose, therefore, to make an order that, the court being satisfied that for the purpose of effecting the transfer of the assets of the old company comprised in the agreement of April, 1903, to the New Eastern Investment Co. (Limited), all proceedings in relation to such winding up ought to be stayed, direct the same to be stayed.

Solicitors, *Travers-Smith, Braithwaite, & Co.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

K. B. Div. (Bigham, J.) Aug. 2, 1904.

HAMPSTEAD BOROUGH COUNCIL *v.* MIDLAND RAILWAY CO. (*a.*)

Local government — New street — Paving expenses — "Owner"—Strip of land fenced off and planted as ornamental garden — Land rendered incapable of yielding rent for the benefit of an individual — Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Amendment Act,* 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77—*Midland Railway Act,* 1900 (63 *&* 64 *Vict. c. cxliii.*), *s.* 18.

By section 18, *sub-section* 2, *of the Midland Railway Act,* 1900, *the company, for the protection of the owner of certain land acquired by them for the purpose of sidings, were to acquire from the owner all the land up to a certain road, but were to leave a strip of the land so taken along the whole length of the road to be fenced and planted out with shrubs and trees and maintained as an ornamental garden. The local authority subsequently paved the road under section* 105 *of the Metropolis Management Act,* 1855, *and apportioned part of the expenses on the railway company under section* 77 *of the Metropolis Management Act,* 1862.

Held, that the provision in the private Act restricting the user of land in such a way as to render it incapable of yielding a rent being imposed for the benefit of an individual who might release it by agreement, and the land be thus capable of yielding a rent without the aid of further legislation, did not prevent the persons to whom the land belonged from being "owners" within section 250 *of the Metropolis Management Act,* 1855, *and as such liable to contribute to the expenses incurred by the local authority in making up the street upon which the land in question abutted.*

Special case stated under ord. 34, r. 1, as follows: The dispute between the parties was as to the liability of the defendants to the plaintiffs to contribute to the estimated expenses of paving a certain portion of a new street, known as Westbere-road, in the metropolitan borough of Hampstead.

The plaintiffs were by virtue of the Metropolis Management Acts the local authority charged with the duty of paving new streets within their district, and they resolved, on the 4th of June, 1903, to pave this road, and served upon the defendant company a notice demanding from them the sum of £1,200 12s., the apportioned amount of the estimated cost due from them as the owners of land "bounding or abutting" on the new street. The defendants contended that they were not the owners of the land within the meaning of the Metropolis Management Acts, 1855 and 1862, and were therefore not liable.

The case stated that the land in question was acquired and held by the defendant company in the manner following: By section 18 of the Midland Railway Act, 1900, it was provided, "That the following provisions shall, unless otherwise agreed, apply and have effect for the protection of Percy Horace Gordon Powell-Cotton and his trustees (in this section called 'the owners')—(1) The company shall not use any part of the sidings to be placed upon the land to be acquired from the owners . . . for any purpose except for the purpose of standing empty passenger trains; (2) the company shall acquire all the land of the owners up to Westbere-road and shall leave a strip of twenty feet wide along the whole length of such Westbere-road, and shall at their own expense plant and maintain the same with shrubs and trees to the reasonable satisfaction of the owners, and shall at the like expense and to the like satisfaction fence off the said lands from the Westbere-road by an open unclimbable iron fence seven feet high, such planting and fencing to be carried out within one year from the company obtaining possession of such lands, and to be maintained by the company."

In accordance with the provisions of sub-section 2 of the above section, the defendants acquired the whole of the land from the owners and dealt with it in the manner provided in the section.

The questions submitted for the opinion of the court were: (1) Whether on the true construction of the Metropolis Management Acts, 1855 and 1862, and having regard to the said provisions of the Midland Railway Act, 1900, the defendants were liable to pay to the plaintiffs the amount claimed in this action in respect of the estimated expenses of paving the new street known as Westbere-road; and (2) by whom the costs of this action and of the special case ought to be paid.

Macmorran, K.C., and *Courthope Munroe*, for the borough council.—The railway company are the owners of this strip of land within the meaning of section 150 of the Metropolis Management Act, 1855, so as to be liable to contribute as frontagers to the paving expenses of the new street on which it abuts: *London County Council* v. *Wandsworth Borough*, 51 W. R. 499, [1903] 1 K. B. 797. To succeed the company must show that the land was subjected in perpetuity to the burden of a public right, which deprives it of all beneficial value: *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379; *Hornsey District Council* v. *Smith*, 45 W. R. 581, [1897] 1 Ch. 843; and *Hackney Borough Council* v. *Lee Conservancy Board*, [1904] 2 K. B. 541. Where the restriction on the user of land may at any moment be removed without the intervention of the Legislature by agreement of the parties for whose benefit it was imposed, the land is not made *extra commercium* within the meaning of that expression as defined by Lord Watson in *Goldsmid* v. *Great Eastern Railway*, 32 W. R. 341, 25 Ch. D. 511, affirmed *sub. nom. Great Eastern Railway* v. *Goldsmid*, 33 W. R. 81, 9 App. Cas., at p. 693: see also *Savin* v. *Hoylake Railway*, 14 W. R. 109, L. R. 1 Ex. 9; *Rothes (Countess of)* v. *Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 694.

Montague Lush, K.C., and *William Wills*, for the railway company.—The provisions of the Midland Railway Act, 1900, render the land sterile, and incapable of being let at a rent. They are not of the same character as the restrictions in user discussed in *Goldsmid* v. *Great Eastern Railway Co.*, and cannot be waived. Whether the restriction could be waived by the Powell-Cotton trustees is open to doubt; but whether that be so or not, the court has only power to decide the question on the facts as they now stand, and not on a hypothetical assumption that the restriction might be removed on the happening of something in the future.

They cited *Plumstead Board of Works* v. *British Land Co.*, 23 W. R. 133, L. R. 10 Q. B. 203.

Macmorran, K.C., replied.

BIGHAM, J.— I have had an opportunity of examining the cases that were cited before me, and I think the result of them is that where land is incapable of yielding a rack-rent by reason of its being subjected to some public user, the owner is not liable. For instance, where it has been dedicated as a highway, or where a church has been built upon it, or where the land has been appropriated by Act of Parliament to some public purpose. But where the incapacity

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

is created in favour of an individual, or of a particular class of persons, then the owner does not escape liability; for instance, where the owner has covenanted not to use the land for any purpose of profit or where he has voluntarily devoted it to a purpose which is inconsistent with the receiving a rent, as in the case of a Wesleyan chapel: *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379.

The reason for the distinction seems to me to be that in one case nothing short of an Act of Parliament can restore to the land its capacity to yield rents, whereas in the other case the capacity can be restored by the mere act of the parties who have for the time destroyed it. Then in which catagory does the present case fall? I think in the second. It is true that the restriction which prevents the railway company from turning the land to a profitable use is embodied in an Act of Parliament, but the Act creates no public right; it does no more than give a legislative sanction to an agreement between Mr. Powell-Cotton and his trustees on the one hand and the railway company on the other. Such an agreement can be put an end to by the parties to it at any moment, apparently, without the intervention of the Legislature: see *Goldsmid* v. *Great Eastern Railway*, 32 W. R. 341, 25 Ch. D. 511. The arguments adduced by Mr. Lush for the railway company were put forward in that case by Mr. Hemming, and were dismissed as insufficient. It therefore does not afford any answer to the claim of the local authority to be paid the amount sued for. There must be judgment for the plaintiffs with costs; but there will be a stay if notice of appeal is given within ten days.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *A. P. Johnson.*

Solicitors for the defendants, *Beale & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) April 15, 1904.

POLLEY *v.* FORDHAM. (*a.*)

Public authorities—Magistrate—Improper conviction—Distress—Action against magistrate—Limitation of actions—Public Authorities Protection Act, 1893 (56 & 57 *Vict.* c. 61), s. 1.

The defendant, a magistrate, having convicted the plaintiff for an offence under the Vaccination Acts, ordered him to pay a fine, which the plaintiff failed to pay, whereupon the magistrate issued a distress warrant and the plaintiff's goods were distrained upon. Subsequently the plaintiff's conviction was quashed for want of jurisdiction. The plaintiff thereupon brought an action against the magistrate for illegal distress. The action was commenced more than six months after the date of the conviction, but less than six months from the date of the distress.

Held, that the action was not barred by section 1 (*a*) *of the Public Authorities Protection Act,* 1893, *as the period of six months thereby limited began to run from the date of the distress and not from the date of the conviction.*

Appeal from his Honour Judge Smyly, sitting at the Shoreditch County Court.

The plaintiff was on the 11th of February, 1903, convicted by E. S. Fordham, Esq., a metropolitan magistrate, for neglecting to have two of his children vaccinated within six months after the birth of such children contrary to the provisions of the Vaccination Acts, and was fined £1 and 16s. costs in each case.

The plaintiff having failed to pay the fines, the learned magistrate, on the 11th of April, 1903, issued a warrant of distress against the plaintiff's goods.

On the 17th of April, 1903, a distress was put in on the plaintiff's premises, and was paid out by the plaintiff under protestion the 29th of April.

On the 8th of July, 1903, a Divisional Court made an order absolute quashing the convictions against the plaintiff on the ground that, the children being twins eighteen months of age at the time of the conviction, the plaintiff had been improperly convicted.

On the 26th of August, 1903, the plaintiff brought an action in the county court against the learned magistrate, claiming damages for illegal distress.

It was contended, on behalf of the defendant, that the action was out of time, and that the defendant was protected by the Public Authorities Protection Act, 1893.

The learned county court judge held that the plaintiff's action was barred by section 1, sub-section (*a*), of that Act, as the injury was suffered by the plaintiff from the conviction on the 11th of February, more than six months before action brought, and he entered judgment for the defendant.

The plaintiff appealed.

The Public Authorities Protection Act, 1893, provides as follows:

Section 1: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof . . ."

By the Justices Protection Act, 1848 (21 & 22 Vict. c. 34), s. 3:

"And be it enacted, that where a conviction or order shall be made by one or more justice or justices of the peace and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace *bonâ fide* and without collusion no action shall be brought against the justice who so granted such warrant by reason of any defect in such conviction or order or for any want of jurisdiction in the justice or justices who made the same, but the action (if any) shall be brought against the justice or justices who made such conviction or order."

Kingsbury, for the plaintiff.—The action is not barred by section 1 of the Public Authorities Protection Act, 1893. The action was commenced within six months next after "the act complained of"—namely, not the conviction, but the distress which followed the warrant. The conviction and the distress are quite separate acts.

He referred to *Carey* v. *Bermondsey Borough Council*, 67 J. P. 447, and *Brittain* v. *Kynnaird*, 1 B. & B. 432.

G. S. Robertson, for the defendant.—The decision of the county court judge was right. The action is barred by section 1 of the Public Authorities Protection Act, 1893, because the "act complained of" within the meaning of the section is the conviction and not the distress; the latter is only the natural consequences of the former. The issuing of the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

distress warrant and the levying of the distress were not a judicial, but only a ministerial act.

[He referred to section 3 of the Justices Protection Act, 1848.]

Lord ALVERSTONE, L.C.J.—I express no opinion as to whether this action can be maintained or as to whether there is a defence to it. The only point before us is whether the county court judge was right in applying the Statute of Limitations to this alleged right of action, so as to bar the proceedings, and whether in fact he has rightly declined to entertain the action upon the ground of the lapse of six months. I think we have only got to construe for this purpose sub-section (*a*) of section 1 of the Public Authorities Protection Act, 1893, which was a new enactment with a statutory limitation, and must be construed strictly. That says: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." The act complained of here was not the conviction. The act complained of here was the trespass to the plaintiff's premises by the levying of the distress. So far as it has any bearing on the case, section 3 of the Justices Protection Act, 1848, does not seem to me to have anything to do with the question of time. Section 3 is for the purpose of protecting a justice who has issued a warrant upon a conviction which was apparently legal, and then subsequently it turns out that he ought not to have issued that warrant, and then an action is brought against the justice who made the original order. In this case, where the action is for trespass and there is a plea of justification, it would require a very plain enactment with regard to a statutory limitation to say that that period of action is to run not from the date of the real cause of action, the entry on the premises, but from some order of anterior date, under the authority of which that entry was made. It may be that there are enactments which enable you to claim as damages matters of aggravation in respect of subsequent acts done as corollory to that act. That is quite possible, but I am unable myself to see any statute which enables us to say that the right of action for wrongful entry has been taken away because brought too late if the action is commenced within six months of the act which is alleged to be wrong. I think if it was intended to ante-date the period of limitation to an earlier date, there must be clear and distinct language to that effect. Whatever may be the result of this action when it comes to be heard, I think the case must go back to the county court judge.

WILLS, J.—I am very clearly of the same opinion. It seems to me the act complained of is the distress, and nothing else. No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual it comes to nothing. One used to be in former days very familiar indeed with matters of this kind. I do not know how many declarations I have drawn in my old pleading days for levies of one sort and another—complaints that people had been distrained upon against whom there was no right of distress or to enforce consequences of a similar nature, but such actions were always actions of trespass, and nothing else. The complaint used to be that the defendant had wrongfully entered the house or premises of the plaintiff and had done so and so. Then any question which arose about the warrant, the conviction, or order on which the erroneous proceedings by way of distress and entry were founded was raised on a defence setting up that it was justified because of the warrant and the conviction or order on which the warrant was founded. But the action itself was not for erroneous exercise of jurisdiction, but was for making a distress and breaking and entering a man's premises where there was no right to do so.

KENNEDY, J.—I agree.

Appeal allowed.

Solicitor for the plaintiff, *H. T. Nicholson.*

Solicitor for defendant, *Solicitor to the Treasury.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — June 20, 21, 1904.

In re JOHNSTON FOREIGN PATENTS CO. (LIMITED).
In re JOHNSTONIA DIE PRESS CO. (LIMITED).
In re JOHNSTONIA ENGRAVING CO. (LIMITED).
THE J. P. TRUST (LIMITED) AND OTHERS *v.* THE ABOVE-NAMED COMPANIES (*a.*)

Company—Issue of debentures issued jointly by three companies—Validity—Ultra vires—Covenant to pay both joint and several—Companies' undertakings charged with such debentures—Application of proceeds—Construction of articles of association.

Three companies by their memorandum and articles of association had power to borrow money on the security of debentures charged upon the property of the company. They subsequently in order to raise money to meet certain liabilities, issued joint debentures, by which they jointly and severally agreed to pay to the holder for the time being the money so lent, together with interest on the same, and they thereby respectively charged with such payments their several undertakings, and all their present and future property and assets.

Held, that the debentures constituted a valid charge upon the assets of the company, so far as the money so advanced had come into the hands of each company, although it was an ultra vires act for any company to charge its assets with money advanced to another company.

Held, also, that a clause in the articles of association of a company which empowered the directors to borrow any sum of money, not exceeding the amount of the preference share capital of the company, on the security of the property of the company by, e.g., debentures, did not limit the amount which could be raised on the security of debentures, when no preference shares had been issued.

Decision of Byrne, J., *on the first point reversed.*

This was an appeal from a decision of Byrne, J.

The facts were as follows:

This was an application for the purpose of determining the validity of certain debentures which were issued purporting to be jointly and severally the debentures given by the three different defendant companies. The companies were limited companies. The Johnston Foreign Patents Co. (Limited) was

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

incorporated in September, 1899, the nominal capital being £50,000, divided into ordinary shares of £1 each; the Johnston Die Press Co. (Limited) was incorporated in June, 1898, its nominal capital being the same; and the Johnstonia Engraving Co. (Limited) was incorporated in September, 1900, its nominal capital being £20,000 divided into 10,000 preference shares and 10,000 ordinary shares of £1 each. The defendant companies were all promoted and controlled by one man, a Mr. J. G. Johnston, they had the same set of directors, secretary, and business offices. In 1901 the companies were in want of money, and it was proposed to raise money for the purposes of all the companies on the security of joint debentures to be issued by the directors of the three companies.

On the 23rd of December, 1901, there were separate board meetings called of the directors of each of the companies, and at each of these meetings resolutions were passed which were the same for all the companies. The following is an example: "Johnstonia Engraving Co. (Limited). Present—three directors, solicitor, and secretary. Resolved, in conjunction with the Johnston Die Press Co. (Limited) and the Johnston Foreign Patents Co. (Limited), to create and issue twenty-five first mortgage debentures of £1,000 each, to be secured upon the joint property and assets, undertakings, and businesses of the three companies, to be repayable on or before the 30th day of June, 1902, with a bonus of £50 on each £1,000 debenture, and to carry interest in the meantime at £6 per cent. per annum. And resolved, that the debentures be in the form submitted to this meeting, and that the seal of the company be affixed to such debentures and that such debentures be from time to time issued as and when applications are received for the same. (Signed) J. Bevan Edwards, chairman"; and at other subsequent meetings it was "Resolved, that all moneys received from the issue of debentures recently authorized shall be paid into a special banking account to be opened with the London City and Midland Bank, to be called 'The Johnston Companies Debenture Account.' That from time to time as occasion arises the three companies shall be financed from the said account, but that every payment thereout shall be sanctioned in writing by a committee consisting of Mr. H. P. Clinton and any two of the undermentioned gentlemen" (whose names were given—"and that all cheques on the said account shall be signed by any two members of the board of the three companies as at present constituted and countersigned by the secretary, Mr. P. Gray." At this meeting Mr. H. P. Clinton was elected the manager of the company. Soon after the 23rd of December, 1901, joint debentures of the three companies were subscribed for in cash, and the form of the debenture, so far as is material, is to this effect: It was headed with the names of the three companies. "Debenture Mortgage £1,000. Issue by the above-named companies jointly of twenty-five first mortgage debentures of £1,000 each. Redeemable on or before the 30th of June, 1902, at £1,050 per debenture, and carrying interest meantime at the rate of 6 per cent. per annum." Then follows the charge: "The three above-named companies (hereinafter called the companies) jointly and severally agree to pay to (the registered holder) to whom this debenture is issued, or other the registered holder or holders for the time being hereof (all of whom are intended to be included in the expression 'the debenture-holder' when used herein), the principal sum of £1,000 together with a bonus of £50, and also interest in the meantime at the rate of £6 per cent. per annum on the 30th day of June, 1902, or on such earlier day as the said several moneys may become payable in accordance with the conditions subscribed hereto. And the said three companies hereby respectively charge with such payments their several undertakings and all their present and future properties and assets. And it is hereby declared that this debenture is issued upon and subject to the conditions subscribed hereto which are to be deemed to be incorporated herein." Then follow the seals of the companies, and certain conditions were attached: "(1) This debenture is one of a series of debentures issued or about to be issued by the above-named companies for securing an aggregate principal sum of £25,000, such debentures being numbered 1 to 25. (2) The debentures of the said series will all rank *pari passu* in point of charge without any preference or priority over one another. (3) The charge hereby created shall be a floating charge, and accordingly the companies shall be at liberty in the course of their businesses and for the purpose of continuing and carrying on the same, and the *bonâ fide* prosecution and conduct of their undertakings and businesses or any part thereof, to use, employ, sell, mortgage, charge, lease, exchange, or otherwise deal with or dispose of all or any part of their property for the time being which may require to be so used, employed, dealt with, or disposed of, but so that the companies shall not have power to create any mortgage or charge ranking *pari passu* with or in priority to the said debentures. (4) The moneys hereby secured shall, in each of the events following, become immediately payable: (*a*) When default shall have been made in the payment of any moneys hereby secured; (*b*) when an order shall be made by any competent court or an effective resolution shall be passed for winding up either of the companies; (*c*) when any process of execution or distress shall be levied on any of the property hereby charged unless such process shall be satisfied within three days from the date of levy." None of the other clauses are material. Pursuant to the resolution, the proceeds of the issue of the joint debentures, together with a sum of £1,000 provided by Mr. Haddrill on the security of a debenture issued by the Johnston Foreign Patents Co. (Limited), were paid into the new banking account. In point of fact the debentures were issued to Mr. Haddrill, and a debenture of £1,000 to Mr. Pakeman, who subsequently transferred it to the J. P. Trust (Limited). Each company was, by its memorandum of association, given power to borrow money on the security of debentures. Except a sum of £666 expended in charges in connection with the issue of the debentures, the balance was received by the companies in the following proportions—the Johnston Foreign Patents Co. (Limited), £15,024 15s.; Johnston Die Press Co. (Limited), £6,493; the Johnstonia Engraving Co. (Limited), £2,815. A summons was taken out by the J. P. Trust (Limited) and H. J. Haddrill on behalf of themselves and all other the debenture-holders of the defendant companies claiming a declaration that they and all other the debenture-holders of the defendant companies were entitled to a joint charge upon the undertakings of the companies and the present and future property and assets, that an inquiry might be made of what the said property consisted, and in whom the same was then vested, that an account might be taken of what was due to the plaintiffs and all other such debenture-holders as aforesaid under or by virtue of the said debentures, for the appointment of a receiver and manager, and that the debentures might be enforced by foreclosure or sale. By an order dated the 12th of March, 1902, upon a motion for the appointment of a receiver, supported by various affidavits, one being by Mr. Lacey Downes, secretary to the plaintiff company,

pointing out the financial embarrassment of the defendant companies, and the necessity of appointing a receiver and manager to protect the interests of the debenture-holders, judgment was given by consent, and it was ordered that the plaintiffs and other holders of joint mortgage debentures of the three defendant companies were entitled to a charge upon the several undertakings of the said companies and all the present and future properties and assets of the said companies, and after directing the usual accounts and inquiries it was ordered that F. P. Walter should be appointed receiver and manager of the three defendant companies, but that he should not act as manager after the 31st of July, 1902, without leave of the judge, and that the said F. P. Walter should forthwith out of any assets coming into his hands pay the debts (if any) of the defendant companies, which had priority over the claims of debenture-holders under the Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), and be allowed all such payments on passing his accounts. On the hearing of this motion the judge suggested that another debenture-holder should be joined as plaintiff, and Haddrill was joined. Subsequently three separate orders were made for the compulsory winding-up of the companies, and the official receiver was appointed liquidator for each company.

With regard to the legality of the joint issue of the debentures, after consulting counsel, it was deemed advisable, having regard to the form of the memorandum and articles of association of the Johnston Die Press Co. (Limited), that that company should issue to one of the other two companies a debenture to secure the actual amount (part of the £25,000) applied to the purpose of that company. Accordingly, the Johnston Die Press Co. (Limited) issued to the Johnston Foreign Patents Co. (Limited) a debenture to secure the sum of £10,700, but it received less, as stated above. On behalf of the liquidator, advice of two well-known counsel was taken as to the validity under the circumstances of these debentures, and as to the steps to be taken to upset them. The advice given was that the joint debentures issued by the three companies were *ultrà vires* and void. At the dates of the liquidation of the three companies, their liabilities to unsecured creditors appeared according to the respective statements of affairs filed by the directors in pursuance of the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 7, as follows: (i.) The Johnston Foreign Patents Co. (Limited), £45,595 0s. 9d.; (ii.) Johnston Die Press Co. (Limited), £22,717 12s. 1d.; and (iii.) the Johnstonia Engraving Co. (Limited), £11,906 4s. 1d.

The memorandum of association of the Johnston Foreign Patents Co. (Limited), by clause 5, gave the company a power "to advance or lend money on such terms as may seem expedient, and with or without security, and to discount bills and notes generally, and to carry on business as bankers." By clause 11 is "To enter into partnership or into any arrangement for sharing profits, union of interests, joint adventure, reciprocal concessions or co-operation, amalgamation with or purchase from any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which this company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take and otherwise acquire and hold shares in or securities of, and to subsidize or otherwise assist any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with such shares or securities." Clause 19 was the clause under which *primâ facie* the debentures were issued, "To raise, borrow, or receive money on deposit or otherwise at interest from any person or persons or secure the payment of money (including liabilities of or taken over by the company) in such manner and on such terms as may seem expedient, and also by the issue of debentures or debenture stock, whether perpetual or otherwise, and charged or not charged upon the whole or any part of the property of the company, both present and future, including its uncalled capital." Article 114 of the articles of association, so far as material, is as follows: "The business of the company shall be managed by the directors, who may exercise all the powers of the company except such as by the Acts or by these articles are required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the said Acts, and to such regulations (being not inconsistent with the aforesaid regulations or provisions) as may be prescribed by the company in general meeting; but no regulations made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulations had not been made; and the directors may do all acts and things which they shall consider proper or advantageous for accomplishing the objects or carrying on the business of the company, and may in particular, but without derogating from the generality of the foregoing powers, exercise the following powers: (*a*) (*c*) "Sell, lease, licence, mortgage, charge, or exchange any of the property of the company at such times and in such manner, and on such conditions as they may think fit." (*d*) [Set out in Vaughan Williams, L.J.'s judgment at length, *vid. infra.*] (*e*) (*f*) "Exercise and carry into effect any or all of the objects mentioned in or referred to in the memorandum of association."

The liquidator took out a summons for a declaration that the joint debenture of the defendant companies for £1,000 purporting to have been issued by them to J. R. Pakeman and transferred by him to the plaintiffs, the J. P. Trust (Limited), and the six several joint debentures of £1,000 each of the plaintiff H. J. Haddrill, were respectively invalid and void and *ultrà vires* the defendant companies and each of them, and created no charge upon the assets of the defendant companies or any of them, and that the said debentures be delivered up to the appellant to be cancelled.

Byrne, J., before whom the matter came, held that the transaction was *ultrà vires* and void, and that the debenture-holders could not rely upon their security in the winding up, and he ordered that the debentures should be delivered up to be cancelled.

The plaintiffs appealed.

Upjohn, K.C., and *A. Beddall*, for the appellants, cited: *Low* v. *Tranmer*, Willes Reps. 682, 2 Wils. 75; *In re Strand Music Hall Co.*, 3 D J. & G. 147; *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*, 31 W. R. 98, 22 Ch. D. 61; *In re German Date Coffee Co.*, 30 W. R. 717, 20 Ch. D. 169; *In re Coolgardie Consolidated Gold Mines (Limited)*, 76 L. T. 269, 45 W. R. Dig. 32; *Stephens* v. *Mysore Reefs (Kangundy) Mining Co. (Limited)*, 50 W. R. 509, [1902] 1 Ch. 745. [By ROMER, L.J.—*Hawksley* v. *Outram*, [1892] 3 Ch. 359, 375, 40 W. R. Dig. 198, 41 W. R. Dig. 169.] [By VAUGHAN WILLIAMS, L.J.—*In re Cork and Youghal Railway Co.*, 18 W. R. 26, L. R. 4 Ch. 748.]

They also referred to Sheppard's Touchstone (7th ed.), vol. 1, at pp. 80-82.

Buckmaster, K.C., and *E. A. Nepean* for the liquidator on the second point, referred to *In re Wrexham, Mold, and Connah's Quay Railway Co.*, 47 W. R. 172, 464, [1899] 1 Ch. 440, 462; *Baroness Wenlock* v. *River Dee Co.*, 35 W. R. 822, 19 Q. B. D. 155; *In*

re Lands Allotment Co., 42 W. R. 404, [1894] 1 Ch. 616.

A. Beddall replied.

VAUGHAN WILLIAMS, L.J.—This is a summons in liquidation proceedings, and the liquidator desires to have certain debentures which had been issued declared to be void and ordered to be given up to be cancelled. Byrne, J., has made an order to that effect, and we have to consider whether that order was right or not. Now what we have got before us here is the debenture itself and the circumstances brought to our notice by the liquidator under which these debentures were issued. But before I deal with this case in the light of this debenture, and what we find within the four corners of it, and the circumstances brought to our notice by the liquidator in his affidavit, I should like at once to deal with a point which has been made, which point really overrides all other considerations. This point arises upon the 114th article of the Johnston Foreign Patents Co. (Limited). Now it is said with regard to that particular company that it had no right to issue debentures at all, and that is by reason of clause *d* of this article 114, which is as follows: "Borrow or raise or secure any sum or sums of money, not exceeding the amount of the preference share capital of the company on the security of the property of the company (including uncalled capital, if any) or any part thereof, either by way of mortgage with or without power of sale, or of debentures or of debenture stock or other security or without security, and upon terms as to payment, interest or redemption or otherwise as they may think fit, and out of the assets of the company redeem and pay such securities and loans, and in connection therewith may make such arrangements as may be deemed expedient for vesting any property of the company in trustees or otherwise for the benefit and security of the holders of such debentures." Now it is seen that in those early words in that section it says "borrow, raise, or secure any sum or sums of money not exceeding the amount of the preference share capital." The point made is that inasmuch as it is an admitted fact here that at the time of the issue of these debentures no preference share capital whatsoever had been issued by the company, the true meaning of this clause *d* is that unless and until there is an issue of preference share capital, the company is not to exercise its borrowing power, and that when there is such an issue of preference share capital then the power of borrowing is only to be exercised to the extent of the amount of that preference share capital. If that were so it would certainly make the debentures issued by the Johnston Foreign Patents Co. (Limited) *ultrà vires* and altogether bad. But I do not agree in that construction. But before I say what I think the true construction is, I want to call attention to a word or two in the earlier part of this article. It is an article which says at the end of the preface "and the directors may do all acts and things which they shall consider proper or advantageous for accomplishing the objects or carrying on the business of the company, and may in particular, but without derogating from the generality of the foregoing powers, exercise the following powers." If one turns to the memorandum and articles of association of this company one finds that there is a power expressly given to borrow and raise money.

Now, I think we must construe this clause *d* in the light of those words in the preface, and in the light also of the memorandum giving the power to borrow and to raise money. This clause *d* is a clause which has, in form at all events, been inserted in order to take effect without derogation from the generality of the foregoing powers. It is a clause which, in my opinion, ought not easily to receive the construction that it is an absolute prohibition of borrowing, unless and until preference shares have been issued. In my judgment this is a clause which is really introduced for the benefit and for the protection of the preference shareholders, and I think that unless and until there are preference shareholders this protection is not wanted. I think, therefore, that the business understanding of this clause would be that you may issue debentures under the general powers that are given you with no limit all, excepting the express limits that are found in the earlier part of the articles and memorandum without any restriction whatever beyond that. But as soon as ever you issue preference share capital, after you have once done that, you must not be allowed to issue debentures beyond the amount of the preference share capital, because, unless the company holds out that sort of security to the public whom they invite to come in as preference shareholders, nobody would come in at all. What it means is this. Avail yourself of your debentures to raise capital by debentures, and do that freely; that is a fact that will be known to all the world, but if you propose, in addition to that, to use the inferior security (because it is an inferior security) of preference shares as a means of raising capital, then from that time forward you are not to issue debentures exceeding the amount of the preference share capital. I think, therefore, that this point fails, and as this point fails, I will now go on to say what it is I gather from this debenture, and from the affidavits which I have mentioned, with reference to the circumstances under which this debenture was issued. I have no doubt myself on these affidavits, that these three companies were each of them in want of money, and in the absence of any suggestion by the liquidator to the contrary, I am entitled to assume, in want of money to be spent for *intrà vires* purposes. They had debts and they had liabilities and they desired to discharge those. Now Mr. Johnston had been in the habit of financing these three companies by lending money to each of them. These companies were pressed with these liabilities and they applied to Mr. Johnston, and he declined because he was not in a position to make the advances which these companies theretofore had got from him. Thereupon this scheme is suggested, that money might be raised to meet the liabilities of each of these companies by the issue of debentures. It is suggested that there is a difficulty about the issuing of debentures by each of the companies in respect of a separate advance to them. It is said that at the moment when that was proposed to be done there was considerable uncertainty both as to the liabilities of the respective companies and also as to the property which belonged to each one of them, their properties having been very much intermixed. Thereupon it occurred to the legal adviser of these three companies that it would be a very good plan that if instead of having three sets of debentures issued by the respective companies, they had one set of debentures issued by the companies jointly. Under those circumstances my conclusion in fact here is that the ultimate object which was in view by these three companies was the raising by each of them of a sum sufficient to meet the financial wants of each company, but that as a matter of machinery it was thought better that this security should be given in this form. Under those circumstances this debenture was issued. Before I read the debenture I may as well say with regard to the moneys which were raised, and which were subsequently raised all at one moment, and all lumped together for user, that at

the time when this sum of £25,000 was thus raised a resolution was passed by the directors—the same directors for each one of these companies acting together as the representatives of all three companies in a committee—that these moneys should be placed in the City and Midland Bank and should be placed to a separate account, and should be paid out to the companies respectively according to their wants, and by cheques which were to be signed by the members of the committee and by the gentleman who was the manager of all the three companies in question. In this way ascertained sums of money varying in amount—one something over £15,000, and another something under £2,000—came into the coffers of all these companies respectively. The ultimate result of all this is that each one of these companies got into its coffers from the pockets of the persons to whom the debentures were issued a sum of money, and this sum of money, in my judgment, ought to be treated as if it had been advanced rateably by each one of these lenders to these companies in such a way that if any one of the three companies was insolvent or unable to pay, the amounts which were advanced by each individual debenture-holder should be treated as being divided rateably between the two solvent companies and the insolvent company. I am not aware whether in fact there was any difference in the solvency of the companies, but the matter was easy enough. If it was a £100 debenture and you had got a certain number of these debenture-holders, and the £100 of each one of these number of persons who become debenture-holders, and who paid £100 to the two companies who were solvent and the one which was insolvent, you will find each of these debenture-holders treated as having advanced £33 6s. 8d. to each of the solvent companies and £33 6s. 8d. to the insolvent company. I do not see any difficulty in doing perfect justice in that manner. I am only saying this to show that the ultimate result was an advance by each of these debenture-holders to the company to the extent that his money goes into the coffers of the company. Now, it is said that either we ought to treat these debenture-holders as not being creditors at all of the company, or secondly, that if we do treat them as creditors at all, we are to treat them as unsecured creditors. It seems to me that in this state of facts it is impossible for us to say that we ought not to treat these debenture-holders as creditors of the companies. Upon the face of each debenture there is an admission of a debt of £1,000, that may not be and will not be the right amount in respect of each company. But it seems to me that, however much the machinery may have been misconceived—if that is the proper word to use—there still is to the extent of the moneys that each debenture-holder found for each company a debt by that company to him. Now, assuming that there is a debt, then the next question which arises is, are these creditors who have advanced these moneys to these companies respectively to come in with the unsecured creditors, and rank with the assets *pari passu*, or are they unsecured creditors, or do the debentures give them a security? Now we will look at the debentures and see what the objections are. The first objection to the debenture is that it is called a debenture mortgage issued by the above-named companies jointly of twenty-five first mortgage debentures of £1,000, each redeemable on or before the 30th of June, 1902, and so on. Now, I shall assume for the purpose of my present judgment that for these companies to issue twenty-five debentures jointly was *ultrà vires*. I am not deciding the question to-day, and I do not wish to be understood as saying that in my opinion in all cases where companies for trading purposes, whether it is the purchase of goods, or whether it is the raising of money, enter into such a transaction, such a transaction would be necessarily *ultrà vires*. I think that it must depend upon the circumstances of each case. But I am happy to say that I have not got to decide that, and I am only dealing with the present case upon the basis that this issue by the companies jointly of these debentures was *ultrà vires*. Now, when you go on, and look at the debenture, you see that it says: "The three companies (hereinafter called the companies) jointly and severally agree to pay," and then it gives the amount of the debenture. Now, it is to be observed that the covenant there is a joint and several covenant, and if there had been the several covenant only, nobody could have said that this debenture was *qua* that several covenant void. But it is suggested that it is void because this is accompanied by the joint covenant. Then it goes on: "And all the said three companies hereby respectively charge with such payments their several undertakings and all their present and future properties and assets."

The objection is that the companies there are charging their assets with moneys which are not coming into their coffers, and moneys which, in the circumstances I have mentioned, it is plain were intended to a certain extent to go into the pockets of other companies—that is to say, others speaking of the one and the two that remain, making up the three. I think I have now read sufficient of this debenture. The conditions are set out, and I do not know that they affect anything that was done here. As a joint debenture, I am assuming that this document is bad, but does that make it a totally void security? The companies, each of them, had a power to borrow money, to the extent that these moneys actually came to their coffers, and for the purpose for which these moneys were intended to be used, and were in fact used. Am I bound to say that because this debenture mortgage is void and *ultrà vires*, in so far as it makes each one of these three companies charge its property, and contract to pay the debts of the other two companies, yet this mortgage debenture may not stand good to the extent that it gives security for the separate debts which might be incurred and secured by these companies respectively for the purpose of their own business? I do not think so. I think that when one bears in mind the undoubted fact that these amounts of money have gone into the pockets of these companies respectively, and these moneys have come from these debenture-holders, and that they have been used by each company for its benefit for proper purposes, and have been used in such a way as to increase the assets of the company, we ought not to refuse to give effect to the debenture in so far as it creates a security for sums which were borrowed within the powers of these companies respectively. I do not think that these sums were the less borrowed by those companies *intrà vires*, because at the moment they gave these debentures they intended to make themselves responsible also for sums of money as to which they could not without doing something that was *ultrà vires* incur a responsibility. Under those circumstances I think that, although the several companies undoubtedly purport on the face of the debenture to do things which for the purpose of my present judgment I am holding to be *ultrà vires*, yet I think that we ought to hold that this debenture stands good as a security for these moneys, which have come from the pockets of the debenture-holders, and have been received and enjoyed by the companies respectively. I do not propose to go at any length into the authorities, but I think that the principle is very well stated in the judgment of Willes, L.C.J., in the case which counsel for the appellants cited to us of *Wilkinson* v. *Tranmer*,

Willes Reps. 682. As the covenant is here set out in 2 Wils. Reps., p. 75, I will read the covenant from there. The covenant is on p. 78. That was a case in which a conveyance was intended to operate by way of release, but it could not do so, and the court, gathering the obvious intention of the parties so far as the form of the document was concerned, sought to justify it in carrying out the real intention of the parties by treating the release as operating as a covenant to stand seised. In this passage the court says: [His lordship read the passage, and continued:] I think here that although the machinery was wrong, the machinery was in part something beyond the powers of the company, and that we ought to prevent injustice by holding here that this security is a good security, in so far as the moneys of the debenture-holders have come into the coffers of each company for purposes which were *intrà vires*, and have been so employed. In one part of the case there was a suggestion made as to an inquiry to see how far the moneys had been so employed, but unless some such inquiry is asked for I think we ought to assume that the moneys have been so employed. Under those circumstances I think that this appeal ought to be allowed. And I think, therefore, these costs ought to come out of the fund.

ROMER, L.J.—I have come to the same conclusion. With regard to the part which concerns the only company we are dealing with, which I will call the Foreign Patents Co., that point bears upon the true construction of clause *d* in article 114. Now, with regard to that clause *d*, it is clear that *primâ facie* that was intended to confer a power and not to cut down any previously existing powers belonging to the directors.

I notice that in clause 114, before it comes to specify the particular powers numbered by letters, it is expressly provided that these powers should be conferred without derogating from the generality of the foregoing powers, which are mentioned in the article. It must be remarked that clause *d* is not negative in form; it is positive in form so far as it purports to confer a power. No doubt it may imply a negative too; the negative must arise by implication. But what that implication is is a question to be determined by a consideration of the wording of the clause, and the circumstances, and the case. I think that so far as any implication is to be drawn from clause *d*, it ought not to be an implication that until preference shares are issued there shall be no borrowing powers given to the company at all. I think that such a construction would lead to the greatest possible inconvenience, and would not be reasonable under the circumstances, and I think that it would not be justified by the wording of clause *d*. I think that the clause really implies only a restriction when preference share capital exists. I do not think it was directed to the case of there being no preference share capital at all; and I cannot help thinking, though this may be a matter of speculation, that the real intent of the clause was to restrict the borrowing in favour of existing preference share capitalists, so that they should not have their security cut down by persons with a higher right being put before them without their consent and approbation. At any rate I cannot myself come to the conclusion that as a question of the construction of clause *d*, it is to be inferred that when there is no preference share capital existing there is no power to borrow at all. On the contrary, I think the general power exists, and therefore, so far as this point is concerned, the appellants are right. That brings one to the main point, as to which I will say what I have to say as shortly as possible. I will assume—and, indeed, it must not be inferred from anything I say that I differ from what Byrne, J., has decided—that so far as these debentures purported as a matter of substance to make each company pledge its credit and assets for money not coming to the company itself, but to the other companies also, that was *ultrà vires*; and I think the transaction must be taken, to say the least of it, to have been irregular so far as the companies purported to contract jointly, and so far as the moneys raised were carried to a joint account, and not paid direct in proportions to the several companies. But the transaction we are considering here was an honest transaction. It is not a case where there has been fraud. Money in cash has been honestly advanced, and has come into the pockets, if I may use the expression, in shares, of each of these companies, and I think that under these circumstances, so far as each company obtained its proportion of the moneys that were borrowed, the court ought, if possible, to support the transaction as against that company in so far as the court can legitimately do so. Now, I think in this case the court can, and ought to, uphold the debenture as against each company to the extent to which the money borrowed came into the coffers of the company. I may point out that there is nothing on the face of the debentures which renders it impossible for us to make the debenture effectual to the extent which I have indicated. It is not as if on the face of it there were merely a joint liability imposed upon the three companies. Each company undertakes, and agrees to pay, the whole debt, and each company charges its own assets with the payment of the whole debt. Therefore, so far as the form of the debenture is concerned, although the joint covenant may be treated as bad and non-existent, yet there is nothing to prevent the covenant of each company to pay the debt being enforceable merely because the amount of the debt may exceed the amount absolutely coming to that company. So far as the form is concerned it seems to make each company liable for the whole debt. It is not impossible, therefore, to say that the company may even on the face of the debenture be at any rate liable for so much of the amount covenanted to be paid as came to the company, and of course no difficulty arises on the form of the debenture from the fact of the charge being given, for it is a charge for the whole debt and therefore clearly a charge for the lesser amount. Therefore it works down to this: In substance what was the transaction, and can it in substance not be held good to the extent to which the moneys borrowed from the lenders came to the coffers of each company? I take the transaction to be in substance this. I gather that each company wanted the money for its own purpose, but that they had the same governing body and the same directors. Erroneously it was thought that they could raise the money wanted for the companies in a lump sum, and subsequently divide it between the three companies after carrying the moneys to a joint account, when it was ascertained exactly how much each company wanted for its particular purposes. Now, so far as each company got from that machinery of the joint account moneys for its own purpose, and used them for its purpose, is not the transaction this: That so far as that company is concerned, while purporting to borrow that money, and to make itself liable for more moneys, it did at any rate borrow that amount and make itself liable for that amount. I agree the machinery was wrong; that the joint covenant was inoperative; and that the joint account was as a piece of machinery irregular. But still it comes to this, that the company did intend to borrow moneys which would come to itself. I agree it intended to make itself liable for more, but

it did intend to borrow moneys, though through a curious form of machinery. It intended to borrow moneys, part of which should come to itself, and part of which did come to itself; and so far as that is concerned, I think each company may be said to have borrowed that amount, and that that amount borrowed was within its powers. As I have already pointed out, there is no objection to giving the transaction validity. On the face of the debentures themselves, and so far as the substance is concerned, in looking how the moneys are dealt with, I think the matter ought to be, and can be supported as I have said, so far as the money raised absolutely came to the coffers of the company, for the reasons given by my lord, and which may have been given by me already. Under those circumstances, as I have said, I agree that to the extent I have indicated these debentures ought to be upheld, and as substantially these matters are indifferent to the appellants, whether they had greater rights or not, I think that in substance the appeal may be said to have been completely successful.

COZENS-HARDY, L.J.—I am of the same opinion, and at this time of day I do not propose to add very much; indeed I do not propose to add a word as to the construction of article 114. But with reference to the point of law which has been argued, speaking for myself, I entirely agree with what Byrne, J., has said in his judgment, that a general power to borrow given to a company, and exercisable by the company, under the terms which are to be found in the present case does not authorize a joining with other companies in the borrowing of a sum of money, which is to be joint borrowing and charged upon the whole undertaking of the three companies. It is upon that assumption that I approach the consideration of this debenture. But when I do that I cannot shut my eyes to this, that the real intention and object was that each of the three companies should have a portion thereafter to be ascertained of the £25,000 to be advanced by the debenture-holders. In that there was no illegality. Now, suppose there had been three separate debentures each for £25,000, one given by each of the companies. Then in that case it would have been plain that each debenture could only be ranked and said to be good, not for the whole £25,000, but only for the amount which was actually received by the company from the £25,000, and which ultimately got into the coffers of the company. Is there any difficulty at all in our giving the like effect to this debenture? It is muddled in form I agree, but it contains a separate covenant by each of the companies and a separate charge upon the assets of each of the companies. It seems to me that, even in substance, regard being had to the honesty of the whole transaction, we ought not to deprive these debenture-holders of this security, but ought to say that the debentures are a valid security by each of the three companies upon its own assets to the extent to which such company has received any part of the £25,000. If necessary there may be an inquiry.

Appeal allowed.

Solicitors for the appellants, *Pakeman & Reid.*

Solicitors, for the respondent, *Blundell, Gordon, & Co.*

From K. B. Div. (Collins, M.R., and Cozens-Hardy, L.J.) } Aug. 12, 1904.

WELLS v. ALLOTT. (a.)

Practice — Application for judgment under ord. 14, *r.* 1 — *Action by money-lender—Harsh and unconscionable transaction — Interest charged* primâ facie *excessive—Money-lenders Act,* 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

Where in an action by a money-lender to recover money lent with interest it appears that primâ facie *the interest charged was excessive, the special jurisdiction conferred by the Money-lenders Act,* 1900, *comes into operation. Therefore that part of the claim for interest cannot be dealt with upon an application for summary judgment under order* 14, *but the action must go to trial for the purpose of having it determined whether the interest is so excessive as to entitle the defendant to relief under the Act.*

Appeal from an order of Phillimore, J., at chambers, giving the plaintiff leave to sign final judgment under order 14 for the amount indorsed on the writ.

The plaintiff was a money-lender; the defendant a clerk in holy orders. The claim indorsed on the writ was for £70, being the amount due on a promissory note dated the 26th of March, 1904, and made by the defendant in favour of the plaintiff, by which note the sum of £70 was made payable by three consecutive quarterly instalments of £23 6s. 8d., each on the first day of each succeeding quarter, the first of such quarterly instalments to become due and payable on the 1st of June, 1904, and it was provided that, should there be default in any one or more payments, the entire amount left unpaid should become due and payable on demand.

The defendant having made default in paying the first instalment, the plaintiff sent him a notice demanding payment of the sum of £70, and as that notice was not complied with took out a summons under order 14 for leave to sign judgment in a summary manner.

The defendant filed an affidavit in answer to the summons, in which he stated that he was a curate with a stipend of £150 per annum. In 1902 he desired an advance, and he wrote asking the plaintiff if he would lend him on reasonable terms £50, and offering to give him as security a charge on his furniture and to pay 5 per cent. on the loan. The plaintiff had replied that he did not do business in that way, but that he would advance £50 if the defendant would agree to sign a promissory note for £70, and in that case he would not require the security of the furniture, and the money advanced under the note could be paid off by twelve monthly instalments. The defendant accepted the offer, except that he said he preferred to pay off by three equal quarterly instalments of £23 6s. 8d. The money was advanced and the first two instalments were paid. When the third instalment was nearly due the defendant wrote asking for a further loan. The plaintiff replied that he did not open two accounts with one creditor, but he would advance another £50 on the same terms as before and cancel the first promissory note. This was done, and £50 was advanced under a second promissory note, less the amount due on the first advance. There was also under similar terms a third sum of £50 advanced to the defendant, who had paid off £140 of the £150 thus advanced. The first instalment under the third promissory note not having been paid, the plaintiff issued this writ claiming the whole £70 as there and then due. The defendant averred that

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the interest claimed was at the average rate of £105 per cent. per annum, and on the particular sum which the defendant now claimed it was at the rate of £125 per cent. per annum, and he was advised and believed that such interest was excessive, harsh, and unconscionable, and that he was entitled to relief under the Money-lenders Act, 1900; that he had offered before action to pay the plaintiff the sum of £10 balance of principal and interest at the rate of 5 per cent. per annum on the sums advanced.

The Master made an order giving the plaintiff leave to sign judgment for £10 principal and 5 per cent. on the three loans of £50 each from the dates of such loans, and giving the defendant leave to defend as to the residue of the claim. The plaintiff appealed to Phillimore, J., who gave him time to make a further affidavit. An affidavit was accordingly made by the plaintiff's clerk which referred to certain correspondence between the plaintiff and the defendant. In that correspondence the defendant had stated that the loan was required by him to purchase a plot of land adjoining property he owned at Sheffield, and he had written in more than one letter that it was really immaterial whether the advance was made him or not. Therefore this was not a case of an impecunious man who was in so "tight a corner" that he was obliged to get the money at any price. There were also certain statements alleged to have been made by the defendant in his letters which it was said were not true. Therefore this was not a case for indulgence. The defendant was an educated man, and was not only able to appreciate, but did appreciate, the rate of interest he was paying, and it was submitted that in the circumstances the rate of interest charged was not excessive; nor was the transaction harsh and unconscionable, nor such as a court of equity would relieve against; and that the said transaction did not come within the Money-lenders Act, 1900, the said loan being advanced without any security whatever. It was also denied that the alleged rate of interest charged was as high as the defendant averred it to be.

Phillimore, J., held on these facts that the plaintiff was entitled to sign judgment for the total sum claimed.

The defendant appealed.

J. R. Randolph, for the defendant.—The defendant has here filed an affidavit stating that the interest is excessive, and claiming relief under the Money-lenders Act, 1900. Where in an action by a money-lender an application is made for leave to sign final judgment under order 14, and it is shown that *primâ facie* the interest charged is excessive, the special jurisdiction of the Act of 1900 comes into operation, and the jurisdiction of the master or judge in chambers to deal with the case is ousted, for the case, *ipso facto*, becomes one to which the procedure under order 14 does not apply: *In re A Debtor, Ex parte The Debtor*, 51 W. R. 370, [1903] 1 K. B. 705. Section 1 of the Act shows that the court which is to determine whether relief shall be given is the court which tries the action. [COLLINS, M.R.—Is the defendant satisfied to have the order of the master restored?—Yes; perfectly. COLLINS, M.R.—Then we will hear the plaintiff's counsel.]

G. Wightman Power, for the plaintiff.—The transaction here cannot be described as harsh and unconscionable, because no unfair advantage was taken by the money-lender. The borrower is an educated man, and there is evidence that this is not the first time that he has had dealings with money-lenders. His own affidavit rebuts the presumption that he borrowed the money because he had got into such financial difficulties that he was bound to raise money, no matter how hard the terms were upon which alone the money-lender would advance. There are no merits in the defence, and it is clear upon the affidavits that his full liability was appreciated by the defendant, who knew from the first exactly what he was agreeing to pay for the accommodation. In *Levene* v. *Greenwood*, (1904) 20 Times L. R. 389, it was held that the court had power to reopen a transaction and to say what was fair where the liability of the borrower exceeded what he understood he had undertaken; the transaction being, in the opinion of the judge, harsh and unreasonable. No such considerations arise here. The order of the learned judge should therefore be affirmed.

Randolph was not heard in reply.

COLLINS, M.R.—This is an application by the plaintiff, who is a money-lender, for leave to sign final judgment under order 14 for the amount of his claim against the defendant, who is a clerk in holy orders, and who holds the position of a curate. The master gave the defendant leave to sign final judgment for the balance due in respect of the principal sums actually advanced and interest at the rate of £5 per cent. per annum on the three sums of £50 calculated from the dates of the respective loans and gave the defendant leave to defend as to the rest of the claim. The plaintiff thereupon appealed to the judge, who, holding that there was no defence to the action, gave the plaintiff leave to sign judgment for the full amount claimed.

Now, the question we have to determine is whether the plaintiff in the case is entitled to judgment under order 14. It seems to me that whatever the law might have been before the passing of the Money-lenders Act, 1900, it is impossible now to say that the procedure of order 14 can be made applicable to an action by a money-lender to recover interest on money lent, where the loan appears *primâ facie* to carry an excessive rate of interest. In such a case the money-lender has not an absolute right to recover what the borrower has agreed to pay, but only a right *sub modo* involving an investigation by the proper tribunal for the purpose of seeing if the plaintiff's *primâ facie* right of action is one to which in the particular circumstances effect ought to be given. That is not, I think, a class of case which is intended to be dealt with under order 14. It is clear that in the present case there is *primâ facie* a debt due from the defendant to the plaintiff. The defendant has, however, made an affidavit, which, if true, may establish a defence under the Money-lenders Act, 1900, to the greater part of the claim. The procedure under order 14 is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence. But where in a particular class of case a special jurisdiction is given to determine whether the plaintiff is entitled in the circumstances to recover what is *primâ facie* a debt, it seems to me clear that that class of case is taken out of order 14. Now, section 1, sub-section 1, of the Money-lenders Act, 1900, is as follows: "Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the commencement of this Act . . . and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premiums, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable or is otherwise such that a court of equity would give relief, the court may reopen the transaction and take an account between the money-lender and the person sued, and may,

notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable." Now in the present case the sum of £150 in all was received by the defendant from the plaintiff. The defendant had paid back £140, leaving a balance of principal of £10. The plaintiff claimed in the action £70. The master ordered that if the defendant paid the £10 and interest at the rate of 5 per cent. on all that had been advanced he should be at liberty to defend as to the rest of the claim. The defendant was willing to do that. Phillimore, J., reversed that order and allowed the plaintiff to sign judgment for the amount of the claim. In my opinion, having regard to the allegations contained in the defendant's affidavit, and having regard to the decision of this court in the case of *In re A Debtor*, 51 W. R. 370, [1903] 1 K. B. 705, the case we are now considering comes within the Money-lenders Act, and is taken, therefore, out of the operation of order 14, because the case involves an investigation, which ought to be made, not upon an application under order 14, but before the proper tribunal for the trial of actions which would have the witnesses before it. Therefore the order of the master must be restored. The costs of this application to be the defendant's in any event.

COZENS-HARDY, L.J.—I entirely agree with all that the Master of the Rolls has said. This is not a class of case that can be dealt with under order 14. The Money-lenders Act of 1900 has introduced an entirely new element into every case which falls within its provisions. Where the interest appears on the face of the transaction to be excessive, whether it be £100 per cent. or less, the further inquiry has to be undertaken — namely, whether the interest is so excessive as to make the bargain harsh and unconscionable. That inquiry must be made, not upon an application for summary judgment under order 14, but before a tribunal which has the parties and the witnesses before it. Phillimore, J., at chambers overlooked, it seems to me, what fell from the Master of the Rolls in *In re A Debtor* when he said: "Relief may be given if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges. Before the Act the courts of equity used to give relief in special cases where the parties stood in a particular relation to each other or upon the ground of fraud or undue pressure upon the borrower, but they did not regard excessive interest alone as a ground for setting aside a bargain in the absence of some particular relation between the parties, as, for instance, if the borrower was an expectant heir. I will not say that under this section the interest charged and the other charges made might not be so excessive as to render the bargain harsh and unconscionable, even as against a borrower who was of full age and who stood in no special relation to the lender." The other members of the court concurred in that view. In arriving at this conclusion I desire to express no opinion as to the result of the action; I merely say that the case, for the reasons stated by my lord, is one that in my judgment ought not to be dealt with under order 14.

Appeal allowed.

Solicitors for the plaintiff, *Bennett & Ferris*, for *Bray & Price*, Leicester.

Solicitors for the defendant, *Pritchard, Englefield, & Co.*, for *Elliott & Elliott*, Manchester.

From K. B. D. (In Bkcy.).
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) July 22, 1904.

In re MACOUN. (*a*.)

Bankruptcy—Debt due to a partnership—Partnership dissolved—Appointment of a receiver in partnership action — Assignment of judgment debt — Leave to receiver to issue execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6.

Where a receiver has obtained an assignment of a judgment debt he is entitled to present a bankruptcy petition, as a creditor, against the debtor.

In re Sacker, 37 *W. R.* 204, 22 *Q. B. D.* 179, *explained and distinguished.*

This was an appeal from a receiving order in bankruptcy made by Mr. Registrar Brougham.

In 1901 the debtor, a Mr. J. R. Macoun, was indebted to a firm of stockbrokers for certain Stock Exchange transactions.

On the death, in 1902, of one of the partners in the firm the partnership determined, and the surviving partners in the same year assigned all the partnership assets to a Mr. Levett for him to collect and receive the same and wind up the affairs of the partnership. Notice of this assignment was served upon the debtor.

In the latter part of the same year the assignee Levett obtained judgment against the debtor for £662 16s. 7d. and costs in respect of the debt which the debtor owed to the said firm.

By an order dated the 12th of August, 1903, in the winding up of the partnership, made by Swinfen Eady, J., a Mr. Peat was appointed receiver of the partnership assets.

In October, 1903, Levett assigned to Peat the judgment debt due from the debtor, and on the 13th of November, Peat obtained the leave of the court to issue execution on the judgment.

In January, 1904, a bankruptcy notice was served upon the debtor for this judgment debt. The debtor having failed to comply with this notice, on the 9th of March a bankruptcy petition was presented against him by Peat, the surviving partners of the firm, and the personal representatives of the deceased partner.

At the hearing of the petition an objection was raised by the debtor that the petitioners had no legal right to present the petition on the principle of *In re Sacker*, 37 W. R. 204, 22 Q. B. D. 179. On the objection being overruled and the receiving order made, the debtor appealed.

Hansell and *Holloway*, for the debtor, cited *In re Sacker*, and *Ex parte Harris*, 24 W. R. 851, 2 Ch. D. 423. [By VAUGHAN WILLIAMS, L.J.—*Ex parte Culley*, 27 W. R. 28, 9 Ch. D. 307.]

Muir Mackenzie, for the creditors.

VAUGHAN WILLIAMS, L.J. — I think that the appeal fails. There is undoubtedly a good deal in Lord Esher's judgment in *In re Sacker* which does suggest—I think I may go further and say which does positively assert—that in the hypothetical case which he puts there of a receiver being able to bring an action at law in his own name, he would not be entitled to become a petitioning creditor, because he does not come within the description of a petitioning creditor under the words of section 6 of the Bankruptcy Act, 1883. I think those words go very far to cover the proposition for which counsel for the debtor contended; but it was not really necessary for the case which was before the Court of Appeal that this question should have been determined—that is, the

(*a*.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

question whether a receiver, having a title to sue at law, could be a good petitioning creditor. It is plain from the judgments, I think, of each of the Lords Justices that in that case the position of things was such that it was perfectly impossible for the receiver to bring an action to recover the debt either at law or in equity; and therefore I think we must treat these observations of Lord Esher as *obiter*, and one can only look at the case as having decided that a receiver who could not sue could not be by himself a good petitioning creditor. Looking at the judgment of Fry, L.J., I observe that he begins by saying that in that case the receiver could not have maintained an action either at law or equity, and later on he deals with exceptional cases in which a receiver could maintain such an action. One of the cases which he gives is where the receiver is the holder of a bill of exchange, and the other is where he is in possession of chattels, and the chattels are wrongfully detained from him. In these circumstances, it seems to me that we ought not to hold the case of *In re Sacker* to be an authority for the proposition that a receiver cannot be a good petitioning creditor even though the state of things is such that he could maintain an action at law. It is plain that Fry, L.J., thought that he could; and Lopes, L.J., seems to have taken the same view—that is, the view that if the receiver were the holder of a bill of exchange, he could be a good petitioning creditor. In the present case the receiver happens to be the assignee of a judgment, and I think that being the assignee of a judgment he can be a good petitioning creditor even though when the money is recovered it is recovered for the purpose of enabling the Court of Chancery to deal with it. For these reasons I think the appeal must be dismissed.

ROMER, L.J.—I agree,

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors, *J. K. Torkington*; *Willis & Willis.*

High Court of Justice.

Chan. Div.
Farwell, J. } Oct. 28.

ATTORNEY-GENERAL *v.* METROPOLITAN ELECTRIC SUPPLY CO. (LIMITED). (*a*)

Electric lighting—Company—Supplying electric energy outside statutory area — Injunction — Metropolitan Electric Lighting Act, 1889 (52 & 53 *Vict. c. cxcvi*), *ss.* 3, 5—*Metropolitan Electric Supply Co. Act,* 1898 (61 & 62 *Vict c. ccxxxv.*), *ss.* 2, 16.

A company obtained statutory powers to supply electrical energy within three statutory areas in the Administrative County of London. The company subsequently obtained statutory authority to set up a generating station at a place outside those areas and outside the County of London, and to supply their areas from the new generating station. The company used their new generating station for the purpose of supplying customers outside their statutory area.

Held, that the meaning of the Acts was only to enable the company to substitute a generating station outside, for the generating station within the area, and that the company were not entitled to supply electric energy outside their statutory area.

(*a*.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Action.

This was an action by the Attorney-General to restrain the defendants, the Metropolitan Electric Supply Co., from supplying electrical energy for consumption within the urban district of Willesden, otherwise than under the authority of Parliament or under a licence by the Board of Trade.

The Metropolitan Electric Lighting Act, 1889, provides:

Section 3.—The undertakers for the purpose of this Act are the Metropolitan Electric Supply Co. (Limited), being a company registered under the Companies Acts, 1862 to 1886, with limited liability. . . . The undertakers shall not purchase or acquire the undertaking of or associate themselves with any other company or person supplying energy under any licence, provisional order or special Act, within the Administrative County of London unless the undertakers are authorized by Parliament to do so.

Section 5.—The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament or under a licence granted by the Board of Trade under the principal Act.

The Metropolitan Electric Supply Co. Act, 1898, provides:

Section 2.—It shall be lawful for the company to hold and use as a station for generating electric current or electrical energy certain lands recently acquired by them in the parishes of Willesden . . . and to establish and work on these lands plant for generating electrical energy and for other purposes incidental to or connected with their undertaking or business.

Section 16.—It shall be lawful for the company to use any of their cables or wires and any mains or cables connected therewith for the transmission of electric current or electric energy from their works on the said lands at Willesden and Acton to the several distributing stations of the company in their Paddington, Marylebone, and Mid-London areas defined by the several provisional orders hereinbefore mentioned . . . and to use the generating station on the said lands for the purpose of supplying electric current or electrical energy within the several areas or districts over which the company have now powers of supply or over which they may hereafter have such powers under any special Act or provisional order.

Upjohn, K.C., and *J. W. Greig*, for the plaintiffs.

Cripps, K.C., *Jenkins, K.C.*, and *Sargant*, for the defendants.

FARWELL, J., in giving judgment, said: This is an action by the Attorney-General, in which he complains that the defendants, the Metropolitan Electric Supply Co. (Limited), are contravening the negative prohibition in the Act of Parliament and the orders confirmed by Act of Parliament under which their undertakings are held, and seeks for an injunction to restrain them. Of course the Attorney-General can maintain such an action irrespective of the fact that the Willesden Urban District Council, who join as relators for the purpose of costs, would have no right of action themselves.

Now, the question really turns on the construction of two Acts of Parliament. I should say that the defendants have three statutory areas, all within the Administrative County of London. The wording of the negative clauses is practically identical in all three, and I propose only to refer to the Acts of Parliament. The defendants have recently found that they were unable conveniently to generate sufficient electricity

in their several areas for the supply of their customers within those areas. They have, accordingly, obtained statutory authority to set up a generating station at Willesden, which is without those three areas, and also without the Administrative County of London, and they have also acquired statutory authority to supply their areas from that generating station. That being the state of circumstances, I now turn to the Acts of Parliament. The first is dated the 26th of August, 1889. I should mention that the defendant company is not formed under any private Act of Parliament, but is a limited company under the Act of 1862 and the following Acts, and it is not suggested that there is anything *ultrà vires* the powers of its memorandum of association, but for the purpose of the argument in this case it is in very much the same position as an individual would be if he chose to do this as a private speculation.

First of all the Act of 1889 defines "the undertakers" as "the Metropolitan Electric Supply Co. (Limited), being a company registered under the Companies Acts, 1862 to 1886, with limited liability and a capital of £500,000." Before I go through the two or three sections to which it is necessary to refer, I should perhaps say that, having regard to the arguments that I have heard, I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act of Parliament itself. As it was put in *Heydon's case*, 3 Rep. 7*a*, which Lord Halsbury cited in *Eastman Photographic Co.* v. *Comptroller of Patents*, 47 W. R. 152, [1898] A. C. 571, "We are to see what was the law before the Act was passed and what was the mischief or defect for which the law had not provided; what remedy Parliament appointed and the reason for the remedy." That is a very general way of stating it, but no doubt one is entitled to put one's self in the position in which the Legislature was as at the time the Act was passed in order to see what was the state of knowledge as far as all the circumstances brought before the Legislature are concerned, for the purpose of seeing what it was the Legislature was aiming at. I have been told by counsel on both sides that the object of Parliament was first of all to allot certain districts which should be dealt with by certain companies, and as appears from Major Marindin's report to the Board of Trade, to which both parties have agreed to refer, the idea in the London district, at any rate, was that there should be two companies because there are two alternative systems of supply, and one might use one and the other the other, but there could not be more than two in any one area. Competition no doubt was intended to be limited, so that each company should have its own area or so as each of the two companies should have their own area to themselves. But further than that—and I do not think counsel for the defendants denied it—I think also that the Legislature took into consideration the financial condition of the company, to which it was giving statutory authority. I think it is only right to infer that they would do so, for it is obvious with regard to the company asking for statutory powers, to break up streets, to interfere in the way that one sees only too often with the traffic of the highway, and to carry on the various works which necessarily interfere a good deal with the general use by the public of what is public property, that the Legislature would naturally take pains to see that the company which they do so authorize to interfere has money enough not only to carry out its work but also to continue to carry on the undertaking when it has once established it. For those purposes it seems to me that the Act of Parliament has inserted in it various clauses with reference to the solvency of the company, and its accounts and so on, showing that that is the true view. Bearing in mind that those two objects are two of the objects which Parliament had in view, I find a provision at the end of section 3 of the Act, to which I will refer. It is "The undertakers shall not purchase or acquire the undertaking of or associate themselves with any other company or person supplying energy under any licence, provisional order, or special Act within the Administrative County of London unless the undertakers are authorized by Parliament to do so." Having regard to what I have just said as to the practice of allowing two companies to compete within each area in the Administrative County of London and not outside, I think that it is exceedingly probable that that section was put in having that in view, and that it is probable that it never was contemplated that this company or any other company would be the least likely to want to go outside the administrative county. However that may be, I can only deal with the words as I find them, and that, no doubt, does extend only to companies and so on within the administrative county, but it also is limited to the purchase or acquisition of an existing undertaking, and it is sufficient for me to say that that section has no application to the case before me.

Then comes the fifth section, which is the material section in the present case, and it is in terms both general and explicit. The defendants are driven to ask me to put a limitation upon the clear negative words—"The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament or under a licence granted by the Board of Trade." The undertakers are in this case supplying energy to the London and North-Western Railway Co. at Willesden, which is outside their area. I am asked to say, first of all, that "the undertakers" cannot mean simply the Metropolitan Electric Supply Co. for all time. To that extent, although it is not necessary for me to determine it now, I should be disposed to agree. I do not suppose it was intended to say that the Metropolitan Electric Supply Co. shall never do this, whatever happens, but the qualification, if any, which is necessary is: "The undertakers, so long as they remain undertakers in the sense that they are running the undertaking." That qualification I am willing to accept, but it does not help the defendants. The qualification they ask me to put in is: "Shall not use any of the powers given to them by the Act for the purposes of this undertaking." I find it absolutely impossible to insert any such words at all. Counsel put it tersely as "Shall not *qua* undertakers." I do not know that the use of the Latin word *qua* assists him much.

It is in effect when translated at length into English, "shall not use any of the powers given to them as undertakers." I may say that I see no ground whatever for so limiting the words, nor do I feel justified in doing anything of that sort. Even if there were any possibility of limiting them so as to make it not inconsistent with section 3—as to which I express no opinion—it would not help the defendants in the present case because the circumstances have not arisen; they have not "acquired or purchased the undertaking of," and so on. They are simply themselves using their new generating station for the purpose of supplying customers outside their statutory area. I think that counsel for the defendants had not the courage to ask me to insert the words "within the Administrative County of London," nor do I see how it would be possible.

There is a further point to which I adverted

during the argument, and that is that the proviso immediately following these negative words excludes any idea of any limitations on the use of the powers, for the proviso is "where the undertakers were on the 20th of May, 1889"—which is months before the Act was passed—"supplying or under any binding agreement to supply energy to any premises beyond the area of supply, they might continue to do so for six months"—or at any rate for a limited period. If this was confined to a general prohibition, that proviso is absolutely unnecessary. It is quite plain that the undertakers before the passing of the Act were not using any of the powers of the Act, for there were none to use; and if they were supplying energy beyond the limits of supply, they were doing it by virtue of some rights or powers of their own as a limited company, and not as "undertakers" under this Act. The proviso is absolutely inconsistent with any such limitation as I am asked to insert, and I find myself wholly unable to insert it.

Then, that being the negative clause, one finds, as one would expect, a corresponding affirmative clause—namely, section 9, which provides: "Subject to the provisions of this Act the undertakers may supply energy within the area of supply," and so on.

I do not think there is any other section in this particular Act to which it is necessary to refer, and I pass on to the Act of 1898. It is to be remembered that the argument which I have heard deals with each area as intended to be a self-sufficing area in which there should be a statutory company, generating its own electricity and supplying it to its customers within its own area.

The preamble of the Act of 1898 contains this recital: "And whereas the demand for the supply of electric current within the areas supplied and authorized to be supplied by the company has increased, and is increasing very rapidly, and in order to enable the company to meet this demand the company have found it practically impossible to provide adequate station accommodation within their then said areas." See now what Parliament is told. The Legislature has thought it proper to have a number of small electric domains complete within themselves, and Parliament is told that that particular system in the present case will not work because the supply and demand have increased so rapidly that their generating stations are insufficient to supply the needs, and for obvious reasons in densely populated districts you cannot put up a very large generating station or multiply generating stations without the risk of continued injunctions against nuisance. They accordingly applied to Parliament to relax its policy with regard to this—because they cannot undertake to supply their own customers within their statutory areas from generating stations within those areas—and to allow them to put their generating stations outside those areas. That is the whole purview of the statute. To my mind it is as plain as possible. "Whereas the company in order to provide for the demands upon them," that is, the demands referred to in the previous sentence from their own customers within their own areas, "have acquired a piece of land in the parishes of Willesden and Acton, and are engaged in constructing a large electrical generating station and works thereon, on which they have expended and are in course of expending large sums of money. And whereas it will conduce to the convenience of those who use the electric current in the said several areas of supply of the company that the company should be empowered to supply from the said electrical generating station and works electric current to their distributing stations within the several areas of supply hereinbefore mentioned, and for that purpose to lay down," &c. The whole thing on the preamble is limited to the convenience and the benefit of the customers within the statutory areas, and the whole Act is a mere enabling of the company to substitute a generating station outside for the generating station within the area. Section 2 is in general terms. I express no opinion about what may happen if the Metropolitan Electric Supply Co. should eventually deprive itself of or give up its three statutory areas. What this section will mean then somebody else may construe when the event happens. I pass it by with the observation that it is simply an authority to hold and to use as a station for generating purposes a certain piece of land, and to establish and work on that land plant for generating electrical energy and for other purposes incidental to their undertaking or business. That does not in terms or by implication authorize the supply of anything from that station, it simply authorizes the manufacture and the generation of power on that spot. I will take the 16th section next, which enables them to supply. It is plain to my mind, and it is consistent with the preamble, that the supply is only to the several areas or districts over which the company have now powers of supply, or over which they may hereafter have such powers under any special Act or provisional order. The argument is that the words "and elsewhere wherever they may think fit to use it as a limited company," or words to that effect, should be added. But it appears to me to be absolutely impossible that I should do anything of that sort, or that I should hold that there is anything in this Act which impliedly authorized their doing anything of that sort in contravention of the express provision of section 5 of the Act of 1889. But it does not stop there, because, if I go back to sections 12 and 13, I find there is an express saving: "Nothing in this Act contained is to be deemed to release the company from any of the duties, liabilities, or conditions." Counsel for the defendants admitted that the negative section was a condition "imposed upon them." One is the lighting order containing words exactly to the same effect, and the other is another lighing order which also contains words to the like effect. On all these grounds it appears to me that the company are acting in direct contravention of the Act of Parliament in doing that which they are now proposing to do. I therefore propose to grant an injunction as asked. I propose to suspend it for a little time so as not to inconvenience the London and North-Western Railway Co. by suddenly depriving them of an electric supply.

Solicitors, *W. G. Greig; Barlow & Barlow.*

Chan. Div. }
Buckley, J. } July 13, 14, 1904.

In re IRWIN'S SETTLEMENT. (a.)

Settlement—Equitable estate in realty—Grant without words of limitation—Estate for life or in fee simple—Assignment to trustees.

An equitable estate of inheritance in real property cannot be passed by grant or assignment without proper words of limitation, and the intention of the grantor or assignor to pass it, even although manifest, is not sufficient, except in two cases—(1) where the grant or assignment is expressed to be for the same estate as that for which other property has been granted or assigned,

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

where this latter grant or assignment has been in terms absolute; and (2) where the grant or assignment is expressed to be for the whole estate which the grantor has in the property.

A. being possessed of an equity of redemption in certain freeholds and of the right to have other freeholds conveyed to him which he had purchased, by post-nuptial settlement assigned all these freeholds to trustees, without using any words of limitation, upon the usual trusts for sale and investment, and to hold the proceeds for himself, his wife, and children, with the usual provisions.

Held, that the trustees only took an estate for their joint lives and the life of the survivor.

In re Hudson, 72 *L. T.* 692, *followed.*

In re Tringham, 20 *Times L. R.* 657, *distinguished.*

By indenture of post-nupital settlement made the 25th of November, 1884, between William Charles Irwin of the own part, and Thomas Boucher Irwin and William Charles Parkes, who, and their executors or administrators, were thereinafter designated "the trustees," of the other part, after reciting that the said W. C. Irwin was absolutely possessed of and entitled to the freehold hereditaments and premises mentioned in the first schedule thereto, and also to the household furniture, plate, goods, chattels, and effects mentioned in the second schedule thereto, "which said freehold property, household furniture, and effects he is desirous to settle in manner hereinafter provided in favour of his wife, Ellen Irwin, and their present or any future children," W. C. Irwin did thereby "assign the said freeholds and household effects unto the trustees to hold the same or the proceeds thereof upon the trusts and for the intents and purposes hereinafter declared (that is to say) upon trust for the said trustees to stand possessed of and retain the said freeholds and household effects so long as they shall think desirable, and at their absolute discretion to sell all or any part of the same" as mentioned, and to invest the moneys arising from the sale as mentioned, and during the joint lives of the settlor and Ellen, his wife, to pay the interest and annual produce of the said shares or trust moneys to Ellen Irwin, without power of anticipation, and for her separate use, and after her death to pay the same to the settlor for his life, or until the events mentioned, and, after the decease of the survivor of the settlor's wife and himself, for their children at twenty-one and daughters at twenty-one or marriage.

The settlement contained provisions for the application of the income of expectant shares of infants for their maintenance and education, and for the investment and accumulation of the surplus income. And in case of failure of such children the trust funds were to be held for the next-of-kin of the settlor. The settlement also contained the usual provision for the appointment of new trustees in case "the said trustees or trustee" died, or desired to be discharged or became incapable.

Among the freeholds mentioned in the first schedule to the settlement were nine houses which were then mortgaged, and to the equity of redemption of which the settlor was entitled in fee simple, and also certain plots of land which he had contracted to purchase, but which had not been conveyed to him.

There were nine children of the marriage. Mrs. Irwin died in 1902, and Mr. Irwin, the settlor, died in September, 1903.

One of the daughters took out this summons making the surviving trustee of the settlement, the executors of Mr. Irwin's will, the heir-at-law, and other of the children, defendants, asking (among other things) whether, according to the true construction of the settlement, the freehold hereditaments, assured thereby to the trustees thereof, passed to them for an estate in fee simple or only for an estate for the joint lives of the trustees and the life of the survivor, or for what other estate or interest, and whether the surviving trustee could sell the hereditaments in fee simple or for what estate or interest.

J. M. Stone, for the plaintiff.—The settlor had only an equitable fee simple estate in the houses mortgaged and in the plots contracted to be purchased. This equitable fee simple passed to his trustees by the settlement, and was held by them in trust for the children of the marriage in fee simple. It is not necessary to use words of limitation to pass an estate of inheritance in equitable property. The intention of the settlor is to be regarded, and if that intention is apparent upon the instrument that is sufficient: Co. Litt., by Butler, fo. 290*b*, note *h*. xvi.; Gilbert on Uses and Trusts (3rd ed.), p. 143; Sandars on Uses and Trusts (5th ed.), p. 280; Hayes Conv. (5th ed.), vol. 1, p. 91; *Garde* v. *Garde*, 3 Dru. & War. 435; *Pugh* v. *Drew*, 17 W. R. 988; and *In re Tringham*, decided quite lately by Joyce, J. (20 Times L. R. 657).

He also referred to Lewin on Trusts (10th ed.), p. 117; Elphinstone on Interpretation of Deeds, r. 104, p. 276; *Holliday* v. *Overton*, 15 Beav. 480; *Lucas* v. *Brandreth*, 28 Beav. 274; *Tatham* v. *Vernon*, 29 Beav. 604; *Meyler* v. *Meyler*, 11 L. R. Ir. Ch. 522; *Middleton* v. *Barker*, 29 L. T. 643, 22 W. R. Dig. 259; *Dearburg* v. *Letchford*, 72 L. T. 489, 43 W. R. Dig. 58; *In re Hudson*, 72 L. T. 982; and *In re Whiston's Estate*, 42 W. R. 327, [1894] 1 Ch. 641.

Tylee, for the heir-at-law.—The earlier authorities are no longer law. *In re Hudson* is precisely in point, and North, J., decided there that the trustees only took an estate for life. That case is a binding authority upon the court. *Garde* v. *Garde* and *Pugh* v. *Drew* were cases where the absence of words of limitation was supplied by a reference to a previous absolute grant. All the other modern authorities show that equity follows the law in this matter, and that an equitable estate in fee simple cannot be granted without proper words of limitation.

Whinney, for Kathleen Hitchcock, one of the daughters.—The intention of the settlor to pass an estate in fee simple to his trustees is clear. He gives his trustees power to sell the property, and he could not have intended them to sell merely their own life estates. He provides for the death of his trustees, which shows that he thought he had given them an estate lasting after their deaths. The cases of *Holliday* v. *Overton*, *Lucas* v. *Brandreth*, *Tatham* v. *Vernon*, and *Middleton* v. *Barker* do not apply to the present case, because in those cases there was an express gift to the trustees "and their heirs," which showed that the omission of words of limitation in the gifts of the beneficial interests in those cases was intentional. I rely on *In re Tringham*.

BUCKLEY, J.—If there is to be any relaxation of the rule as to the necessity of the use of words of limitation in passing real estate, I think that that relaxation must be made by the Court of Appeal, and not by myself. I am bound by the authorities to decide in a way in which, if the matter were *res integra*, I do not hesitate to say that I should not decide. W. C. Irwin, the settlor, was at the date of the deed of settlement of November, 1884, entitled to certain lands for an equitable estate in fee simple and other lands for a legal estate in fee simple. With regard to the former I will, before considering the contents of the deed of settlement, refer shortly to the authorities which have been cited to me in order of date. In *Holliday* v. *Overton* there were no words of limitation in the gift to the trustee. *Lucas* v.

Brandreth is in its essential particulars a repetition of *Holliday* v. *Overton*. *Tatham* v. *Vernon* is the same as the previous cases, except that there was a gift over in default of there being children or issue. *In re Whiston's Settlement* was decided by Chitty, J., perhaps as great a master of this branch of the law as any judge of recent times. There the settlor, being entitled to an equity of redemption, assured it to trustees and their heirs upon trust for his wife and himself for life, and then for their children, without words of limitation. Chitty, J., says: "If this case had to be decided according to the doctrine of legal limitations it is plain that these children would only take life interests; but the limitations are in fact only of an equitable interest, and on this point some of the older text writers, such as Cruise and Hayes, seem to have been of opinion that equity regarded the intention of the settlor in these cases, and did not follow the law; so that the court had some considerable latitude in the construction of equitable limitations like the present; but the more modern text writers seem to have rather come round in their opinions, and in Elphinstone on the Interpretation of Deeds it is stated: 'An equitable limitation by way of trust executed has the same construction as a legal limitation.' In Lewin on Trusts it is laid down that if an estate be conveyed by deed to the use of a trustee and his heirs in trust for the settlor for life with remainder in trust for his children simply, without the word heirs, the children by analogy to legal limitations take an estate for life only." Chitty, J., then comes to a conclusion in accordance with the rule laid down in Elphinstone on the Interpretation of Deeds and approves of the Irish case of *Meyler* v. *Meyler*, and of the views expressed in *Lucas* v. *Brandreth* and Lewin on Trusts. He also says: "Some reliance was placed in the course of the argument on the recital that the settlor was desirous of settling all his freehold and personal estate for the benefit of his children, and it was said that this would distinguish the case from the authorities in Beavan. In my opinion that recital is not sufficient to carry the fee to the children; besides, the settlor, after having so far benefited them by giving them a life interest, might have intended the reversion in fee to result to himself." That is a passage which I think will become very material when I come to read the provisions of the deed before me.

Those four cases have no express application to the case I have to decide, because in all of them there were words of limitation in the gift to the trustees. But those four cases are relevant to this extent, that Chitty, J., said the modern rule, and not the rule of the older text writers, is now the rule that ought to be applied—that is to say, this court is not at liberty to regard the intention of the settlor in such cases, instead of following the law.

In *Dearberg* v. *Letchford*, Letchford, the son, assigned to Letchford, the father, absolutely all his estate in the property devised by a certain will; no words of limitation were inserted; Wright, J., held that the fee simple in an equitable estate did not pass, and said: "It seems to me of great importance not to introduce any uncertainty into the construction of conveyances and instruments of that kind; and that if any doctrine is established, no exception should be allowed from it without the greatest reluctance."

The next decision is that of North, J., in *In re Hudson*. That is a decision of a judge of co-ordinate jurisdiction with myself, and I think that I ought to follow it. If there is anything wrong in it, it is for the Court of Appeal, and not for me, to determine the contrary. It that case the settlor assigned his share and interest under a will to two persons to hold to them, their executors, administrators, and assigns, without words of limitation. It was held that the assignees did not take an equitable estate to which the settlor was entitled under the will in fee simple. The learned judge had no doubt, and I may say that I have no doubt in the case before me, that the settlor meant to pass an absolute interest, but on the face of the deed he had not done it. "Although I have no doubt," said North, J., "that the settlor intended his whole interest to pass, I think that intention cannot have effect," and later on he says—and this is the dominant sentence of the judgment—"If there were any words which showed that the trustees were to take all the share and interest which the testator had in the same way as the testator had it, that might be sufficient; but I cannot find such words." And he goes on to say that although the assignment was of his share and interest under the will, those words were merely words of description.

There is only one other case I need refer to, that of *Pugh* v. *Drew*. There leaseholds were disposed of for an absolute interest to A. and B., and freeholds were disposed of upon the same trusts as were declared concerning the premises described in the deed disposing of the leaseholds, or as near thereto as the difference of the estates would admit. James, V.C., held that the freeholds were disposed of in fee simple, and indicates in his judgment that he did so upon the ground that you can by reference convey freeholds for an absolute interest without words of limitation.

Now, the result of these decisions, as it appears to me, is this: An equitable estate in fee simple may be passed without words of limitation, if the assurance is made by reference to other words which show that the estate granted is to be held for an absolute interest and estate, as, for instance, that it is to be held upon the same trusts as leaseholds which have been assigned to A. B., his executors, administrators, and assigns, or as near as the rules of law and equity will permit. That will do. Or such an estate in fee simple may be passed without words of limitation if words are used which express that the grantee is to have all the estate and interest which the grantor had. Except in those two cases I am not aware of any decision that an equitable estate in fee simple can be passed without words of limitation.

Now the relevant provisions in the deed before me are these: [His lordship then read the appointment of trustees, the recital of the settlor's ownership and desire to settle the freeholds and effects, the assignment, and the trust for sale, and continued:] I do not attach importance to the use of the word "assign." The words "grant" or "convey" or "assure" are the proper words to use, no doubt. But an assignment to trustees and their heirs would pass the fee simple. But here we have no words of limitation, and there is so far nothing to assist the matter except that the settlor recites that he is absolutely possessed of the freeholds, and that he is desirous to settle them in manner thereinafter provided. What he does, therefore, is to create some estate or other in that to which he is equitably entitled in fee, and he does it by words which, by reason of the absence of limitation, create only a life interest in the trustees. Then he goes on with the trust for sale and conversion, and there are subsequently beneficial interests created. Now, I agree that when you read the provisions of this deed you cannot doubt that the settlor thought that he had sufficiently passed to his trustees the fee simple, and not merely an estate for their joint lives and the life of the survivor. But if he has not passed the fee, I cannot pass it for him. There are no words of limitation in favour of the trustees, and their omission brings the case within *Dearberg* v. *Letchford* and the authorities upon which that decision

was based. Then are there any referential words by which the settlor gives his freeholds upon the same trusts as some other property given absolutely, or by which he gives the interest in the freeholds for his whole estate and interest therein? There are not. The settlor says that he has got an absolute interest and is going to settle it in manner thereinafter provided, and he simply assigns that in which he had the equitable fee simple to trustees, without words of limitation, and thus creates only an estate for life. In addition I need only mention a very recent decision of Joyce, J. (*In re Tringham*). In that case there were words of limitation in the gift to the trustees, although none in the subsequent trusts, and the decision was based on that circumstance.

I come, with regret, to the conclusion that by reason of the absence of words of limitation there passed to the trustees merely an estate for the lives of the trustees and the life of the survivor—that is, for the lives of Thomas Boucher Irwin and William Charles Parkes, and the survivor of them.

Solicitors, *Stones, Morris, & Stone; Watson, Sons, & Room.*

Chan. Div.
Warrington, J. } Nov. 23.

WOODALL *v.* CLIFTON. (*a.*)

Landlord and tenant—Covenant running with land—Option of purchasing fee simple—Executory interest—Rule against perpetuities.

Lands were demised to W. for ninety-nine years at a yearly rent, with an option in favour of W., his heirs or assigns, of purchasing the fee simple thereof at any time during the term. Other lands were similarly demised to W., with a similar option in favour of W., his executors, administrators, and assigns.

Held, that whether the options were or were not covenants running with the land, they created an interest in land, which interest did not at the time of its creation necessarily vest within the limits allowed by the rule against perpetuities, and consequently were void. The dicta *in* Muller *v.* Trafford, 49 *W. R.* 132, [1901] 1 *Ch.* 54, *relating to covenants for perpetual renewal, distinguished.*

By an indenture dated the 6th of July, 1867, lands were demised by S. to W., his executors, administrators, and assigns, for ninety-nine years at the yearly rent of £142, subject to the proviso that W., "his heirs or assigns," should have an option of purchasing the fee simple of the lands at any time during the term.

By an indenture dated the 14th of July, 1869, other lands were demised by S. to W., his executors, administrators, and assigns, for ninety-nine years at the yearly rent of £112 1s., subject to the proviso that W., "his executors, administrators, and assigns," should have the option of purchasing the fee simple of the lands at any time during the term.

The lands comprised in both leases were now vested in the plaintiff, who claimed that, as assignee of the terms, he was entitled to the benefit of both options. Subject to these leases and options, the reversion in fee of the lands was vested in the defendants as trustees of a settlement, dated the 3rd of June, 1890, upon trusts still subsisting.

The plaintiff gave notice to the defendants of his intention to purchase the fee. The defendants refused to sell on the ground that the options in both leases infringed the rule against perpetuities, and that the first option was given to W., his heirs and assigns, and was not annexed to the lease. The plaintiff claimed a declaration that the options were valid and subsisting, and specific performance, or, in the alternative, damages.

Cave, K.C., and *Marigold*, for the plaintiff.

Rowden, K.C., and *Beaumont*, for the defendant.

WARRINGTON, J., stated the facts, and gave judgment to the following effect: The rule against perpetuities fixes a limit of time, now accepted as a life or lives in being and twenty-one years afterwards, within which every executory limitation, not being a limitation subject to an estate tail, must necessarily vest, if it vests at all, on pain of being otherwise void. Does this option amount to an executory limitation within the meaning of that rule?

The provision in the lease by which the option is granted amounts to an agreement or covenant on the part of the then owner to grant the fee simple to another person at a period of time which undoubtedly may infringe the rule against perpetuities. If the grant creates an interest in land, it seems to me that the effect of it is to render it something more than a mere covenant, and to create an interest in land which does not vest at the moment at which it is granted, but requires for its vesting the happening of another event—namely, the exercise of the option and the payment of the purchase-money, which event may happen beyond the limit. For the moment I shall not deal with any question as to whether that provision runs with the land or not. Taking that provision by itself, it is impossible to avoid the conclusion that it does create an estate or interest in land, and, if it does, it is one which is obnoxious to the rule against perpetuity, on the authority of *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 321, 620, 20 Ch. D. 652. In that case, the company conveyed land to Powell in fee simple, and the deed contained a covenant that Powell, his heirs or assigns, would at any time thereafter, on six months' notice and the receipt of £100, re-convey the land to the company. Comparing that covenant with the present one, they are for all practical purposes identical. In that case the defendant was not the covenantor, nor directly bound by the covenant. He was the then owner of the land, but, notwithstanding that fact, he was said to have bought with notice of the covenant. Kay, J., decided that the defendant was bound by the covenant in equity, and that it did not create an interest in land, and that the case was therefore one of contract. It is plain that if Kay, J., had thought he was dealing, not with a mere case of contract, but with a case where the effect of the contract was to create an estate or interest in land, his decision would have been the other way. The Court of Appeal took a different line from Kay, J. All the judges in that court held that the defendant was not bound by the contract in question—not at law, because the covenant could not run with the land; and not in equity, because it was negative, and therefore not falling within the principle of *Tulk* v. *Moxhay*, 2 Ph. 774. That might have been an end of the case, but the court, and especially Jessel, M.R., thought it right to deal with the question whether, assuming that this covenant was binding on the defendant, it did or did not create an interest in land, and was therefore obnoxious to the rule against perpetuities. They concluded that it did create an interest in land. There is a remarkable interlocutory observation of the Master of the Rolls which shows plainly how his mind worked in arriving at the conclusion (20 Ch. D., at p. 579): "What is the distinction between

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

this case and a conditional limitation that, if A. B. pays £100 at any time, the estate shall vest in him?" That question was not answered. Having that before him, he puts the point in this way at p. 580: "If, then, the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not, depends upon this, as it appears to me, does or does not the covenant give an interest in land? If it is a bare or mere personal contract it is, of course, not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into a contract, but is only a purchaser from Powell, who did. If it is a mere personal contract, it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land, it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for re-purchase is not different in its nature. A person exercising the option has to do two things. He has to give notice of his intention to purchase and to pay the purchase-money; but so far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in land." He further decided that the rule against perpetuities applied to the interest so created. The other Lords Justices took the same view.

The only possible ground on which the plaintiff can escape from the decision in *Gomm's case* is that this covenant ought to be treated as an exception to the rule against perpetuities. The plaintiff's contention is that in leases, covenants to renew and even to renew in perpetuity are held valid, although the interest which they create may be one which arises outside the limits of the rule against perpetuities; that this covenant, although it is a covenant to convey the fee simple, is for all practical purposes nothing more than a covenant for perpetual renewal. Covenants to renew are undoubtedly valid. Are they an exception to the general rule, and is there some ground on which that exception is founded which would apply to the present case? There is admittedly no authority on that point. The authority which has been most relied on in order to induce me to say that the validity of those covenants depends on a ground applicable to the present case is the case of *Muller* v. *Trafford*, 49 W. R. 132, [1901] 1 Ch. 54—not the decision, because the decision in that case was against the plaintiff seeking to enforce the covenant—but the *dicta* of Farwell, J., in dealing with one part of the case. These *dicta* amount to this, that the covenant to renew runs with the land, and, that that being so, the doctrine of perpetuities has no application to it. I will assume for the present purpose (although I do not wish to decide it, because further questions may arise upon which I prefer to reserve my opinion) that this covenant, being contained in a lease, does run with the land, as being a covenant touching and concerning the thing demised. Even then I do not see why that fact takes it out of the mischief that it infringes the rule against perpetuities. I should have thought, on the contrary, that it was just that fact which did create an interest in land; that, if it was a mere personal and collateral covenant, it might well have been argued that it had no such effect; and it will be noticed that for the purposes of his judgment in *Gomm's case*, the Master of the Rolls assumed for the purpose of his decision on that part of it that the covenant bound the defendant—that is to say, that it did either run with the land, or that the defendant was in such a position that, having notice of it, he was bound by it. Now Farwell, J., was dealing in the passages which have been cited to me only with a covenant to renew (I think that is important to bear in mind)—that is to say, with a covenant which was recognized as being one of the exceptions to the general rule. He says ([1901] 1 Ch., at p. 61), "I will assume that this is a covenant for renewal running with the land; it is then, in my opinion, free from any taint of perpetuity, because it is annexed to the land." Then he goes on to say, "It must bind the land from its inception, because it would otherwise be an executory interest in land arising *in futuro*, and therefore obnoxious to the rule against perpetuity." When he says "It must," I suppose he means that it must be a condition of its enforceability that it shall bind the land from its inception. Then he says: "Perpetuity has no application to covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessee and lessor, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted. It is a term subject to something and with the benefit of something. It is a reversion subject to something and with the benefit of something, and those two something are annexed to and form part of the land from the beginning of the term in such a sense that the doctrine of perpetuity has no application." I think he means that, in the case before him, the interest created is so annexed to the land that it vests in the lessee in the first instance.

I think it is impossible to apply that to the present case. I think I must treat covenants to renew as exceptions to the general rule—exceptions for which it is very difficult to find a logical justification, but which have been probably recognized, because they were in existence long before the rule had been developed. I must hold, therefore, that there is nothing, in the attempts which have been made to logically justify that exception, that would bind me to apply it in the present case, even on the assumption that the covenant runs with the land. It appears to me that it is the very fact that the covenant runs with the land which makes it an interest in land, and an interest which is not vested in the lessees at the moment of the lease, but one which comes into existence only on the happening of a future event—namely, the exercise of the option and the payment of the purchase-money.

I must make a declaration that the two options to purchase are not valid and subsisting. Then, with that declaration, if the plaintiff desires it, the action will have to go to trial on the question whether the defendants are liable in damages or not.

With regard to Mr. Cave's contention that he is suing on the contract, and that the rule against perpetuities is not part of the law of contract, I had better say that I agree with him to this extent, that it may be (again I do not express any definite opinion about it) that he can sue the defendant on contract in the sense of recovering damages, but I am decidedly of opinion that he cannot enforce specific performance.

Solicitors for the plaintiff, *Stow, Preston, & Lyttelton.*

Solicitors for the defendant, *Fladgate & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Phillimore, JJ.) July 8, 15, 1904.

SYKES v. BARRACLOUGH. (a.)

Coal mines—Checkweigher—Acts of interference with workmen—Removal—Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 13, *sub-sections* 3, 4.

By sub-section 3 *of section* 13 *of the Coal Mines Regulation Act,* 1887, *it is provided that a checkweigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine, but shall be authorized only to take such account or determine the deductions as provided by the Act. Sub-section* 4 *provides that if the owner, agent, or manager of the mine desires the removal of a checkweigher on the ground that the checkweigher has impeded or interrupted the working of the mine, or interfered with the weighing or any of the workmen, or with the management of the mine, or has, at the mine, to the detriment of the owner, agent, or manager done anything beyond taking such account, determining such deductions, or giving such information as aforesaid, he may complain to a court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient* primâ facie *ground for the removal of the checkweigher, shall call on the checkweigher to show cause against his removal.*

Held, that the expression "interfere with any of the workmen" in these sub-sections was not limited to interference by a checkweigher virtute officii, *nor to acts of interference on the mine premises only.*

Case stated by justices of the West Riding of Yorkshire.

A complaint was preferred by the respondent, who was the certified manager of the Ackton Hall Colliery, Featherstone, and of a certain mine, the Silkstone pit, of that colliery, under section 13 of the Coal Mines Regulation Act, 1887, against the appellant, who was the checkweigher, on behalf of the persons employed at the mine, that the appellant did, on the 13th, 14th, 19th, 20th, and 21st of November, 1903, unlawfully impede and interrupt the working of the mine, and did unlawfully interfere with certain of the workmen employed at the mine, and did unlawfully interfere with the management of the mine.

The justices were of opinion that the respondent had shown sufficient *primâ facie* ground for the removal of the appellant as checkweigher, and the appellant was duly summoned to appear to show cause against his removal.

The material facts found by the justices on the hearing of the case were as follow: In addition to being the checkweigher of the mine, the appellant was also president of the local branch of the miners' association, and on the 19th of November, 1903, he presided over a meeting of the men which had been called to consider the question of working on play days. Play days were days on which the pits were not working for pulling coal, and the only work done on those days was work necessary for the safety of the pit roads, workings, roofs, and ventilation. On a play day, therefore, the appellant had no business at the pit. Four men had been previously stopped by the respondent for refusing to work on a play day for the opening of some blocked ventilation, and this meeting had been called to consider the matter. The appellant told the four men whose checks had been stopped not to go and see the respondent, but to be at a pit-gate meeting not later than 4.30, and he would see there were others to stop the men from going to work, and they would then have a meeting at 5.30. There was accordingly a pit meeting the next morning. The appellant spoke, and said the men were not to go into the pit, and he asked for a motion to stop play day working either by fair or foul means. A pit-gate meeting is a meeting at the entrance to the colliery yard as the men are going to work. The appellant told the men also that they were not to work on play days in future. Several men called as witnesses went on the 20th to work, but did not go to work, as they were told not to do so. The appellant also told the men at this meeting to go back and come in their holiday clothes next morning and watch those who went to work. The justices also found that on the 21st, which was a play day, and a day on which the appellant had no business at the pit, men had been interfered with by him and had gone to the colliery intending to work, but had been turned back.

On behalf of the appellant it was contended before the magistrates that section 13 of the Act specially referred to what a checkweighman might do in the discharge of his functions. He might not take advantage of his position to inflict injury upon his employers, but the statute did not interfere with his freedom of action when not discharging his ordinary functions unless he did unlawful acts. If in his capacity as president of the branch, and not while acting as checkweigher, the appellant simply advised the men not to go down, there was no offence.

On the part of the respondent it was contended that a checkweighman was in no sense in the service of the colliery company. They had no voice in the appointment, and so long as he kept to the Act they had no power to remove him. This made it all the more necessary that such a person should be careful not to exceed his duties. The offence constituted by the 13th section of the Act need not necessarily take place on the mine premises, but might be committed at any time and at any place.

The justices found that on the 19th, 20th, and 21st of November the appellant had unlawfully interfered with certain of the workmen employed at Ackton Hall Colliery, and they ordered the appellant to be removed as checkweigher.

The question for the opinion of the court was whether there was any evidence to support the finding of the justices.

Atherley Jones, K.C., and *J. O. Andrews,* for the appellant.

Bairstow, for the respondent.

Cur. adv. vult.

July 15.—Lord ALVERSTONE L.C.J., said that he had read the judgments about to be delivered by Kennedy and Phillimore, JJ., and that he had nothing to add to them.

KENNEDY, J., read the following judgment: Whilst I concur in the conclusion at which my lord and my brother Phillimore have arrived, I wish to state shortly the reasons for my own judgment as the matter to be decided is one of general importance. The magistrates have found as a fact that on three out of the five days alleged the appellant, being at the time a checkweigher, did unlawfully interfere with the workmen, and upon this ground, under the provisions of the Coal Mines Regulation Act, 1887, s. 13, sub-sections 3, 4, and 5, they made a summary order for his removal from the office of checkweigher. We were invited to reverse this decision, upon the ground that there was no evidence upon which the magistrates could hold that there had been interference on the part of the appellant. "Interference with workmen" is under these sections a specified

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

legal ground of removal, and we can reverse that decision only if there was not in point of law any evidence to justify the magistrates' finding of fact. [His lordship read the findings of fact set out by the magistrates in the special case, and continuing said:] After careful consideration, I cannot say that what they have found as taking place on the 20th and 21st of November were matters which in point of law could not constitute an interference with the workmen within the proper meaning of the statute. It was urged that it could not be so regarded on two grounds—first, that the interference intended to be forbidden meant only interference by the checkweigher *virtute officii*, or conduct in the apparent or professed exercise of the checkweigher's powers as such, and that the acts found against the appellant were not acts done by him, or professed to be done by him, as checkweigher; but acts which he did as president of a local miners' federation. Now I desire to say that I should not be prepared to justify an order of the magistrates removing a checkweigher merely because he was an official of a miners' association, or because, as a private individual, a checkweigher took some part in the legitimate work of a miners' association, or on the ground that he was present or spoke or presided at meetings assembled to consider matters affecting the interests or actions of miners. It was quite true that such action might be intended to influence, and might, in fact, influence, the conduct of the workmen at a mine; but I should not be prepared to hold, nor must I be understood as holding here, that such action was necessarily interference within the meaning of this section. I do not believe that that was the purpose of the enactment in question; but I am equally convinced that the mere fact that the checkweigher was also an official of a local miners' association, and that the acts charged were acts done when purporting to act as such official, and not as checkweigher, does not necessarily constitute an answer to the charges made. As to what conduct amounts to interference which under the terms of the statute would constitute a ground for the removal of a checkweigher, it seems to me that that question must in each case turn upon the particular circumstances and the acts done. Interference is not a word of art, and it is not a word capable of precise definition, but there is nothing in the section which limits the interference to acts of the checkweigher done in connection with his duties in that office, nor is there—and I am now dealing with the second contention on behalf of the appellant—anything which limits the locality where the interference could take place.

With regard to the locality of the acts and to the further contention for the appellant that the section does, if it is properly construed, limit the objectionable interference to interference within the gates, or, to use the phrase which appears in a later part of the section, to interference "at the mine," I do not agree with this view as a matter of construction. The very fact that the section later on did limit the offence of acting to the detriment of the owner, agent, or manager to acts done "at the mine," and that the former sub-section contained no such words, was strongly against implying such a limitation in the former case. Nor would it be a reasonable construction to hold that such a limitation was imposed, because a safeguard against the abuse of the checkweigher's influence or power with the workmen was, it seems to me, quite as reasonably necessary with regard to interference with the workmen at the gate or outside, as in the mine itself.

Reference was made in the course of the argument to the case of *Prentice* v. *Hall*, 26 W. R. 237, which was quoted in support of the arguments on behalf of the appellant, but I think that the effect of the judgments in that case, as well as the change in the wording of the Act of 1887 from the wording of the Coal Mines Regulation Act, 1872, under which that case was decided, is opposed to the contention of the appellant upon both the points relied upon. I can find no suggestion in the case as reported that the locality where the act was done would make any difference, nor any suggestion that a distinction was to be made according as the act was done apparently in the performance of the checkweigher's duties as such and under colour of his authority as such, or otherwise.

For these reasons I am unable to say that the facts found by the magistrates, which we must accept as properly found, could not constitute interference within the meaning of the section and justify them in removing the checkweigher from his office. The appeal must therefore be dismissed.

PHILLIMORE, J., read a judgment in which he concurred, and, after referring to the facts of the case and the sections of the statute, said the Act of 1887 repealed the provisions of the earlier Act, which contained the words "otherwise misconduct himself," and substituted the words "done anything at the mine to the detriment of the owner, agent, or manager." The new Act, therefore, deals with three offences—interference with any workmen, interference with the management of the mine, and acting to the detriment of the owner, &c., at the mine.

[After reading the facts as found by the magistrate, his lordship said]: If it be necessary to constitute a cause of removal that the action of which complaint is made should be done at the mine, I do not think that what happened on the 19th could be said to be done at the mine. But I think that the justices might find that what was done on the 20th and 21st was interference with the workmen, because the acts, though not done by the appellant in his capacity of checkweigher, were acts of serious interference. It was suggested that the order could not be supported unless the justices were right in their findings as to all three days, but this was not a conviction for a misdemeanour to which the rule in *O'Connell* v. *Reg.*, (1844) 11 Cl. & F. 155, would apply. In my opinion there was no local limitation for the doing of the act. Sub-section 3 defined certain acts which the checkweigher has no authority to do, and sub-section 4 provides that he may be removed for doing these acts, and added as an additional ground of removal "acting to the detriment of the owner at the mine." These are words of extension, not of limitation. It was therefore open to the justices to find that the act done by the appellant on the 19th of November (though it did not take place "at the mine," and though it was not as checkweigher, but as president of the miners' association that he spoke) was an unlawful interference with the workmen. The appeal will be dismissed, with costs.

Solicitors for the appellant, *Charles Russell & Co.*, for *Charles Sowden*, Pontefract.

Solicitors for the respondents, *Moxon & Barker*, for *West, King, Adams, & Co.*, North Featherstone.

K. B. Div.
(Wills and Kennedy, JJ.) June 21, 1904.

SMITH v. GIDDY. (a.)

Nuisance — Trees overhanging neighbour's ground — Damage to neighbour's ground—Right of action.

The plaintiff was the owner of a fruit garden. The branches of ash trees growing on the defendant's land overhung into the defendant's garden and caused damage to the garden.

Held, that he had a right of action for the damage so caused.

Appeal from his Honour Judge Russell, sitting at the Chertsey County Court.

It appeared that the plaintiff was the occupier of a fruit garden, and that some forty ash trees, the property of the defendant, overhung the plaintiff's land, and, as the plaintiff alleged, damaged his land.

The county court judge nonsuited the plaintiff on the ground that no cause of action was created.

A. T. Lawrence, K.C., and *Owen Thompson*, for the appellant.—It is true that no action of this kind is to be found in the books, but the principle of *Crowhurst* v. *Amersham Local Burial Board*, 27 W. R. 95, 4 Exch. D. 5, is directly in point. In *Lemmon* v. *Webb*, (1894) 3 Ch. D. 1, Kay, L.J., after stating that allowing trees to overhang the boundary was a nuisance, added: "For any damage caused by this nuisance an action in the case would lie." It is true that was an *obiter dictum*, but the judgment was a considered one.

Drake, for the defendant.—Such an action as the present one is unprecedented. In the *Crowhurst case* the trees were poisonous, and that case is therefore distinguishable.

WILLS, J.—I have come with some reluctance to the conclusion that there must be a new trial in this case. It is true that no action of this kind is to be found in the books, but in the case of *Crowhurst* v. *Amersham Local District Board*, Kelly, C.B., after carefully considering the matter, decided that such an action would lie. In that case the local burial board grew yew trees on their own ground, and some of the branches overhung into the adjoining field and were eaten by the cattle pasturing in the field, and the cattle died from eating the poisonous leaves of the yew tree. The Exchequer Court held that the local board were liable for the damage so occasioned. They treated it as one of a class of cases where the maxim "*sic utere tuo ut alienum non lædas*" applies, and of which *Fletcher* v. *Rylands*, is perhaps the best example. Now, what is the difference in principle between the *Crowhurst case* and the present case. I can see none. If the cuttings from the defendant's trees do in fact cause damage to the plaintiff's land I think that there is no doubt that he has a cause of action against the defendant. I am always reluctant to create new classes of actions, but it would be impossible for us to decide otherwise without ignoring the decision in *Crowhurst* v. *Amersham Local Board*, and though we are not bound by the *dicta* of Kay, L.J., in *Lemmon* v. *Webb*, they support the view which I have just expressed. It is said that the remedy to abate the nuisance by cutting the overhanging branches is open to the plaintiff. That may be so, but that, in my opinion, affords no answer to this action. The case must therefore go back to the county court judge.

KENNEDY, J.—I agree. The county court judge has nonsuited the plaintiff, and we must therefore assume that the plaintiff has suffered material damage to his garden by reason of the overhanging trees on the defendant's property. It is said that such an action is unknown. I agree; but I see on principle no reason why it should not lie. I think that the principle laid down in *Fletcher* v. *Rylands*—viz., that you have no right to use your land so as to inflict damage on your neighbour, applies to this case. It seems to me that this case is undistinguishable in principle from *Crowhurst* v. *Amersham Local Board*. As to the right to abate the nuisance, I see no reason why the plaintiff should be obliged to go the expense of cutting the overhanging branches.

Solicitors for plaintiffs, *Neave & Bretherton*, for *Cholmeley & Taylor*, Feltham.

Solicitors for defendants, *Allen & Son*.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Privy Council.

(*From the Supreme Court of Sierra Leone.*)

June 22; July 19, 1904.

JOHNSON v. THE KING. (a.)

Fraud — Interest given in court of law or equity—Ordinance of the 10th of November, 1881, of Sierra Leone—Crown abandoning charges of fraud—Costs where Crown is a litigant.

Money obtained by fraud and retained by fraud can be recovered with interest, whether proceedings be taken in a court of equity or in a court of common law, but where the Crown in a civil action intentionally and deliberately put aside all charges of fraud no interest was allowed.

In dealing with costs in cases between the Crown and a subject the rule of the Judicial Committee of the Privy Council will be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

Appeal from the Supreme Court of Sierra Leone.

The whole circumstances of the case are given at length in their lordships' judgment.

Muir Mackenzie, for the appellant.

Sutton, for respondent.

The judgment of their lordships (Lords MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY) was delivered by

Lord MACNAGHTEN.—Isaac Babington Johnson, a Government contractor in Sierra Leone, who was the defendant in the action, appeals against a judgment of the Acting Chief Justice of the colony ordering him to pay to his Majesty £428 13s. 3d.

The money in question represents interest on two sums which Johnson received from the army paymaster in excess of what was due, and which he retained in his own hands for over a year.

Under his contract with the Government Johnson was required to remove a quantity of granite stones from the Signal Hill to the Naval Coal Shed in Water-street, Freetown. For this service he was to be paid so much a ton. Between the 29th of November, 1900, and the 9th of January, 1901, he removed 298 tons and a fraction. His charge at the agreed rate ought to have been £448 1s. 7d. He presented a voucher for £2,474 18s. 6d., and received

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

that sum from the army paymaster, thus obtaining £2,026 16s. 11d. beyond his due. Between the 31st of December, 1900, and the 24th of January, 1901, he removed in addition 138 tons and a fraction. His remuneration for that work ought to have been £207 8s. 5d. His claim was for the removal of 4,140 tons. He presented a voucher for £6,210, and actually received that sum from the army paymaster. The total amount overpaid was thus £8,029 8s. 6d.

On the 2nd of January, 1902, a writ was issued in the name of his Majesty against Johnson claiming return of the money overpaid. The claim was put in two ways—(1) return of money obtained by fraud; (2) in the alternative, return of money paid by mistake.

The statement of claim in the action was delivered on the 5th of February, 1902. It followed the lines on which the writ was framed. It dealt with the two cases of over-payment separately. In paragraphs 6, 8, and 9 it charged fraud, while in paragraphs 7 and 10 it presented the case as one of over-payment by mistake without alleging fraud. Then in paragraph 11 it was alleged that on the 5th of February, 1902 (that is the day on which the statement of claim purported to be delivered) the defendant was convicted of having obtained by means of false pretences from the army paymaster two several sums equal in the aggregate to the two sums actually overpaid. In paragraph 12 it was alleged that the plaintiff had "incurred great expense in prosecuting and obtaining the conviction of the said defendant for his said frauds," and had "suffered damage by the unlawful obtaining and detention of the said sums." The statement of claim concluded by claiming under paragraphs 6 and 7 and paragraphs 9 and 10 return of the two sums which amounted together to £8,029 8s. 6d. Under paragraph 11 it claimed £1,200 as damages.

By his statement of defence, which was delivered on the 14th of February, 1902, Johnson admitted over-payment of two sums amounting to the sum of £8,029 8s. 6d. and tendered repayment. He denied fraud, and accepting apparently the suggestion of the Crown indicated in paragraphs 7 and 10 of the statement of claim, he said the over-payments were due to mistakes which he attributed to certain officials or servants of the Crown. The said sum of £8,029 8s. 6d. was forthwith paid into court.

On the 18th of February, 1902, Johnson was sentenced to nine months' imprisonment.

By his reply, delivered on the 19th of February, 1902, the plaintiff said that he accepted the sum of £8,029 8s. 6d. paid into court by the defendant "in satisfaction of the plaintiff's claim under paragraphs 7 and 10 of his said statement of claim"—the two paragraphs which treated the over-payment as due to mistake and not to fraud. At the same time he denied that the sum was sufficient to satisfy his claim arising under paragraphs 11 and 12 of his statement of claim.

The case went to trial. The Crown adduced no evidence except the statement of defence and Johnson's answers to interrogatories which came to nothing more than an admission of his conviction and the sentence thereon.

At the trial the claim put forward on behalf of the Crown to recover the expenses of the prosecution and conviction was rejected and abandoned. As regards the claim for interest, it does not appear that the learned counsel for the Crown attempted to rest it on fraud. The learned counsel for the defendant pointed out that fraud had not been proved in the action. But the learned judge held that it was unnecessary to go into that point as the defendant admitted "receiving the money by mistake or as over-payment." Consequently he thought the law would "imply a promise from defendant to pay back to the plaintiff the money paid in excess." He thought the allegation of special damage in the statement of claim sufficient, and gave "judgment for the plaintiff for £428 13s. 3d. damages by way of interest without costs."

Having regard to the law as settled by the judgment of the House of Lords in the case of *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, [1893] A. C. 429, it is impossible to support the decision of the Acting Chief Justice on the ground upon which it was rested. Mr. Sutton, who argued on behalf of the Crown, admitted that the case was presented to this board in a very unsatisfactory manner. He pointed out, however, that the over-payments were so gross and indeed so monstrous in amount that it was impossible to believe in the absence of fraud. It would not be easy to resist that conclusion if their lordships had to draw inferences of fact from the materials placed before them. But the difficulty is that the Crown seems intentionally and deliberately to have put aside all question of fraud. In the reply on behalf of the Crown the money paid into court was accepted in terms as money paid by mistake, and no attempt was made to give any evidence of the fraudulent pretences which had been proved to the satisfaction of the criminal court. Possibly, as was suggested, no evidence of fraud was given in the civil action because everybody concerned must have known all the facts of the case. This board, however, has nothing before it but the evidence presented in the record. Having regard to the dates of the conviction, the payment into court and the sentence, in connection with the reply delivered on behalf of the Crown, and considering that the punishment awarded does not seem to have erred on the score of severity, it is at least conceivable that there may have been some understanding or some expectation or hope held out that the question of fraud would not be further pressed. However that may be, the miscarriage, if miscarriage there be, is due entirely to the action of the Crown and the way in which the Crown has conducted the case. If the Crown intended to rely on fraud as giving a right to interest, the case ought to have been stated plainly and proved clearly.

In order to guard against any possible misapprehension of their lordships' views they desire to say that in their opinion there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a court of equity or in a court of law or in a court which has a jurisdiction both equitable and legal, as the Supreme Court of Sierra Leone possesses under the Ordinance of the 10th of November, 1881.

In order to support the decree it was suggested that Johnson, who was a trader, must have made a profit by the use of money which was in his hands for a year. That is very probable, but there is no proof of it. It was also suggested that Johnson as a "casual accountant" to the Crown was bound to account for the money with interest. But no authority was given in support of this proposition, and it appears that the records of the old Court of Exchequer which might have thrown some light upon this point are not readily accessible.

In the result, therefore, their lordships are of opinion that the order appealed from ought to be reversed, and they will humbly advise his Majesty accordingly.

Their lordships having reserved the question of costs for further consideration, the following adden-

dum to their lordships' judgment was delivered by Lord Macnaghten on the 19th of July, 1904:

As regards costs, their lordships have heard a separate argument, and they desire to say that they are much obliged to the learned counsel on both sides for the industry and care which they have bestowed upon the question. It will be enough to state the conclusions at which their lordships have arrived.

It cannot be disputed that over and over again before this tribunal the Crown has been treated in the matter of costs just like a private litigant. It appears, however, that no case can be found in which the point was argued.

All the cases seem to fall under one or other of the following three heads:

1. Cases where the Crown has been treated as an ordinary litigant, under the authority of local statutes, as is generally the case in the self-governing colonies.

2. Cases where the question arose under a petition of right or some proceeding analogous to a petition of right.

3. Exceptional cases where justice seemed to require that the Crown should pay costs or where the Crown was not unwilling to be treated as an ordinary litigant.

The present case cannot be brought under any of of these heads. There is no Ordinance in Sierra Leone authorizing the court to treat the Crown as an ordinary litigant, and the appellant has succeeded in spite of demerits.

Mr. Muir Mackenzie relied on section 19 of the Ordinance of the 10th of November, 1881, which declares that statutes of general application which were in force in England on the 1st of January, 1880, should be in force in Sierra Leone from the date of the Ordinance coming into effect. He contended that that section imported into the colony the Act 18 & 19 Vict. c. 90. Their lordships, however, are of opinion that that Act is not a statute of general application within the meaning of section 19 of the Ordinance in question. It only deals with proceedings in the United Kingdom.

In the result, therefore, their lordships are of opinion that, in dealing with costs in cases between the Crown and a subject, this board ought to adhere to the practice of the House of Lords, and that in future the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

In the present case their lordships think that the order appealed from should be reversed without costs, and that there should be no costs of the appeal.

Solicitors, *Redfern & Hunt; The Treasury Solicitor.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) And K. B. Div. (Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) } Nov. 1, 30.

HYMAS *v.* OGDEN. (*a.*)

County court—Detinue—Judgment for return of chattel — Warrant of delivery—Jurisdiction to commit — Assessment of value of chattel—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 89—*Rules of Supreme Court,* 1883, *ord.* 42, *rr.* 6, 7; *ord.* 48, *r.* 1—*County Court Rules,* 1903, *ord.* 25, *r.* 57.

In an action of detinue in a county court the plaintiff recovered judgment for the return of the chattel, and in default that a warrant of delivery should issue. The defendant did not return the chattel and a warrant of delivery in the usual form was issued. The defendant, nevertheless, did not deliver up the chattel, but the bailiff did not distrain his land and goods under the warrant. The plaintiff thereupon applied for an order of committal, and the county court judge, being satisfied that the defendant had wilfully disobeyed the order of the court, made an order of committal.

Held, that, as the High Court had, under ord. 42, *rr.* 6, 7, *power to enforce a judgment for the recovery of a chattel by a writ of attachment or committal, the county court had, under section* 89 *of the Judicature Act,* 1873, *and ord.* 25, *r.* 57, *of the County Court Rules,* 1903, *jurisdiction to enforce the judgment by committal; that the plaintiff was not precluded, by having obtained the warrant of delivery or by not having distrained thereunder, from applying for an order of committal; and that it was not a condition precedent to the making of an order for delivery up of a chattel that the value of the chattel should have been assessed.*

Appeal by the defendant from an order of Judge Allen, sitting at the Mansfield County Court.

The plaintiff brought an action of detinue in the Mansfield County Court, alleging that the defendant had detained a certain running dog named "Floss," the property of the plaintiff, and claimed the return of the dog or £40, its value, and £10 for its detention.

Judgment was given for the plaintiff, and was drawn up in the following form: "Upon the trial of this action at this court, holden this day, it is adjudged that the plaintiff do recover against the defendant the following goods and chattels of the plaintiff wrongfully detained by the defendant—that is to say, the plaintiff's running dog, 'Floss,' and also costs to be taxed on scale B. And it is ordered that the defendant do return the said dog to the plaintiff within seven days from that date, and that in default of his so doing a warrant of delivery do issue."

The defendant failed to deliver up the dog within seven days, and a warrant of delivery in the usual form was issued, requiring the bailiff to seize the dog and deliver it up to the plaintiff, and if he should be unable to find the dog within the district of the court he was ordered "to distrain all the lands and chattels of the defendant, wheresoever they may be found within the district of this court, and them hold until the defendant shall deliver the said goods to you, and to make return of what you have done under this warrant immediately upon the execution thereof." This order was served on the defendant, who failed to deliver up the dog as required, but the bailiff did not distrain the defendant's goods.

An application was then made to the county court judge to commit the defendant for refusing to obey the order of the court to deliver up possession of the dog, and the county court judge, being satisfied that the defendant had been in a position to obey the order, and had wilfully refused to do so, made an order of committal, but directed the warrant to remain in court for seven days, and if in the meantime notice of appeal was given, and the dog was placed in neutral custody to the satisfaction of the registrar, the warrant was to be suspended during the appeal.

From this order the defendant appealed to the Divisional Court, on the ground that the judge had no jurisdiction to make the committal order, and that

(*a.*) Reported by E. G. STILLWELL and W. F. BARRY, Esqrs., Barristers-at-Law.

the plaintiff could only enforce his judgment by a warrant of delivery in accordance with the terms of the judgment; and that, as the warrant of delivery provided that in the event of the order being disobeyed the bailiff should distrain the defendant's lands and goods, the plaintiff was not entitled to apply for an order of committal until he had sought to enforce his judgment by the means provided by the warrant.

Israel Davis, for the defendant.

Etherington Smith, for the plaintiff.

Lord ALVERSTONE, L.C.J.—This is a case of considerable difficulty and great importance. I have come to the conclusion, though not without much hesitation, that we ought not to interfere with the order made by the learned county court judge. Section 89 of the Judicature Act, 1873, provides as follows: "Every inferior court which now has, or which may after the passing of this Act have, jurisdiction in equity, or at law and in equity, and in Admiralty respectively shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." I think it is clear that under that section a county court judge in such a case as this has, subject to the rules made for the county court, the same power to commit as a judge of the High Court. That view was taken in *Martin* v. *Bannister*, 28 W. R. 143, 4 Q B. D. 491, where it was held that a county court, under this section, has in actions within its jurisdiction power to grant an injunction against a nuisance and to enforce obedience to it by committal. I think, therefore, both statute and authority are in favour of the plaintiff. The great difficulty, however, which I feel in this case is whether the methods of enforcing the judgment provided by the warrant of delivery—namely, that if the dog were not delivered up the bailiff was to distrain the defendant's lands and goods and hold them until the defendant should deliver the dog—not having been exhausted, the county court judge had power to commit the defendant for neglecting to obey the judgment. It has been further contended by counsel for the defendant that the court has no power to make an order for delivery until proceedings have been taken to assess the value of the goods to be delivered. In my view, however, an order for delivery can be made without assessment. The order of the court was that the defendant was to deliver up the dog within seven days. The court has power not to give a defendant any option, but to order the specific chattel to be returned within a certain time, and the defendant in this case was given no alternative option. The warrant of delivery here is in the ordinary form, and is not a means of obtaining damages for the plaintiff, but of enforcing the judgment of the court. The question which arises is whether a warrant of delivery having been issued, that is the only remedy which can be put in execution in order to enforce the judgment of the court. I think it would be a very strong thing for us to hold that the fact that an order had been made by the court requiring the bailiff to distrain ties the hands of the court so as to prevent it from enforcing its judgment in any other manner. I think we must take it that the county court judge was satisfied that the defendant knew where the dog was and would not give it up, and that there was, therefore, a wilful refusal by the defendant to obey the original order of the court. That being so, I am very loth to hold that the defendant may not be committed for contempt in refusing to obey the order of the court merely because the warrant of delivery gave the bailiff authority to levy a distress. I am not prepared to limit the powers of the court merely because another remedy than commitment existed for the enforcement of its order. For these reasons I think that the decision of the county court judge was right, and that this appeal must be dismissed.

KENNEDY, J.—I am of the same opinion, though I do not arrive at this conclusion without considerable hesitation. The court cannot be too careful in dealing with applications for committal at the instance of plaintiffs to punish defendants. There is no doubt we must take care that wilful disobedience be proved. In this case I should have felt easier if the county court judge had given his reasons for his decision. The difficulty arises in this way: The defendant in this action, in which the plaintiff got judgment, must be taken either to have put it out of his power to obey the order of the court, or, worse still, has hidden the dog and knows where she is. Is it wrong or illegal for the judge to say that disobedience to an order of the court entitles him to make an order of committal, though the original order said that unless delivery was made within seven days a warrant of delivery would follow, and a warrant was applied for and given to the bailiff who sought ineffectually to enforce it. It ought not to be said to be law that the court can be defied, and in the absence of authority to the contrary I think that where a defendant deliberately refuses to obey an order of the court, the court has power to order a committal. Because there may be a civil remedy by distress, is there any reason why the court should not be vindicated, and should not justly punish disrespect of its order duly made? The two things can perfectly well exist, though I have some doubt by reason of the absence of authority. I think, on the whole, that the county court judge was within his jurisdiction in making the order.

RIDLEY, J.—I have come to the same conclusion. I only wish to add that I think the county court judge arrived at the conclusion that there had been on the part of the defendant a wilful disobedience of the order of the court, and that therefore he was acting within his jurisdiction in making the committal order.

The defendant, by leave, appealed.

Israel Davis for the defendant.

Etherington Smith, for the plaintiff, was not called upon.

COLLINS, M.R.—This is an appeal from the judgment of the Divisional Court affirming an order of the county court judge for the committal of the defendant. The action was brought in the county court for the return of a running dog, named Floss, and judgment was obtained ordering the defendant to return the dog within seven days, there being no alternative given to pay its value instead of returning the dog. The defendant did not return the dog within seven days, and by not doing so he disobeyed the order of the court. A warrant of delivery was accordingly issued, but still the defendant did not give up the dog. Steps were then taken to give the defendent the opportunity of showing cause why he should not be committed for contempt, and evidence was given before the judge which abundantly justified him in coming to the conclusion that the defendant had wilfully refused to obey the order of the court. Thereupon the judge made a very moderate order of committal, suspending the

operation of the order if within seven days an appeal was brought and the dog was placed with a neutral person to the satisfaction of the registrar. The defendant appealed, and the Divisional Court dismissed the appeal. The defendant now appeals here.

The first contention urged on his behalf is that the county court judge had no power to commit. It seems to me that the matter is fully provided for by the Judicature Act, 1873, and the County Court Rules. It is said that the power of committal is exclusively derived from the equitable jurisdiction of the county court, and that, as a court of equity would not have made an order of committal in such a case as the present, the county court judge had no jurisdiction to make the order of committal. The matter has been dealt with in section 89 of the Judicature Act, 1873, which provides that—"Every inferior court which now has, or which may after the passing of this Act have, jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." That is the enactment. Then by ord. 25, r. 57, of the County Court Rules, 1903, "Orders in the nature of an injunction, and all orders, interlocutory or otherwise, within the competence of the court, which, if the same were made in an action or matter pending in the High Court, could in such court be enforced by attachment of the person or committal may be enforced by order of the judge by warrant of attachment which shall be according to the form in the appendix." It seems to me to be perfectly clear that the High Court can now in a common law action of detinue order the defendant to deliver up the chattel specifically, and if he wilfully disobeys that order the court has power to commit him. The High Court, having jurisdiction to make that order, can enforce it by means of committal. The county court rule provides for the exercise of that jurisdiction by the county court judge. In these circumstances it is perfectly clear that the county court judge had jurisdiction to make the order of committal.

It is then said that by obtaining the warrant of delivery the plaintiff has lost his right to obtain an order of committal. The obtaining of the warrant of delivery did not, however, get rid of the defendant's obligation to hand over the dog. The judgment recovered against him was to deliver up the dog, and the issue of the warrant of delivery did not wipe out the obligation imposed upon him by that judgment. It is next said that it is a condition precedent to the making of an order for delivery of a chattel that the value of the chattel shall first be assessed. If that were ever so, it is now unnecessary under ord. 48, r. 1, of the Rules of the Supreme Court, 1883. The note in the Annual Practice under that rule correctly says that "the addition of the words 'if any' after 'value assessed' appears to make this rule applicable, whether the value of the property has been assessed or not." The case has been shortly stated by Ridley, J., in his judgment, where he says that the county court judge arrived at the conclusion that there had been on the part of the defendant a wilful disobedience of the order of the court, and therefore he was acting within his jurisdiction in making the committal order. Upon all grounds the appeal fails.

STIRLING, L.J.—I am of the same opinion. The case is governed by ord. 25, r. 57, of the County Court Rules, 1903. The first question we have to consider is whether the order of committal was within the competence of the county court judge. In my opinion it clearly was. Judgment was recovered against the defendant in an action of detinue for the delivery up of the dog within seven days. How was that judgment to be enforced? Rule 57 of order 25 says that if the order were made in an action in the High Court and could be enforced there by attachment or committal, it may be enforced in the county court by warrant of attachment. If this judgment were in the High Court, ord. 42, r. 6, provides that it could be enforced by writ of attachment. That rule provides that "a judgment for the recovery of any property other than land or money may be enforced (*a*) by writ for delivery of the property; (*b*) by writ of attachment; (*c*) by writ of sequestration"; and rule 7 provides that "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal." These two rules deal with the matter, both entitling the plaintiff to the remedy by attachment or committal. Therefore the county court judge had jurisdiction to make the order of committal. It is said that the remedies provided by ord. 42, r. 6 are not cumulative, but alternative, and that if the plaintiff first applies a warrant or writ of delivery, he cannot afterwards apply for a writ of attachment. I do not agree. The remedies are cumulative and not alternative.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Stevens, Son, & Parkes*, for *Jones & Middleton*, Chesterfield.

Solicitors for the defendant, *Halse, Trustram, & Co.*, for *A. Muir Wilson*, Sheffield.

From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 14.

THOMPSON v. MAYOR, &c., OF ECCLES.
HÆDICKE v. FRIERN BARNET URBAN DISTRICT COUNCIL. (*a*.)

Local government — Sewer — Drain — "Single private drain" — Houses belonging to different owners — Nuisance—Apportionment of expenses—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A pipe, which was laid in private property, received the drainage of several houses belonging to different owners, and was then connected with a public sewer. A nuisance having arisen in the pipe, the local authority gave notice in writing to the owner of the premises where the nuisance existed to remedy the same, and, the owner having made default in complying with the notice, the local authority did the work and sued the owner to recover the expenses.

Held, first, that the pipe was a "single private drain" within section 19 *of the Public Health Acts Amendment Act*, 1890, *and that therefore the local authority were entitled to require the owner of the premises to abate the nuisance under section* 41 *of the Public Health Act*, 1875; *and, secondly, that as the nuisance existed on the premises*

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

of one owner only, no question of apportionment arose, and the owner was liable to pay the whole of the expenses.

Self *v.* Hove Commissioners, 43 *W. R.* 300, [1895] 1 *Q. B.* 685, *and* Bradford *v.* Mayor, &c., of Eastbourne, 45 *W. R.* 31, [1896] 2 *Q. B.* 205, *approved and followed.*

Judgments of the Divisional Court ([1904] 2 *K. B.* 1), 52 *W. R. Dig.* 143, *and of* Channell, J. ([1904] 2 *K. B.* 807), *reversed.*

THOMPSON *v.* MAYOR, &c., OF ECCLES

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.) upon a case stated by justices (reported in [1904] 2 K. B. 1).

At a court of summary jurisdiction sitting at Eccles a complaint was preferred by the corporation of the borough of Eccles under section 41 of the Public Health Act, 1875, and section 19 of the Public Health Acts Amendment Act, 1890, against Thomas Thompson, for that on the 16th of March, 1903, a notice was served upon him requiring him to abate a nuisance on certain premises situate at 428, Liverpool-road, in the said borough, and that he had made default in complying with the requisitions thereof. The notice required Thompson within fourteen days from the service to take up the existing defective yard and cellar drains and gullies and tops, and in lieu thereof to provide and lay down efficient drains constructed of glazed and socketed stoneware pipes, the joints to be properly made good with cement, the cellar drain to be embedded in concrete to a thickness of six inches all round the pipes, and to provide efficient wash-out gullies with lipped tops.

The facts were as follows: Thompson was the owner of a block of seven houses, numbered 426 to 438, Liverpool-road, of which the house the subject of the complaint was one. The houses were built in 1875 in accordance with plans deposited with the then sanitary authority, the predecessors of the corporation, and approved by them on the 4th of March, 1875. Adjacent to the said block on the same side of Liverpool-road, and only separated therefrom by a private passage giving access to the backs of the said houses, were twelve houses belonging to one Johnson, divided into two blocks of six houses each by a private passage giving access to the backs of the said houses. On the 6th of March, 1903, a complaint was made that a certain drain or sewer belonging to 428, Liverpool-road was a nuisance and injurious to health. On examination the drain or sewer was found to be in bad condition and to require alteration or amendment, and the corporation served upon Thompson the notice of the 16th of March, 1903, requiring him to execute the works above set out. The works specified therein were necessary for the purpose of abating the nuisance. The notice was not complied with.

The said drain or sewer was part of a nine-inch drain or sewer running through and under the cellars of the said seven houses belonging to Thompson, and receiving the drainage of each house before falling into the corporation's main sewer in Hampson-street. This nine-inch drain or sewer was a continuation of and received the drainage from a six-inch drain or sewer passing through and under the cellars of the said two blocks of houses belonging to Johnson, and receiving the drainage from each of the said twelve houses before reaching the nine-inch drain or sewer. The whole of the six-inch and nine-inch drain was laid through private property until it reached the public sewer in Hampson-street. It was admitted by the corporation that the notice required Thompson to make structural alterations in the drain or sewer.

It was contended for Thompson that as the drain received the drainage of more than one building, not within the same curtilage, belonging to the same owner, it became a sewer under the provisions of sections 4 and 13 of the Public Health Act, 1875, and was vested in the corporation, whose duty it was to repair, cleanse, and keep it so as not to be a nuisance or injurious to health, and that the said drain was not a single private drain within the meaning of section 19 of the Public Health Acts Amendment Act, 1890.

It was contended for the corporation that the drain or sewer at the place where the nuisance occurred was a single private drain to which section 19 of the Public Health Acts Amendment Act, 1890, applied.

The justices found that the drain was used by two or more houses belonging to different owners, and that the drain was a single private drain within the meaning of section 19 of the Act of 1890, and they made an order upon Thompson to abate the nuisance and to do the necessary works within twenty-eight days.

Thompson appealed, and the Divisional Court reversed the decision of the justices, and held that the drain was not a single private drain within section 19 of the Act of 1890, but was a sewer.

HÆDICKE *v.* FRIERN BARNET URBAN DISTRICT COUNCIL.

Appeal from the judgment of Channell, J., at the trial of an action without a jury (reported in [1904] 2 K. B. 807)

The action was brought by the plaintiff, a married woman, to recover from the defendants £73, money expended by her at their request in repairing a sewage pipe at the rear of the houses Nos. 3, 5, 7, and 9, Friern Barnet-road, New Southgate. The defendants pleaded that the plaintiff was not entitled to recover from them the sum claimed or any part thereof on the ground that the expenses were incurred by the plaintiff in abating a nuisance arising from a defective drain on the plaintiff's premises for the repair of which the plaintiff was liable.

The following statement of facts is taken from the written judgment of Channell, J., in the court below: The plaintiff was the owner of the four houses in question, which were built many years ago. The houses were drained by ordinary house drains into a nine-inch pipe, which was laid through the back gardens of these and other houses, about sixteen in number. The nine-inch pipe, when first laid, communicated with a similar pipe behind other houses, between thirty and forty in number, and both parts of the pipe were entirely on private ground, and the outfall was into a ditch or cesspool—it did not clearly appear which. In 1888 the defendants or their predecessors constructed a sewer in the roadway, and they then made a communication from the nine-inch pipe into that sewer, so diverting the drainage of the sixteen houses through the nine-inch pipe into the sewer. The nine-inch pipe in the neighbourhood of one of the plaintiff's houses about January, 1903, became obstructed, and a nuisance was caused, of which the occupier complained to the defendant council, and after some correspondence and the service of two notices, which need not be further referred to, the district council served on the plaintiff a notice dated on the 24th of February, 1903, stating that the council were satisfied of the existence of a nuisance at 5, 7, and 9, Friern Barnet-road (being three of the four houses owned by the plaintiff), and requiring her in three days to abate the same, and for that purpose to relay the drains in the rear of the houses in a certain way. The notice was the ordinary notice for abatement of a nuisance. The plaintiff's husband, who managed her property, replied by a letter of the 25th of February, stating that the notice related to a drain, "which is a combined

drain or sewer." The clerk to the council replied by letter of the 27th of February that "the drains in question are repairable by the owner and not by the local authority, and that the notice should be complied with without further delay." The plaintiff's husband replied by a letter dated the 28th of February, in which he said that he would "in self-defence do the repairs to the drainage, and enforce payment in a court of law." The plaintiff proceeded to do all the work which required to be done to the satisfaction of the district council, and then brought this action.

At the trial Channell, J., was of opinion—notwithstanding the decision of the Divisional Court, of which he was a member, in the above case of *Thompson* v. *Mayor, &c., of Eccles*—that the case was governed by the decision in *Bradford* v. *Mayor, &c., of Eastbourne*, 45 W. R. 31, [1896], 2 Q. B. 205, and that therefore the drain now in question was "a single private drain" within section 19 of the Public Health Acts Amendment Act, 1890, so as to entitle the local authority to serve notice upon the owners of the houses under section 41 of the Public Health Act, 1875, to do the necessary works to remedy a nuisance existing therein. He held, however, that the apportionment by the surveyor of the expenses of abating the nuisance among the different owners was a condition precedent to the liability of the plaintiff to repay any portion of these expenses, and that not having served notices on all the owners and not having apportioned the expenses, the defendants had failed to comply with the requirements of section 41 of the Public Health Act, 1875, and section 19 of the Act of 1890. He held, therefore, that no portion of the expenses was payable by the plaintiff, and that the plaintiff was entitled in this action to recover from the defendants the amount of the expenses.

The defendants in each case appealed.

Macmorran, K.C., and *Fleetwood Pritchard*, for the Corporation of Eccles.

George Rhodes, for Thompson.

Macmorran, K.C., and *R. F. Colam*, for Hæ licke.

Clavell Salter, K.C., and *W. H. Duckworth*, for the Friern Barnet Urban Council.

The following cases were referred to: *Travis* v. *Utley*, 42 W. R. 461, [1894] 1 Q. B. 233; *Self* v. *Hove Commissioners*, 43 W. R. 300, [1895] 1 Q. B. 685; *Hill* v. *Hair*, 43 W. R. 651, [1895] 1 Q. B. 906; *Bradford* v. *Mayor, &c., of Eastbourne*, 45 W. R. 31, [1896] 2 Q. B. 205; *Reg.* v. *Mayor, &c., of Hastings*, 45 W. R. 109, [1897] 1 Q. B. 46; *Seal* v. *Merthyr Tydfil Urban District Council*, [1897] 2 Q. B. 543, 46 W. R. Dig. 100; *Jackson* v. *Wimbledon Urban District Council*, *ante*, p. 95, [1904] 2 K. B. 359.

COLLINS, M.R.—These are appeals in two cases, and substantially the same point is raised in each, though a further point is raised in the second case. With reference to the first appeal, it raises the question as to the effect of section 19 of the Public Health Acts Amendment Act, 1890, and how far it extends in altering the former state of the law. By sub-section 1 of that section, "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction." By sub-section 3, "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." Up to that time a pipe used for the drainage of more than one building was a sewer and not a drain. But by sub-section 3, for the purposes of that section only, the expression drain is to include a drain used for the drainage of more than one building. That new definition of drain being introduced, the section applies section 41 of the Public Health Act, 1875, which provides that "on the written application of any person to a local authority stating that any drain, water-closet, earth-closet, privy, ashpit, or cesspool, on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise) the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain, water-closet, earth-closet, privy, ashpit, or cesspool. If the drain, water-closet, earth-closet, privy, ashpit, or cesspool on examination is found to be in proper condition, he shall cause the ground to be closed. . . . If the drain, water-closet, earth-closet, privy, ashpit, or cesspool on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises, requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty . . . and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing . . ." The word "drain" in that section means a drain in the old sense as one used for the drainage of one building only. In the present case the head-note of the report in the Divisional Court (1904, 2 K. B. 1) is, so far as material, as follows: "Where two or more houses are drained by a single pipe, neither the fact that the pipe is wholly situate on private land nor the fact that the houses belong to different owners will suffice to make the pipe a 'single private drain' within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, so as to entitle the local authority, in the event of the pipe becoming a nuisance, to require the owner or occupier of the premises to amend it under section 41 of the Public Health Act, 1875." The drain in question in the present case is used for the drainage of two or more houses belonging to different owners, and is indistinguishable in its character from the drain in many of the cases referred to in the course of the argument, and notably in the case of *Bradford* v. *Mayor, &c., of Eastbourne*. The question as to the true meaning of section 19 of the Act of 1890, and especially the meaning of the words "single private drain" has been the subject of discussion in several cases. Upon examining those cases there seems to be a clear balance of authority in favour of the appellant corporation. It is not necessary to travel through all those cases again, because I cannot improve upon the reasons so fully given by the late Lord Russell of Killowen, C.J., and Wills, J., in *Bradford* v. *Mayor, &c., of Eastbourne*. That decision has been followed more than once. It lays down a reasonable and intelligible interpretation of the section. The first case which it is necessary to mention is *Self* v. *Hove Commissioners*, which was a decision of Wills and Wright, JJ., in 1895, and the interpretation of the section which was there laid down was subsequently adopted in *Bradford* v. *Mayor, &c., of Eastbourne*. In my opinion, upon the

facts in the present case, the pipe here is not distinguishable from what was held in that case to be a "single private drain" within section 19 of the Act of 1890. There is another later case in 1895—*Hill* v. *Hair*, where Cave and Lawrance, JJ., took a view that was contrary to that taken in *Self* v. *Hove Commissioners*. In *Bradford* v. *Mayor, &c., of Eastbourne*, decided a year later, Lord Russell of Killowen, C.J., and Wills, J., in very elaborate judgments, adopted the view taken in *Self* v. *Hove Commissioners* in preference to the view taken in *Hill* v. *Hair*, and held that a pipe which was indistinguishable from the pipe in the present case was a single private drain within section 19 of the Act of 1890, the result being that the combined effect of section 41 of the Act of 1875 and section 19 of the Act of 1890 imposed the obligation upon the owners of the houses, at the instance of the local authority, to repair the pipe so as to do away with a nuisance arising therefrom. The same question came again before a Divisional Court, consisting of Cave and Ridley, JJ., in *Seal* v. *Merthyr Tydfil Urban District Council*, and the court followed *Bradford* v. *Mayor, &c., of Eastbourne*, Cave, J., receding from his earlier opinion. Such was the state of the law when the present case of *Thompson* v. *Mayor, &c., of Eccles* came before the Divisional Court. Upon the argument there *Bradford* v. *Mayor, &c., of Eastbourne* was cited, but it was not referred to in detail, and we have the authority of Channell, J., for saying that that case was not fully considered when judgment was given in the present case. In the subsequent case of *Hœdicke* v. *Friern Barnet Urban District Council* Channell, J., having carefully considered the *Eastbourne case*, followed it. The balance of authority is therefore entirely in favour of the view taken by the Divisional Court in *Bradford* v. *Mayor, &c., of Eastbourne*, as to the combined effect of section 41 of the Act of 1875 and section 19 of the Act of 1890, and as we have had a full opportunity of considering the arguments and reasoning in that case, it would be a waste of time if I were to state over again that reasoning and why I agree with it. For the reasons there given the appeal in the first case must succeed.

With reference to the second case, *Hœdicke* v. *Friern Barnet Urban District Council*, the drain is indistinguishable from the drain with which I have been dealing in the first case. There is, however, a further point taken in this case, which might have been, but was not taken in the first case. The plaintiff was called upon by the local authority to abate a nuisance existing in a drain within the definition in section 19 of the Act of 1890. The plaintiff did the work, and brought this action to recover the amount so expended by her from the local authority upon the ground that she had been compelled to do work which they were legally compellable to do, the plaintiff contending that the drain where the nuisance existed was a sewer. The answer of the local authority was that, though before the Act of 1890 the pipe would have been a sewer repairable by the local authority, and though it might still be for other purposes a sewer, by section 19 it is now a single private drain, and by the combined effect of section 41 of the Act of 1875 and section 19 of the Act of 1890 the plaintiff must do the work. Upon the question whether the pipe comes within section 19, the case, as I have said, is governed by the decision in the first of these two appeals. Conceding that, the further contention, however, is put forward that, assuming that the pipe is a single private drain within the section as between her and the local authority, the latter have not taken the proper steps to render her liable, and as they cannot localize the cause of the mischief as arising entirely on her premises, they cannot say that she, and she alone, is liable under the sections to make good the defect; and that, as they have not apportioned the expense among the other owners, they have not taken the necessary steps for insisting upon her liability, and that therefore the burden of repairing the defect remains still upon the local authority. The answer to that contention is simple. Broadly speaking, the Legislature has thrown back upon the private owner what had been placed upon the local authority—namely, the remedying of a nuisance existing in a single private drain as specified in section 19 of the Act of 1890. That being so, the obligation of making good the defect in the drain is upon the plaintiff, and she is debarred from saying that any work done by her has been done in relief of the local authority. The Legislature has laid the burden on her and not on the local authority, and therefore she cannot say that the burden is on the local authority by reason of their not having taken steps to place that burden on her. It is then said that section 19 of the Act of 1890, which introduces machinery applicable to a drain, cannot be applied to what was done upon something which is not within the control of one particular owner—namely, a sewer which is on the premises of several owners. It is said that the nuisance must be taken as arising out of all the premises. But the facts here show that the nuisance was ascertained by the local authority as arising on the plaintiff's premises, who is the owner of more than one of the houses. It was proved that the nuisance was abated by her without travelling out of her own premises. Therefore upon the facts here the plaintiff cannot say that the nuisance was not upon her property. The nuisance was one which could be and was reached by the procedure of the two sections. No question of apportionment, therefore, arises, even if it be *ad rem* at all, as the whole obligation was on the plaintiff. The appeal in this case must also be allowed.

STIRLING, L.J.—I am of the same opinion. The first question is a difficult one—namely, what is the meaning of "single private drain" in section 19 of the Act of 1890. That question was considered by the Divisional Court in 1896 in *Bradford* v. *Mayor, &c., of Eastbourne*, and the interpretation of those words was laid down in most admirable judgments, and that decision has been followed from that time until the decision of the Divisional Court in the present case. I have carefully considered the reasons given by Channell, J., in his judgment in the second case under appeal, where that learned judge, though he followed the decision in *Bradford* v. *Mayor, &c., of Eastbourne*, states his own personal opinion that the decision of the Divisional Court in the first case under appeal is to be preferred. I do not think that those reasons are of such weight that they ought to induce us to depart from the decision in *Bradford* v. *Mayor, &c., of Eastbourne*, and in my opinion that decision should be followed in the first case under appeal.

With reference to the second case, the decision in the first case applies to it as well. But there is another question raised, which is also a question as to the construction of section 19 of the Act of 1890. In terms that section does not say how the application is to be dealt with. It is suggested that the meaning of the two portions of sub-section 1 of that section is that, in every case upon an application being made under the Act as therein provided, the local authority may execute the necessary works and, if they do so, they can only recover the expenses from the owners of the houses in such proportions as may be settled by their surveyor. I do not think that that is the true meaning of the section. In my opinion the true meaning is that, upon such an application being

made, the procedure of section 41 of the Public Health Act, 1875, is to be followed, and there are given to the local authority by section 19 additional powers of recovering the expenses in apportioned parts from the several owners of the houses. The procedure under section 41 of the Act of 1875 is as follows: The local authority, upon a complaint being made to them, after giving notice to the occupier of the premises, may empower their officer to enter upon the premises and open up the ground and examine the drain for the purpose of ascertaining the cause of the nuisance. If the drain is found to be in good condition, the ground is to be closed up. If it is found to be in bad condition, the local authority are to give notice to the owner or occupier to do the necessary works. If the notice is not complied with, the person served is made liable to a penalty, and the local authority may execute the works, and recover the expenses thereof from the owner in a summary manner. That is the procedure under section 41. That section applies only to a drain used for the drainage of one house only. Section 19 of the Act of 1890 extends it to a drain used for the drainage of more than one building, where the houses belong to different owners. What is the proper course for the local authority to adopt in such a case? It seems to me that when an application is made to them under the section, their duty is to go upon the premises and make the necessary examination. Upon making such examination they may discover that the nuisance does not exist solely, or at all, upon those premises, and they may trace it to other premises. In that case the local authority will have to pursue their inquiries further, and give notice to the owner of those other premises. It may, however, turn out upon examination that only one owner is affected, and that works confined to the property of that particular owner will remedy the nuisance. In this latter case I do not think that sections 41 and 19 of the Acts impose upon the local authority any duty of serving notices upon the owners of all the premises. It is enough if the owner of the premises where the defect was found is served. If that be so, the contention that the local authority have not observed the proper procedure in the second case falls to the ground. If the defect exists on the premises of more than one owner it may be necessary to serve more than one. But if the defect exists on the premises of only one, then only one need be served, and the whole of the expenses of remedying that defect may be recovered from the owner of those premises, and it becomes unnecessary to invoke the last clause of section 19, sub-section 1, of the Act of 1890. In the present case the defect existed only on the premises of the plaintiff, and therefore the ground upon which Channell, J., decided in her favour cannot be supported.

MATHEW, L.J., concurred.

Solicitor for Thompson, *E. Lorimer Wilson*, Manchester.

Solicitors for Eccles Corporation, *Sharpe, Parker, & Co.*, for *W. H. Hickson*, Eccles.

Solicitors for Hædicke, *Emanuel & Simmonds*.

Solicitor for Friern Barnet Urban Council, *R. Miller, Wiggins, & Naylor*.

High Court of Justice.

Chan. Div. } Farwell, J. } July 26, 27; Nov. 14, 17.

In re OLIVER'S SETTLEMENT.
EVERED *v.* LEIGH. (*a.*)

Will—Appointment—Power—Perpetuity—Election.

Where the limitations in a will are illegal and void for perpetuity they cannot be used to raise a case of election. The fact that the limitations also exceed the limits of the power is immaterial. The court is bound on finding illegality to refuse to assist in carrying it out.

In re Bradshaw, [1902] 1 *Ch.* 436, 50 *W. R. Dig.* 138, *not followed.*

Originating summons.

This was an originating summons by Charles Evered, the sole trustee of a settlement dated the 24th of May, 1831, made on the marriage of John Oliver and Sarah Oliver, and also one of the trustees of the will of John Oliver, dated the 10th of September, 1886, for the determination of the following amongst other questions: Whether the appointments made by a deed-poll of the 12th of February, 1880, executed by John Oliver and Sarah Oliver, of property subject to the trusts of the said settlement were revoked by the will of John Oliver, and if the appointments made by the deed-poll were wholly or partially revoked by the said will, whether the appointments made by the will of the said property are valid, and whether any case of election arises under the said will?

John Oliver survived his wife and by his will appointed shares of the settled property to his three daughters for life with remainder to their children, and gave property of his own to the same daughters.

Stafford Crosmann, for the plaintiff.

E. Ford, Elgood, Baker, H. A. Smith, L. Ryland, and *Sherrington*, for the several parties interested.

FARWELL, J., in giving judgment, said: The testator in this case has exercised a limited power of appointment vested in him in such a way as to contravene the rule against perpetuities, and has by the same instrument given to the persons entitled in default of appointment benefits out of his own property. The question for my determination is—Does this raise a case of election? I reserved my judgment because there is a conflict of authorities on the subject by reason of Kekewich, J.'s, recent decision in *In re Bradshaw*, [1902] 1 Ch. 436, 50 W. R. Dig. 138. I propose first to consider the question on principle and then to examine the authorities. The rule against perpetuities is a comparatively modern development of the ancient rule of English law that one of the inseparable incidents of property is the right of alienation by appropriate assurances. The rule is one of public policy, and it has always been considered to be the duty of all the courts to uphold it, not to assist in evading it, and accordingly the maxim "*Quodcunque prohibetur fieri ex directo, prohibetur et per obliquum*" has on many occasions been applied so as to give full effect to it. It is sufficient to refer to the well-known case of *Spencer* v. *Duke of Marlborough*, 1 Ed. 404, 3 Bro. P. C. 232, where Lord Loughborough, and the judges who advised the House of Lords, and the Lords were unanimous in applying it. The testator in that case attempted to evade the rule by creating an estate tail with powers in trustees to revoke the uses from time to time as tenants in tail were born, and resettle so as to make such tenants in tail tenants for life with remainders in tail, and a bill

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

was filed for the execution of the trusts of the will; it was unsuccessfully argued that, though estates could not be directly limited to the extent desired, yet that the Court of Chancery, "which professes to regard the intent of testators, would allow it to be done *arte vel ingenio et per obliquum*."

The doctrine of election is a rule of equity by virtue of which the court of equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will. It is somewhat startling that this court should be asked to extend it to illegal provisions, and to apply its doctrines for the purpose of enabling a testator to evade a rule of law founded on public policy. Lord Northington, in 1 Ed., at p. 417, puts it somewhat strongly. After referring to the various attempts that had been made at law to evade the rule against perpetuity, he says: "It seems to me most surprising, after these puerile attempts had been made upon the narrow, fettered, and technical reasonings of courts of law, and been rejected by them and exploded with contempt and derision, that it could ever have entered into the head of man to think that he could subvert the fundamental principles of property by the aid of this court." And the Master of the Rolls, in *Mainwaring* v. *Baxter*, 5 Ves. 458, where another attempt at evading the rule against perpetuities was made, said that he adopted Lord Northington's words. Kekewich, J., has said, and it is the basis of his judgment, that it is immaterial whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of Equity to participate in his illegal act by giving effect to it; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the particular case, limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are void on the face of the will, but a devise of Blackacre by a testator who has no interest therein is not illegal nor is it void on the face of the will, but depends on an inquiry into the testator's title. In considering a will this court has first to construe the words and then to apply to them such rules of general law (*e.g.*, the rule against perpetuity or the Thellusson Act) as may be appropriate: *Pearks* v. *Mosely*, 29 W. R. 1, 5 A. C. 714. If it thereupon appears that there is any infringement of such rules, the court is bound to refuse to allow its process to be used to carry out such illegality, and that, too, whether any of the parties to the litigation raise the objection or not: *Evans* v. *Richardson*, 3 Mer. 469. How is this compatible with the order that I am asked to make here, by which I should first declare the appointment illegal and void for perpetuity and then give practical effect to it by putting in force the equitable doctrine of election? There is certainly no novelty in the statement that this court will refuse to aid a testator to commit any breach of the law. Lord Hardwicke explains the refusal of the court to marshal assets in favour of a charity by saying that he "was not warranted to set up a rule of equity contrary to the common rules of the court merely to support a bequest which was contrary to law": *Mogg* v. *Hodges*, 2 Ves. sen. 52. Other instances will be found referred to in Lindley on Partnership (5th ed.), p. 1114. I have gone into this more fully than I should have otherwise thought necessary out of deference to Kekewich, J.'s, judgment, the whole foundation of which is that it is immaterial whether the appointment fails for illegality or merely on a point of construction, and I can only say that on principle I am wholly unable to agree with him.

But when I come to the authorities on the particular point before me, it appears to me that there is an overwhelming concurrence of judicial opinion against Kekewich, J.'s, view. The first case is *Wollaston* v. *King*, 8 Eq. 165, before James, V.C. It is said that the Vice-Chancellor's statement is only a *dictum*. I doubt if it is so; it seems to me to be one of several reasons for his judgment. He says: "It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this court to aid such an attempt either by the application of the doctrine of election or otherwise." But if it be a *dictum* only, it comes from a great judge, and I desire to adopt it as in my opinion a correct statement. The next case is *In re Warren*, 32 W. R. 641, 26 Ch. D. 208, which is an express decision of Pearson, J., exactly in point. It is said that it was not argued, but I cannot regard the decision as of less weight, because the judge obviously thought the point unarguable, and I am not aware that the decision has ever before been doubted. But the case does not rest there, for the point has recently been before a strong Court of Appeal in Ireland in *In re Handcock*, 23 L. R. Ir. 34, and they unanimously approved *In re Warren* and *Wollaston* v. *King*. Their decision is not, of course, binding on the English courts, but I cannot help feeling more confidence in the decision at which I have arrived when I find it shared by Lord Ashbourne and Fitzgibbon, Naish, and Barry, L.JJ., and similar reasons given. These reasons may be summarized from pages 47 and 48 of the report thus—that the court refused to infringe on the rule against perpetuity, a rule introduced on grounds of public policy, or to aid in tying up trust property for a period beyond legal limits. They would not allow the court to be the medium of carrying out an appointment of the settled fund in violation of the rule against perpetuity.

I therefore decline to follow *In re Bradshaw*, and I declare the limitations in this will, being illegal and void for perpetuity, cannot be used to raise any case of election in this court. It is, perhaps, hardly necessary to add that the fact that the limitations also exceed the limits of the power is immaterial. The court is bound on finding illegality to refuse to assist in carrying it out.

Solicitors, *Grubbe & Troughton*, for *Evans & Taylor*, Bristol; *Cameron, Kemm, & Co.*, for *C. D. Miller*, Derby; *Scott, Spadding, & Bell*, for *Barham & Son*, Bridgwater; *Seymour Williams & Co.*, for *Lawrence & Watts*, Bristol.

Chan. Div. } Warrington, J. } Dec. 1, 3.

In re BEALE'S SETTLEMENT. (*a.*)

Will—Appointment under power—Perpetuity—Doctrine of election.

The doctrine of election, that a person cannot take property against an instrument and at the same time claim other property under the instrument, does not apply to a case where the claimant takes property in default of an appointment in consequence of the appointment actually made being void for transgressing the rule against perpetuities; and in such a case the claimant can take not only that property but also other property given to him by the instrument purporting to make the appointment, without making compensation.

In re Oliver's Settlement, ante, *p.* 215, *followed.*

In re Bradshaw, [1902] 1 *Ch.* 436, 50 *W. R. Dig.* 138, *not followed.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Originating summons.

This was an application by the trustees of a marriage settlement for the determination (among others) of the question whether persons who took part of the settled fund in consequence of an appointment made by will under the settlement being void for perpetuity were put to their election as to taking other property under the same will.

By a settlement made upon the marriage of John Beales and Frances Beales (then Frances Day) in 1833 certain funds were settled upon such trusts (after life estates to husband and wife) for the children of the marriage, and their issue, born in the lifetime of John Beales and Frances Beales or the survivor of them, as the survivor of them should by deed or will appoint, and in default of such appointment, for the children of the marriage in equal shares at twenty-one as to sons, and twenty-one or marriage as to daughters. There was no hotchpot clause.

There were three children of the marriage, all of whom attained twenty-one—John Day Beales, Frances Elizabeth Beales, who married Mr. Youngs, and Gertrude Lloyd Beales, who married Mr. Cummings.

Mrs. Beales survived her husband, John Beales, and died in 1880.

By her will, dated the 8th of May, 1869, Mrs. Beales exercised the power of appointment given by the settlement by appointing the fund to her trustees upon trusts for conversion, and she at the same time bequeathed her own estates to the trustees upon the same trusts for conversion. She directed her trustees to stand possessed of the produce of the conversion upon trust to divide the same into three equal parts, as to one part for John Day Beales, as to one for Mrs. Youngs for her life, and after her death for her children attaining twenty-one or (if daughters) marrying, and as to the remaining part upon similar trusts for Mrs. Cummings and her children.

It was admitted that as to the children of the daughters, the appointment, not being limited to such as were born in the lifetime of Mrs. Beales, was void as offending against the rule as to perpetuities. Mrs. Young had several children, all of whom were born in the lifetime of Mrs. Beales, their grandmother. Mrs. Cummings also had children.

The trustees of the settlement had paid to John Day Beales his share of the trust fund, and had retained the shares of Mrs. Youngs and Mrs. Cummings.

Mrs. Youngs died in August, 1904. J. H. D. Beales, the executor of the executrix of John Day Beales, who had died, claimed that, as the trust for appointment could not take effect, he was entitled to one third of the share of Mrs. Youngs of the settled fund under the trust in the settlement in default of her appointment, and that he could at the same time retain the share of John Day Beales of the free disposable property of his mother, Mrs. Beales, bequeathed to them by her in the same will which contained the void appointment, without making any compensation to the objects of that appointment.

The trustees of the settlement took out this summons for the determination of that question (among others), both as regards his share and also that of his sisters.

Rolt, for the trustees of the settlement.

Blakesley, for the children of Mrs. Youngs.—I admit that the appointment upon the death of Mrs. Youngs to her children is void, and that the fund goes to the children of Mrs. Beales in default of appointment, but I submit they cannot take any part of the fund without making compensation to the children of Mrs. Youngs, in whose favour the void appointment was made, out of the free disposable property bequeathed to them by Mrs. Beales. A case of election arises, and they cannot take at once against and under the will. It is true there is a conflict of authority upon the question, but I rely on the decision of Kekewich, J., in *In re Bradshaw*, [1902] 1 Ch. 436, as preferable to that of Farwell, J., in *In re Oliver's Settlement*, *ante*, p. 215. Moreover, in this case the appointment was made to persons some of whom might be outside the power altogether, which was limited to the children of Mrs. Youngs born in the lifetime of the survivor of Mr. and Mrs. Beales. It is therefore governed by *In re Brooksbank, Beauclerk* v. *James*, 35 W. R. 101, 34 Ch. D. 160, and is distinguishable from *In re Oliver's Settlement*. [WARRINGTON, J., referred to *In re Handcock's Trusts*, 23 L. R. Ir. 34.]

Colquhoun Dill, for the children of Mrs. Beales.—I rely on the decision of Farwell, J., in *In re Oliver's Setttement*, following *Wollaston* v. *King*, 17 W. R. 641, L. R. 8 Eq., 165, and *In re Warren's Trusts*, 32 W. R. 641, 26 Ch. D. 208.

Cur. adv. vult.

Dec. 3.—WARRINGTON, J.—It is admitted that the trust for the children of Mrs. Youngs is too remote, and that her share goes, in default of appointment, in thirds between the legal personal representative of John Day Beales and Mrs. Youngs and the defendant Mrs. Cummings; but it is said that the legal personal representative of John Day Beales is put to election between his interests in default of appointment and his share in the testatrix's own estate. The case is covered by authority, but unfortunately the authorities are conflicting. In favour of the proposition that in a case where an appointment fails for remoteness, as distinguished from one in which it fails as being in favour of persons not objects of the power, a case of election is not raised, there are the following authorities: *Wollaston* v. *King*, *In re Warren's Trusts*, *In re Handcock's Trusts*, and *In re Oliver's Settlement*. In *Wollaston* v. *King* it is said the passage relied upon is a mere *dictum* (see p. 175); it is, however, contained in a considered judgment, and may be taken to express the deliberate opinion of the very learned judge, James, V.C. *In re Warren's Trusts* was a decision of Pearson, J., and *In re Handcock* was a decision of the Irish Court of Appeal. Finally, in *In re Oliver's Settlement*, Farwell, J., reviewed all those authorities and some earlier ones, and came to the conclusion that they should be followed rather than the decision of Kekewich, J., in *In re Bradshaw*. The latter case is the only authority on the other side, and it is undoubtedly a deliberate decision of that learned judge after consideration of the several authorities other than *In re Oliver's Settlement*. In this state of things, all I can do is to say that in my view the balance of authority is against raising a case of election, and I so hold accordingly.

An attempt was made to distinguish this case on the ground that the appointment fails as extending to persons not objects of the power. But to ascertain whether an appointment fails on this ground the court looks at the actual facts, and not, as in the case of the rule against perpetuities, to possible facts: *Harvey* v. *Stracey*, 1 Dr. 73, 117. In the present case, on the actual facts, no person not an object is included; therefore, the distinction does not exist. I declare that the share of Mrs. Youngs in the funds comprised in the settlement ought to be treated as unappointed, and that the three children can claim such share without making compensation out of their interests under the will.

Solicitors, *White, Borrett, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) July 7, 1904.

BOW v. HART. (a.)

County court—Jurisdiction—Trade-mark—Injunction to restrain infringement—Title to a franchise—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 56—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 75, 76, 90, 117—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 18.

A county court has jurisdiction to try an action for infringement of a registered trade-mark, notwithstanding the fact that the validity of the trade-mark is in dispute. A trade-mark is not a "franchise" within the meaning of the proviso in section 56 *of the County Courts Act*, 1888.

Appeal by the plaintiff from a decision by Sir W. L. Selfe, judge of the Rochester County Court.

The question raised was whether the county court has jurisdiction to entertain an action for an alleged infringement of a registered trade-mark.

The plaintiff brought an action in respect of an alleged infringement by the defendant of his, the plaintiff's, trade-mark "Freedom," registered on the 4th of July, 1902, and he claimed an injunction to restrain the defendant from infringing the trade-mark and also an account or damages.

The defendant gave notice that at the hearing he would object to the jurisdiction of the county court to try the plaintiff's claim, and also that he intended to contest the validity of the plaintiff's trade-mark and to apply to the High Court to have it expunged from the register of trade-marks.

At the hearing the objection as to jurisdiction was duly taken, but the learned judge decided to hear the evidence but declined to give any judgment and made the following order: "It appearing that the defence to this action puts in issue the question of the plaintiff's right to the exclusive use of his registered trade-mark and his right to have such trade-mark continued on the register, which is a question which this court has no jurisdiction to decide, I do not think fit to make any order in this action."

From this order the plaintiff now appealed.

Spokes, for the appellant.—By section 56 of the County Courts Act, 1888, jurisdiction is given to the county courts in all personal actions where the claim does not exceed £50, provided that "the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or for any libel or slander, or for seduction, or breach of promise of marriage." "Franchise" is the only exception in that proviso that could possibly apply to the present case; but a trade-mark is not a "franchise." Lord Esher, M.R., in *Reg.* v. *Halifax County Court Judge*, [1891] 2 Q. B. 263, says: "The term 'franchise' in the County Courts Act, 1888, includes a privilege granted by the Crown in respect of its prerogative." A trade-mark cannot be so defined. Section 56 clearly shows that the county court judge had jurisdiction to grant the injunction the plaintiff asked for.

Beddall, for the respondent.—A trade-mark is a "franchise" within the meaning of section 56, and therefore the county court judge has no jurisdiction to entertain the action. In principle there is no difference between a trade-mark and letters patent, except that the former is granted by the Legislature and the latter by the Crown. *Reg.* v. *Halifax County Court Judge* decided that the grant of letters patent is a franchise within the meaning of the proviso in section 56. "Court" in section 117 of the Patents, Designs, and Trade-Marks Act, 1883, means the High Court equally whether the subject of dispute is the title to a trade-mark or to a patent.

Spokes replied.

Lord ALVERSTONE, L.C.J.—The point raised in this case is one of considerable importance and difficulty, and I am anxious that the conclusion at which I have arrived—namely, that the county court has jurisdiction, should be reviewed in the Court of Appeal. I think the decision of the county court judge was wrong, because it seems to me that if the statute gives him jurisdiction over this action the question raised by the defence cannot take it away.

This action was brought in respect of an alleged infringement of a registered trade-mark, and the defendant by way of defence gave notice that he intended to contest the validity of the plaintiff's trade-mark, and to apply to a judge of the High Court to have it expunged from the register. Under these circumstances the question which arises is whether the county court judge had jurisdiction. Section 56 of the County Courts Act, 1888, confers jurisdiction on the county court in "all personal actions where the debt, demand, or damage claimed is not more than fifty pounds," but it goes on to provide that the court shall not have cognizance of, *inter alia*, any action in which the title to any franchise shall be in question. During the argument I inquired whether there exists any authority upon the question whether a registered trade-mark is a "franchise" within the meaning of section 56, but counsel were unable to cite any such authority. I have never heard it contended that a trade-mark is a franchise, and, looking at the grounds of the decision in *Reg* v. *Halifax County Court Judge*, I think that case is certainly not an authority to that effect. The right to the exclusive use of a trade-mark is a right based upon property, and the right to the registration of that trade-mark is a right conferred by statute; it is not based upon any question of grant from the Crown, and therefore it is not analogous in its nature to a franchise. We cannot, therefore, hold that the jurisdiction of the county court is excluded on the ground that a trade-mark falls within the meaning of the term "franchise."

Then we come to the second point, which gives rise to considerable difficulty—namely, that it has been held in *Reg.* v. *Halifax County Court Judge* that actions for an infringement of a patent, where the validity of the patent was contested, could not be brought in a county court, because, as Lopes, L.J., in his judgment points out, the Patents Act, 1883, "provides special machinery for the trial of patent actions, only applicable to a trial in the High Court, and by section 117 interprets the expression court as used by the Act to mean the High Court." That, of course, is independent of the view the learned judges in that case took, that the grant of letters patent is a franchise within the meaning of the proviso in section 56 of the County Courts Act, 1888. The difficulty that I experience arises from the wording of section 18 of the Patents Act, 1888, which is in terms the same as section 31 of the Patents Act, 1883, and is to be read with that Act.

Section 18 provides that "in an action for infringement of a registered trade-mark the court or a judge may certify that the right to the exclusive use of the trade-mark came in question, and if the court or a judge so certifies, then in any subsequent action for infringement the plaintiff in that action, on

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the court or judge trying the subsequent action certifies that he ought not to have the same." I confess I have had some doubt as to whether or not the language of this section is not almost enough to show that the special machinery for dealing with questions of infringement of trade-mark might exclude the jurisdiction of the county court, but on the whole I do not think the language is strong enough for me so to hold. I do not think we need attach much weight to the contention that section 18 is merely optional, and that the plaintiff could waive his right thereunder or not ask for it, because that would amount to giving jurisdiction by consent. I do, however, recognize the force of the objection that there might be a decision in the county court with reference to a trade-mark in favour of one of the parties and a decision in favour of the other party in proceedings taken in the High Court under section 90 of the Act of 1883 to expunge or vary the entry in the register, a power which is confined to the High Court. It has not been contended that the county court has any jurisdiction under that section to expunge or vary the entry, nor that the county court can give a certificate as to exclusive use under section 18 of the Patents Act of 1888.

In my opinion section 56 of the County Courts Act, 1888, does not exclude trade-mark actions from the jurisdiction of the county court. I do not think the arguments in *Reg.* v. *Halifax County Court Judge* apply in the case of a trade-mark except to the limited extent which I have indicated There is power in the High Court to remove from the county court a case in which such a defence is raised as we have here, a power which certainly ought to be exercised in the present case if the defendant so desire, because if he be successful in his defence effect can only be given to it by expunging the entry in the register, which, as I have already pointed out, can only be done by the High Court. On the whole I come to the conclusion that the county court judge had jurisdiction and ought to have entertained this case. This appeal must therefore be allowed, but as this case is one of considerable importance the defendant will have leave to appeal.

KENNEDY, J.—I am of the same opinion. In my judgment a trade-mark is not in any sense a franchise, and therefore *primâ facie* the county court judge had jurisdiction, and the plaintiff had a right to have the case heard and determined; but the defendant raised by his defence as to the validity of the trade-mark a matter over which the county court clearly had no jurisdiction, and he contended that the learned judge therefore had no jurisdiction over the action at all. I do not agree with that contention. Under section 56 of the County Courts Act, 1888, jurisdiction is given to a county court judge to hear all but certain excepted cases, and this action is not one of those excepted cases, although I quite see the difficulty of working out a defence such as is raised in the present case under the county county procedure. The defendant, however, can under section 126 of the County Courts Act, 1888, apply for the removal of the case into the High Court, and as the defendant can only obtain the relief he is seeking in the High Court, I think that such an application would be granted. I agree, therefore, that this appeal should be allowed.

Appeal allowed; leave to appeal.

Solicitors for the plaintiff, *Carter & Bell.*

Solicitor for the defendant, *Churchman & Winser.*

K. B. Div.
(Kennedy and Darling, JJ.) June 20, 1904.

GWENDOLEN FREEHOLD LAND SOCIETY v. WICKS. (a.)

Industrial society—Arrears and fines—County Court—Special remedy for debts due from members—Past Members—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 23, *sub-section* 1.

By section 23 *of the Industrial and Provident Societies Act,* 1893, "*All moneys payable by a member to a registered society shall be a debt due from such member to the society, and shall be recoverable as such either in the county court of the district in which the registered office of the society is situate or in that of the district in which such member resides, at the option of the society.*"

Held, that, under the above section, a society could sue in the county court a past member for a debt contracted while he was a member; and consequently that it was immaterial that the amount sued for was in excess of the ordinary jurisdiction of the county court.

Appeal from the Leicester County Court.

The action was brought by the Gwendolen Land Society, a society registered under the Industrial and Provident Societies Act, 1893, to recover from the defendant, who had ceased to be a member, the sum of £136 for arrears and fines alleged to have become payable to the society from him during the time he was a member.

At the trial the county court judge entered judgment for the plaintiffs for £95.

The defendant appealed on the ground, *inter alia*, that having ceased to be a member of the society the action was not maintainable under section 23 (1) of the Industrial and Provident Societies Act, 1893, which provided for the recovery of money due from a member to a society as a debt that could be sued for in the county court. That having ceased to be a member of the society at the date of the issue of the plaint, the special provisions for the recovery of debts from members given by section 23 no longer applied, and the amount of the plaintiffs' claim being in excess of the ordinary jurisdiction of the county court, the action should have been brought in the High Court.

A. Neilson, for the defendant.

C. B. Marriott, for the plaintiffs.

KENNEDY, J.—With regard to the point taken on behalf of the defendant upon section 23, sub-section 1, of the Act of 1893, the contention was that the right of the county court judge to adjudicate upon an alleged debt from a member to the society depended upon whether the plaint had been entered during the time the defendant was a member. But I do not agree with that contention, for I do not think that the jurisdiction is so limited. I think that the word "member" in the section must be read as including past members as well as present. Nor do I see how the fact that this defendant had ceased to be a member alters the case or affects the right of the society to sue him in the county court for moneys which became due from him whilst he was still a member of the society, and which the Act expressly says may be sued for in the county court.

DARLING, J.—I agree.

Appeal dismissed.

Solicitors for the plaintiffs, *Stileman & Neate*, for *Latham, New, & French*, Melton Mowbray.

Solicitors for the defendant, *Bennett & Chance*, for *Bray & Price*, Leicester.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) May 13, 1904.

LONDON COUNTY COUNCIL (*Appellants*) v. ILLUMINATED ADVERTISEMENT CO. (*Respondents*). (*a*.)

Metropolis — Buildings — Illuminated advertisements affixed to buildings—Projection beyond building line—"Building or structure"—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 200 (3).

The respondents erected upon the front walls of a building twelve advertisement cases constructed of sheet iron, supported by wrought iron supports, which were pinned through the front walls. The outer side of each case was covered with a wooden frame carrying canvas or linen lined with advertisements, and provision was made for illuminating the interior of the cases by electric light. The cases varied in width from two to five feet, and in height from five to seven feet. Each of the cases stood out ten inches in front of a front wall of the building beyond the general line of building, but each projection was less than the projection of the existing cornice over the shop, which was two feet from the face of the main building. The respondents had not obtained the consent of the London County Council to the erection of the cases.

Held (*by* Lord Alverstone, L.C.J., *and* Kennedy, J., Wills, J., *dissenting*), *that the cases were not structures within the meaning of section* 22 *of the London Building Act,* 1894, *which provides that "no building or structure shall, without the consent of the council, be erected beyond the general line of buildings in any street."*

Case stated by A. C. Plowden, Esq., metropolitan police magistrate, sitting at the Marlborough-street police-court.

On the 10th of October, 1903, an information was laid against the respondents by T. Chilvers, on behalf of the appellants, charging them that on the 26th of May, 1903, they did unlawfully erect certain structures beyond the general line of buildings at 48, Cranbourn-street, Leicester-square, in the City of Westminster, in the county of London, in contravention of the provisions of Part III. of the London Building Act, 1894, and without the consent in writing of the appellants, whereby they became liable to the penalty prescribed by section 200 (3) of the said Act, and the later Amendment Act of 1898.

Upon the hearing of the information the following facts were proved or admitted:

In the months of April and May, 1903, the respondents erected upon the front walls of the building No. 48, Cranbourn-street, Leicester-square, twelve advertisement cases. The cases were constructed of sheet iron, supported by strong wrought-iron supports, securely cut and pinned through the front walls of the building. The outer side of each of the cases was covered with a wooden frame carrying canvas or linen lined with advertisements, and provision was made for illuminating the interiors of the cases by electric light. The cases varied in width from two feet to five feet, and in height from five feet to seven feet. Each of the cases stood out ten inches in front of a front wall of the building, but each projection was less than the projection of the existing cornice over the shop, which is two feet from the face of the main building. The front of the cases was about ten inches beyond the general line of buildings as determined by a certificate dated the 23rd of December, 1903, of the superintending architect of metropolitan buildings. It would be possible to move the whole of the cases (with the exception of the iron supports) in a single day without injury to the building.

The respondents had not obtained the consent of the appellants to the erection of the cases.

The appellants contended that the cases so fixed and supported as aforesaid were structures within the meaning of sections 22 and 200 (3) of the London Building Act, 1894.

The respondents contended that the cases were not structures within the meaning of section 22 of the said Act.

The learned magistrate was of opinion that the cases in question were not structures within the meaning of the Act, that they were in their nature mere excrescences which could be removed at will without injury to the fabric, and that they could not be said, therefore, to be a "bringing forward" of the main building such as was contemplated by the statute, and he accordingly dismissed the summons.

The question of law for the opinion of the court was whether, upon the true construction of the sections above referred to, the respondents, on the facts above referred to, had erected a structure or structures beyond the general line of the buildings aforesaid.

The London Building Act, 1894 (57 & 58 Vict. c. 213), s. 22, provides as follows:

"No building or structure shall without consent in writing of the council be erected beyond the general line of buildings in any street or part of a street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall be defined by the superintending architect."

By section 200 (3) a penalty is imposed on every person who "erects or brings forward any building or structure in contravention of any of the provisions of Part III. of this Act or of any conditions attached by the council to any consent given pursuant to such provisions."

Avory, K.C. (*Daldy* with him), for the appellant.

Macmorran, K.C. (*H. Cassie Holden* with him), for the respondents.

The arguments of counsel sufficiently appear in the judgments.

The following cases were referred to: *Coburg Hotel Co.* v. *London County Council*, 63 J. P. 105; *Hull* v. *London County Council*, 49 W. R. 396, [1901] 1 K. B. 580; *Venner* v. *McDonnell*, 45 W. R. 267, [1897] 1 Q. B. 421; *Davy* v. *London County Council*, [1895] 2 Q. B. 577; and *Wendon* v. *London County Council*, 42 W. R. 370, [1894] 1 Q. B. 812.

KENNEDY, J.—In this case, speaking for myself, I am unable to adopt the view that the decision of the learned magistrate must be overruled. I do not think there is much more to be said than this, that it is a question of fact and a question of degree in each case. The magistrate has, no doubt, put it as a question of law—that is, "Whether upon the true construction of sections 22 and 200 (3) of the London Building Act, 1894," the respondents "erected a structure or structures beyond the general line of buildings aforesaid." It seems to me that if it be a question of fact and of degree in each case, it was for him to decide it; and he has decided "that the cases in question were not structures within the

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

meaning of the Act." It is true he has added a rider "that they were in the nature of mere excrescences which could be removed at will without injury to the fabric, and that they could not be said therefore to be a 'bringing forward' of the main building such as was contemplated by the statute." With great respect to the learned magistrate, I do not see the force of the rider. We are told they are mere excrescences. I do not know what a mere excrescence is in that sense; but I cannot say that he is wrong in point of law in holding that this particular thing erected over the door of this shop is not a "structure or building" erected within the meaning of that section. It was a thing which was unquestionably, I should think, not necessarily intended to be permanent; indeed, I should think when this tenant contemplated leaving his shop he probably would remove it, or possibly change it next year. It is a form of advertisement. It is not, to my mind, like a bow window or anything of that kind, which is, from its nature, whether it is made of wood, tin, or iron, or of stone, intended to form part of a building or structure. I agree also that there may be a structure, such as a greenhouse, under certain conditions which would be within the section a structure or building, although in fact it might be physically removable without injury to the building; for it would be *primâ facie* a thing which would be intended to remain, and would be within the statute if it does go beyond the building line. Here there is something up aloft on the house equivalent to a projecting ledge—a large one, I agree—but still I cannot consider it a "structure or building" as a matter of law, nor that the magistrate who held that it is not, is wrong in law. Had the question arisen under section 73 (8), as to whether this was a projection, then unless we are hampered and prevented from so deciding by the previous decision of this court (*Hull* v. *London County Council*), I should have been inclined to say it was a projection. But, be that as it may, we are now only dealing with section 22, and I am not satisfied that the learned magistrate was wrong in point of law.

WILLS, J.—I have the misfortune to differ from my lord and brother Kennedy, and, therefore, I have now to express my own opinion. Questions of this kind must always be questions of mixed law and fact, and it is not very easy to say to what extent the law ought to prevail, and to what extent the consideration of facts ought to prevail. But I am quite sure the learned magistrate did not mean us to deal with the case which he stated, as if he had found, as a matter of fact, that this was not a structure; and, therefore, it seems to me to be open to us to consider whether from the natural construction of the words in the Act of Parliament it is or is not a structure. Of course, I take my stand upon the description of it given in the case stated—viz., "The said cases were constructed of sheet iron supported by strong wrought iron supports securely cut and pinned through the front walls of the said building." I need not go any further. It seems to me that it would be difficult to have any amount of annexation, short of that which would prevent the tenant from removing it during the term, that could go much further than what exists in this case; and I cannot help coming to the conclusion myself that, as long as it remains annexed to the building, it is a part of the building, although it may be a part that can be removed; and that, if it is not part of the building, certainly to my mind it is a structure. Put glass there instead of canvas and you would have a window. I think there would not be very much difficulty in saying, if that was the case, that then it was a structure. I do not think that anything is gained by considering other parts of the Act of Parliament. I cannot help experiencing this kind of feeling, though it ought not to influence one's decision, and it does not influence mine, that it is extremely unlikely that erections of this kind should be left untouched altogether by this legislation, because it is obvious that, so long as the character of the annexation remains the same—at least, it seems to me to be obvious—it cannot make any difference whether the breadth is ten inches or two or three or four feet. For these reasons I am compelled to differ, although, of course, I need not say I doubt my own judgment when I am differing from my lord and brother Kennedy; but I am bound to say that in my opinion the erection in question is a building or structure within section 22.

Lord ALVERSTONE, L.C.J.—I agree with the greater part of what my brother Wills has said, but I am unable to arrive at the conclusion he arrives at on the reasons he has given. I agree with him entirely that we are not entitled to look at other parts of the Act for the mere purpose of construing particular words. I agree entirely with him that these words have to be construed in each of the sections, and each group of sections too, with regard to the purview of those particular sections and groups of sections; but I do think it is legitimate to consider whether or not a particular thing is dealt with in one part of the Act, or is dealt with in another; and to that extent, and to that extent only, do I think it material to consider other groups of sections and other enacting clauses in this Act. However, I must say my main ground of decision in this case is that I am unable to say that the learned magistrate has gone wrong as a matter of law. I do not think he meant to state the case so as to say that his finding was one of fact; but his conclusion is one of fact in one sense—when he says, "I was of opinoin that the cases in question were not structures within the meaning of the Act, that they were in the nature of mere excrescences which could be removed at will without injury to the fabric,"—and I am unable to say that in coming to that conclusion he has gone wrong on a matter of law. It must, of course, be taken on the finding that these advertisement cases could be removed by the tenant at the tenant's will—he finds so—and they are therefore not fixtures in the sense that a bow window would be, or that a structure of that character would be, for they can be removed without any injury whatever to the main structure. I think all these findings of fact must be taken as being found by him with reference to these particular structures, and the question we have to ask ourselves is, On those findings is he bound to hold as a matter of law that a structure so erected as that was, comes within section 22 (1) or section 200 (3)? I was much pressed with what my brother Wills has relied on —viz., the description of this "thing" in the case as stated, but it seems to me, as he has rather indicated, that you cannot deal with these sort of cases by simply dealing with the way in which the thing is constructed; because one can imagine many "things" —as he has properly called them—far less substantially built, which might be a much more clear infringement of section 22 (1) than these. Section 22 (1) was a part of the group of sections in Part III. of the Act dealing with "lines of building frontage," and *primâ facie*, I think it can scarcely be denied it relates to "buildings" or "structures in the nature of buildings." That, of course, does not solve the question, because parts of buildings and parts of structures would come in under those words. But if you look at section 23 as to setting back buildings when they are taken down, and at section 26 as to the

conditions which the council may attach to their consent to the erection of a building beyond the general line of buildings, those sections seem to me to point to different considerations to those which ought to be borne in view when you are dealing with such a case as this. And I supplement that by pointing out that I do find in this Act of Parliament a number of sections dealing with what I think this structure undoubtedly was—namely, a projection from the building. Now, of course, I am hampered in coming to that conclusion, having regard to the decision of Bruce and Phillimore, JJ., in *Hull* v. *London County Council*. All I desire to say is that if, upon a proper statement of facts, the question does hereafter come up as to whether such a thing as this is or is not a projection under section 73 the effect of that decision will have to be reconsidered by this court or, if possible, in some way taken to the Court of Appeal. But I am unable to see in that, an argument for enlarging section 22 as my brother Wills suggested it should be enlarged. Section 22, and all the sections in Part III., sections 22-31, relate to a different subject-matter to projections which are dealt with under other sections of the Act. Looking at the facts I do not think the magistrate came to a wrong conclusion in law when he found that these excrescences or things were not structures or buildings within section 22. I am, therefore, of opinion this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant, *W. A. Blaxland.*

Solicitor for the respondent, *Maurice Mosley.*

IN BANKRUPTCY.

K. B. Div. (Bigham, J.) — Dec. 5.

In re FANSHAWE.
Ex parte LE MARCHANT. (*a.*)

Bankruptcy—Proof—Secured creditor—Amendment of proof by re-valuation of security—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Schedule II., rr.* 9-14.

A creditor may amend his proof by assessing his security at an increased value, even though the original under-valuation of his security caused the failure of a scheme to pay the unsecured creditors 7s. 6d. in the £.

Application by creditors for leave to amend their proof by re-valuing their security, which had increased in value since the admission of their proof.

The applicant creditors had lent the debtor the sum of £5,000 upon mortgage of an estate, which was subject, among other charges, to a jointure of £300 a year in favour of the debtor's wife in the event of her surviving her husband.

At the date of the receiving order, the 15th of March, 1895, there was due to the creditors £4,200 on account of principal and £1,008 on account of interest, making a total sum of £5,208. The debtor returned the creditors as fully secured, consequently no notice of the making of the receiving order was given to them, and they did not hear of it until the 28th of May.

On the 29th of May, Farrer & Co., solicitors for the creditors, wrote to Munns & Longden, solicitors for the debtor, stating that their clients did not consider that they were fully secured, and claimed to prove in the bankruptcy.

On the 30th of May the debtor proposed a scheme for the payment of 7s. 6d. in the £ to his unsecured creditors.

On the 3rd of July the applicant creditors presented a proof for £5,208, in which they valued their security at £2,604. The solicitors for the debtor protested at the presentation of this proof, as it entirely upset the proposed scheme of arrangement by adding £2,604 to the unsecured debts.

The creditors, however, insisted on presenting the proof, which was admitted by the trustee. The scheme of arrangement fell through, and the unsecured creditors only received 1s. in the £, the applicant creditors receiving £130.

In January, 1903, the bankrupt's wife predeceased her husband, and, the mortgaged estate being relieved of liability for her jointure, the applicant creditors' security rose in value.

On the 12th of May, 1904, they asked the trustee to allow them to amend their proof by valuing their security at the full amount of their debt, and they offered to return the sum of £130 which they had received in dividends.

The trustee refused his consent upon the 14th of May, whereupon notice of the present application was given.

Muir Mackenzie, for the applicants.—A creditor may amend at any time on showing to the satisfaction of the court that his security has increased in value, so long as he is prepared to repay any dividends he may have received owing to the under-valuation of his security: see rules 13 and 14 of Schedule II. of the Bankruptcy Act, 1883.

Hansell, for the trustee.—In the first place the

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

creditor ought not to be allowed to amend in this case because of his delay in waiting for fourteen months from the date when his security increased in value before making his application—from January, 1903, to May, 1904. Secondly, I contend that the court will not allow amendment where the parties have altered the position of things by their action. Here the scheme of arrangement was upset by these creditors insisting on their proof, and it is not fair now for them to deprive the other creditors of the only asset they can hope to get. See the remarks of Vaughan Williams, J., in *In re Newton, Ex parte The National Provincial Bank*, 45 W. R. 63, [1896] 2 Q. B., at p. 406: "The rule ought so to be construed as to give the creditor the right to amend unless by something which has happened the position of the trustee and the creditor has become so altered that the rights of the parties concerned may be considered to be fixed on the basis of the alteration."

He also cited *Ex parte Norris, In re Sadler*, 35 W. R. 19, 17 Q. B. D. 728, and *In re Safety Explosives Co.*, 52 W. R. 470, [1904] 1 Ch. 226.

Muir Mackenzie, in reply.—The argument put forward on behalf of the trustee would deprive the creditor of all his rights under rules 13 and 14 of Schedule II. *In re Newton* is really a strong case in the applicants' favour, for there a creditor was allowed to revalue his security after he had been tendered the amount at which he had originally assessed it. [He was stopped by the court.]

BIGHAM, J.—The applicants in this case valued their security in 1895 at half the amount of their debt, and there is no reason to suppose that that was not an honest valuation. They had then the right which they seek to enforce now, of altering their valuation and amending their proof "at any time," on showing to the satisfaction of the court that their security has increased or decreased since its previous valuation. They have here satisfied me that it has increased.

It is urged that in equity they should not be allowed to exercise this right because they prevented the debtor from carrying through a composition owing to their proof standing as an unsecured claim for £2,604 This is set up as a reason why they should not be allowed to amend, and reliance is placed on an *obiter dictum* of Vaughan Williams, J., in the course of his judgment in *In re Newton*, where he speaks of possible cases where "the position of the creditor and the trustee has become so altered" by the action of the creditors, that amendment ought not to be allowed. That passage, however, cannot be construed so as to apply to this case because the trustee was not in existence when the applicants did what is complained of.

It seems to me that nothing which the secured creditors have done has taken away their right to amend. They made an honest valuation upon both occasions, and I am at a loss to see why the fact that the debtor failed to carry a composition, because the applicants did what they had a right to do, should stand in the way of their being allowed to amend their proof.

Application allowed.

Solicitors for the applicants, *Farrer & Co.*

Solicitors for the trustee, *Munns & Longden.*

K. B. Div.
(Bigham and Darling, JJ.) } Aug. 9; Oct. 25.

In re A DEBTOR.
Ex parte THE DEBTOR. (*a.*)

Bankruptcy—Petition—Act of bankruptcy—Deed of assignment—Conduct of petitioning creditor—Sufficient cause for refusal of receiving order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.

Where a debtor had offered a composition to his creditors a creditor refused to assent to the deed of assignment, by means of which the composition was to be carried out, and threatened bankruptcy proceedings unless he were paid in full.

Held, that the creditor was not entitled to succeed upon the presentation of a bankruptcy petition, as his conduct constituted "sufficient cause" within section 7, *sub-section* 3, *of the Bankruptcy Act*, 1883, *for refusing to make a receiving order.*

In re Shaw, Ex parte Gill, 49 *W. R.* 264, *followed.*

Appeal by the debtor from a receiving order made against him in the county court at Wandsworth.

The following statement of the facts is taken from the judgment of Bigham, J.:

On the 19th of April, 1904, the debtor executed a deed of assignment of all his property to a Mr. Baker for the benefit of his creditors. This was an act of bankruptcy. The next day the debtor's solicitors issued a circular convening a meetings of the creditors for the purpose of receiving and considering a statement of the debtor's affairs. A copy of this circular was sent to the respondents, Gover & Co., who were creditors for £75. The meeting was held on the 25th of April, Gover & Co. being represented thereat by a Mr. Corfield, an accountant. A statement of affairs was produced, showing assets £636, and liabilities, £1,771. Some of the creditors expressed their willingness to accept a composition of 10s. in the pound, but Corfield, representing Gover & Co., stated that he could not agree. The available funds were sufficient to pay 10s. in the pound and accordingly the debtor's solicitors issued a second circular. This circular invited each creditor to sign a form of assent to the deed of assignment, and it also stated that although the debtor could not pay ten shillings in the pound his friends were prepared to repurchase the estate for a sum sufficient to pay seven-and-sixpence in the pound. The respondents answered this circular on the 3rd of May by a letter in which they said that in their opinion the case was not one for a deed of assignment but for the bankruptcy court. On the next day Mr. Baker (the trustee under the deed) saw the respondents with the object of inducing them to assent to the scheme, but they refused, saying that they would file a petition "unless the debtor or his friends were prepared to make some better arrangement with them."

On the 5th of May, according to an affidavit of the debtor, he himself asked the respondents to execute the deed, and they answered that they would if the debtor promised to pay them the balance of their debt in full, but not otherwise. On the 7th of May the debtor, accompanied this time by his brother-in-law, Mr. Levy, again saw the respondents, who then said that they were prepared to accept a composition of seven-and-sixpence to be paid under the deed "provided they were given two bills for the balance of their debt

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

with the names of the debtor and his father-in-law upon them, or they would take £60 cash down and sign the deed." The debtor's father-in-law was asked to lend his name in the way suggested, but he refused, and his refusal having been communicated to the respondents they wrote a letter of the 11th of May which is as follows: "Unless you call here to-morrow with £29 8s. 3d., that is seven-and-sixpence in the pound, together with two bills drawn one at twelve months for £25 14s. 6d. and the other at fifteen months for £25 14s. 6d., accepted by the debtor and endorsed by his father-in-law, we shall instruct our solicitor to file a petition in bankruptcy." It appears that later on the debtor offered to give his sole undertaking to pay the balance of the debt, but this offer the respondents declined, insisting, as before, that the father-in-law should make himself responsible, and adding that if not, they would present a petition in bankruptcy.

On the 27th of May an agreement was entered into between Baker and the debtor's relatives, whereby the latter undertook to buy the estate for a sum sufficient to pay 7s. 6d. in the £. This was the first and only agreement for the purchase of the estate.

On the 9th of June the respondents presented a petition against the debtor based on the execution of the deed of assignment.

The petition was heard, and the registrar made a receiving order.

The debtor appealed.

Aug. 9.—*Reed, K.C.*, and *Tindale Davis*, for the appellant.—There was sufficient cause for refusing to make a receiving order within section 7, sub-section 3, of the Bankruptcy Act, 1883. The creditors acquiesced in the deed of assignment, for they wrote letters to the trustee treating him as trustee. They delayed the presentation of their petition from the 25th of April to the 9th of June, though they knew administration was going on under the deed. They also threatened bankruptcy for the purpose of extorting better terms than the other creditors were to get, which was held "sufficient cause" for refusing a receiving order in *In re Shaw, Ex parte Gill*, 49 W. R. 264, 83 L. T. 754.

C. A. Russell, K.C., and *F. C. Willis*, for the respondents.—The creditors believed that the debtor could pay in full and was setting up a number of family creditors, whose debts were not *bonâ fide*. Under those circumstances there was no abuse of the powers of the court in what they did.

Reed, K.C., replied.

THE COURT reserved judgment.

Oct. 25.—BIGHAM, J.—The question in this case is whether the evidence discloses a "sufficient cause" within the meaning of sub-section 3 of section 7 of the Bankruptcy Acts, 1883, for dismissing the respondents' petition. [His lordship here stated the facts.] The debtor has appealed upon the ground that the circumstances disentitle the respondent to a receiving order. It is said that the attempt to obtain a secret advantage over the other creditors accompanied as it was by a threat that if the debtor did not concede it a bankruptcy petition would be presented, has had the effect of depriving the respondents of the right which they would otherwise have had of requiring a receiving order to be made on their petition. I am unable to follow this contention. It is of course well known that the Bankruptcy Court will not allow its process to be used for purposes of extortion; it will not allow a petition to be presented and then used not for the purpose of obtaining a receiving order, but for the purpose of extorting money from the debtor in consideration of consents to adjournment of the hearing.

But that is not this case. Here nothing was done after the petition was filed to which any objection could be taken, and all the requirements of the Act of Parliament existed which would entitle the respondents to their order. It is an unpleasant thing to be served with a writ in an action, and I can imagine an unconscionable creditor threatening his debtor with such process unless the debtor paid more than he owed, but I cannot imagine any court of law on that ground subsequently refusing to give the creditor judgment for the right amount of his debt. I do not for my own part think that section 7 of the Bankruptcy Act, 1883, was ever intended to give the court the power of punishing a petitioning creditor for misconduct before the presentation of the petition, by refusing to make an order on the petition when presented.

But it is said that we are bound by the decision in *In re Shaw, Ex parte Gill*, 49 W. R. 264, 83 L. T. 754, and I agree that we are. The circumstances of that case cannot be distinguished in any material respect from the circumstances in the present case, and there the lords justices, overruling Wright and Phillimore, JJ., decided that there was "sufficient cause" for declining to make a receiving order. I must follow that decision. The appeal is therefore allowed with costs.

DARLING, J.—I agree in the conclusion at which my learned brother has arrived. The decision of the Court of Appeal in *In re Shaw* seems to me an authority—which I am glad to have—for holding that there is sufficient cause why the respondents should be held to have disentitled themselves to present the petition in question.

Appeal allowed.

Solicitors for the appellant, *R. Raphael.*

Solicitors for the respondents, *Langford & Fisher.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) And K. B. Div. (Channell, J.) — March 10; Dec. 7.

MOUNT LYELL MINING AND RAILWAY CO. (LIMITED) v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Stamp duty—"Marketable security"—"Given in substitution for a like security"—Debentures in different companies—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Schedule, "Marketable Security," sub-head* 4.

The debenture-holders in a company registered in England under the Companies Acts agreed to accept, in satisfaction of the liability of the company under the debentures, debentures for an equivalent amount in a company to be incorporated under the laws of an English colony for the purpose of taking over the assets and liabilities of the English company. The colonial company was duly incorporated, and the debenture-holders delivered up the debentures of the English company, and in lieu thereof received debentures of the colonial company.

Held, that, inasmuch as the parties were different, the debentures of the colonial company were not "given in substitution for a like security" within the meaning of the Stamp Act, 1891, *Schedule, "Marketable Security," sub-head* 4, *and were therefore chargeable with stamp duty at the rate of* 1s. *for every* £10.

Appeal by case stated from the decision of the Commissioners of Inland Revenue.

On the 12th of October, 1903, an instrument was presented on behalf of the Mount Lyell Mining and Railway Co. (Limited) (hereinafter called the appellant company) by Messrs. James White & Leonard, their solicitors, to the Commissioners of Inland Revenue under the provisions of section 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

In 1898 the North Mount Lyell Copper Co. (Limited) (hereinafter called the North Co.), being a company registered under the Companies Act, 1862 to 1893, issued under the seal of the company a series of debentures of varying amounts, whereby they promised to pay to bearer, or, when registered, to the registered holder, the respective amounts thereof.

In order to secure such debentures a trust deed was on the 7th of December, 1898, executed between the North Co. of the one part, and General Sir Hugh Gough and William Jacks (as trustees for the debenture-holders) of the other part, containing the conditions usual in such trust deeds.

By an agreement dated the 22nd of May, 1903, made between a company called the Mount Lyell Mining and Railway Co. (Limited) (being a company registered under the laws of the State of Victoria) of the one part, and the North Co. of the other part, it was provided that a new company should be incorporated to take over the assets and liabilities of the companies parties thereto, including the liability of the North Co. to the debenture-holders, to whom debentures in the new company were to be given as therein provided.

By a subsidiary agreement dated the 18th of June, 1903, made between Daniel James Mackay (on behalf of all the holders of the outstanding debentures of the North Co.) of the one part, and the North Co. of the other part, it was (amongst other things) provided that every holder of debentures of the North Co. should deliver up the debentures held by him and accept in lieu thereof debentures of an equivalent amount in the new company to be formed as aforesaid; such debentures were to be framed and secured as therein mentioned, and by clause 5 the delivery of such substituted debentures was to be accepted in satisfaction of the liability of the North Co. to him under the said debenture trust deed and debentures.

By an agreement dated the 6th of August, 1903, and made between the aforesaid Mount Lyell Mining and Railway Co. (Limited), of the State of Victoria, of the first part, the North Co. of the second part, and Alfred Mellor, on behalf of a new company which it was contemplated should be formed under the laws of the State of Victoria, under the style of the Mount Lyell Mining and Railway Co. (Limited) (the appellant company), of the third part, it was agreed to sell the respective undertakings of the old companies to the appellant company when incorporated, and as to the assets of the said North Co. subject to the existing mortgage debentures to be satisfied by the issue of debentures of the appellant company as therein provided.

On the 11th of August, 1903, the appellant company was duly incorporated under the laws of the State of Victoria, in the Commonwealth of Australia, and by deed of that date it duly adopted under seal the last-mentioned agreement.

A holder of one of the above-mentioned debentures payable to bearer issued by the North Co. surrendered such debenture at the office of the appellant company in London, and in lieu thereof received the debenture payable to bearer under the seal of the appellant company which is the subject of adjudication.

In accepting such new debenture he acted under the agreement of the 18th of June, 1903, and he thereby released and gave up all right against the North Co. and all rights in respect of the first-mentioned debenture.

The appellant company contended that the instrument in question fell to be charged only with substituted security duty at the rate of 6d. for every £20 thereof.

The commissioners, being of opinion that the instrument in question was a marketable security, being a security transferable by delivery, and bearing date after the 6th of August, 1885, by reference to the heading "Marketable Security," sub-head 3 in the first schedule to the Stamp Act, 1891, and that it was not within the fourth sub-head of that heading, assessed the duty at 1s. for every £10 and for every fractional part of £10 of the money thereby secured.

The appellants being aggrieved at the decision, the commissioners, at the request of the appellants, stated this case for the opinion of the court.

The questions for the opinion of the court were: (1) Whether the assessment of the commissioners was correct. (2) If not, to what duty the said instrument was liable.

In the schedule to the Stamp Act, 1891, under the heading "Marketable Security," sub-head 3 is as follows: "Marketable security (except a colonial government security) being a security transferable by delivery and bearing date or signed or offered for subscription after the 6th of August, 1885—For every £10 and also for any fractional part of £10 of the money thereby secured—1s." Sub-head 4 is as follows: "Marketable security (except a colonial government security) being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty—For every £20 and also for any fractional part of £20 of the money thereby secured—6d."

(a.) Reported by W. F. BARRY and E. G. STILLWELL, Esqrs., Barristers-at-Law.

March 10.—*W. F. Hamilton, K.C.* (*Edgar Elgood* with him), for the appellants.

Sir Robert Finlay, A.G. (*S. A. T. Rowlatt* with him), for the Crown.

CHANNELL, J.—In this case I am not at all anxious to decide questions which I think I have not necessarily to decide. There are some portions of the Attorney-General's argument which, I confess, I am not prepared to accept without further consideration. They may be correct. It may be that I personally have formed an altogether erroneous view of what is meant by "substitution" in the Stamp Act. I gave my opinion in *City of London Brewery Co.* v. *Inland Revenue Commissioners*, [1898] 1 Q. B. 408, 46 W. R. Dig. 76, 47 W. R. 216, [1899] 1 Q. B. 121, and my decision was reversed by the Court of Appeal. I confess I do not understand fully the grounds of that decision on this point. Consequently I do not propose to decide or say anything one way or the other on the argument the Attorney-General has raised as to the alleged distinction between giving in substitution and taking in substitution. I think I have to look at the exact wording of this schedule, and it is "marketable security (except a colonial government security) being such security as last aforesaid given in substitution for a like security." It seems to me that the words "like security," occurring where they do in the schedule to this Stamp Act, mean a security which is like the one referred to for the purpose of stamping, and when you see that one of those is a debenture of an English company and the other of a colonial company, and that under section 82, although the amount of the stamp to which they are liable is the same, nevertheless the considerations under which they become liable to stamp duty are not the same, it seems to me that there is a difficulty in holding that the one security is a like security with the other for stamp purposes. On that ground I think that I must hold that this is not a substituted security. I say nothing about the other points one way or the other. I do not say they are wrong, but I do not give any decision upon them.

The Mount Lyell Mining and Railway Co. appealed.

Dec. 7.—*W. F. Hamilton, K.C.*, and *Edgar Elgood*, for the appellants.—The debentures in the appellant company were given "in substitution for" a like security in the North Co. "In substitution for" means in place of or in exchange for, and "a like security" means a like instrument for the purposes of stamp duty. It is immaterial that the debtor is changed or that the property charged is different. The word "security" does not necessarily mean an instrument giving a charge. It means an instrument which is popularly called a security. The Stamp Act includes in the term "marketable security" instruments which do not give a charge as well as instruments which do. The words "in substitution for" occur in section 1, where they obviously mean "in place of"; and they bear the same meaning in this part of the schedule. This is a case of novation, where there is always a substitution of one debtor for another.

They referred to *City of London Brewery Co.* v. *Inland Revenue Commissioners*, 47 W. R. 216, [1899] 1 Q. B. 121; Alpe's Law of Stamp Duties (9th ed.), p. 157.

Sir Robert Finlay, A.G., and *S. A. T. Rowlatt*, for the Crown.—The words "in substitution for a like security" refer to a case where, the parties remaining the same, some property is substituted for some other property charged. They do not include a case where the debtors are changed, and there is probably also a change made in the property charged. In the heading "Mortgage, Bond, Debenture, Covenant" in the schedule to the Act, sub-head 2, the words "substituted security" occur, and they clearly mean a change of the property charged and not a change of parties. Those words throw some light on the meaning of "in substitution for" in "Marketable Security," sub-head 4. Nor was the security a "like security." The judgment was therefore right.

W. F. Hamilton, K.C., replied.

COLLINS, M.R.—This is an appeal from the judgment of Channell, J., and the point lies in a small compass. It arises in this way: An English company had issued debentures payable to bearer. By an arrangement to which that company were parties, debentures issued by a colonial company were in a sense substituted for debentures in the English company, which had been stamped with the duty of 1s. for every £10 of the money secured thereby under sub-head 3 of "Marketable Security" in the schedule to the Stamp Act, 1891. There was thus an arrangement called a novation by which the debenture-holders in the English company accepted debentures in the colonial company in lieu of the debentures in the English company. It is said on behalf of the appellants that those new debentures came within sub-head 4 of "Marketable Security" as "being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty," and are, therefore, only subject to the duty of 6d. for every £20 of the money secured thereby. The contention is that the new security was "given in substitution for a like security." That depends upon the question whether the debentures of the colonial company, being a security of a different debtor and probably charged upon different property, are a "like security" with one in which the debtor is an English company and in which the property covered by the security is probably not the same. It seems to me that the word "like" in that context imports that the debtor must be the same in each case. To substitute the obligation of a different person, and probably a charge upon different property, is not to give a security in "substitution for a like security" within the meaning of sub-head 4. Channell, J., has dealt more especially with the words "like security," and has pointed out that, in ascertaining the liability to stamp duty, different considerations apply to debentures in a colonial company and to debentures in an English company. Those considerations certainly cannot be ignored, because the use of the word "like" brings in all considerations. Just as the security of one debtor cannot be said to be like the security of another debtor, so the fact that a colonial security is fenced round with certain conditions specified in section 82, is a factor in determining whether such a security is to be treated as a "like security" with another within the meaning of sub-head 4 of "Marketable Security." No doubt, as has been pointed out on behalf of the appellants, the words "in substitution for" occur in section 1 of the Act as meaning "in place of." But in a part of the Act more nearly connected with the provision of the Act now in question—namely, under the heading "Mortgage, Bond, Debenture, Covenant," sub-head 2, in the schedule to the Act, the words "substituted security" occur, and those words, when read in connection with the context, imply the substitution of property on which the sum is charged, and do not cover the substitution of a different security between different persons. It is said that the word "security" under the heading "Marketable Security" includes a security in the popular sense which does not give a charge upon property, and

that, therefore, no analogy can be drawn from the meaning of the word security in a part of the Act where it involves a charge upon property. I do not agree. The security included under the heading "Marketable Security" may, no doubt, be an instrument giving a mere personal security and not involving any charge. Still the security included under that heading may be one which gives a charge, and a security which gives a charge is not a "like security" with another when the charge given is different and the parties to it are different. All the facts of the case must be considered, and when it is found that the security is not between the same persons and that probably it is not charged upon the same property, it is not a "like security" within the meaning of the Act. The appeal must, therefore, be dismissed.

STIRLING, L.J.—I am of the same opinion. The question, in my opinion, turns upon the meaning of the words given "in substitution for" a like security in sub-head 4 of the heading "Marketable Security" in the schedule to the Stamp Act, 1891. The appellants contend that those words mean "in place of" in the widest sense, and they refer to section 1 of the Act in support of that contention. On the other hand, the Crown contend that the words have a much less wide meaning when dealing with the question as to the liability of an instrument to stamp duty, and especial reference is made to the heading "Mortgage, Bond, Debenture, Covenant" in the schedule to the Act, which, in sub-head 2, deals with a "substituted security." The type of "substituted security" under that heading appears to be one in which, the parties to the transaction remaining the same, one piece of property is removed from the original security and another piece of property is brought in which may be designated the substituted piece, and it seems to me that that throws light upon the words "given in substitution for" in sub-head 4 of the heading "Marketable Security" in the schedule. In the present case the transaction is one in which a new debtor comes upon the scene, and in my opinion this is not a case within sub-head 4 of a security given in substitution for a like security.

MATHEW, L.J., concurred.

Solicitors for the appellants, *James White & Leonard.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Nov. 7, 8, 9, 10, 11, 12, 14; Dec. 5.

In re LAW.
LAW *v.* LAW. (*a.*)

*Partnership — Sale to managing partner of another's share—Assets undisclosed—*Uberrima fides*—Action for purchase-money—Action for fraudulent misrepresentation—Settlement of actions—Further discovery of assets—Rescission—Election.*

In a transaction between co-partners for the sale by one to the other of a share in the business, the duty rests on the purchaser, who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the assets, and not to conceal what he alone knows; and unless such information has been furnished the sale may be set aside.

Maddeford *v.* Austwick, 1 *Sim.* 89, *approved.*

But if the vendor, having learnt from a third party that there are undisclosed assets, and suspecting there may be more, recognizes the sale by suing for an unpaid balance of the purchase-money—still more if he brings an action alleging fraud in the transaction and settles it by accepting even an inadequate sum in discharge of all his claims—then there is a binding election, and there is no further duty to disclose on the part of the purchaser which will preclude his relying on it as a defence to an action to rescind the sale.

This was an appeal by the plaintiff from a judgment of Kekewich, J. (reported 20 Times L. R. 295), in an action for rescission of a sale by one partner to another of a share in a business.

After the death of John Law in 1873, the firm of J. Law & Sons, woollen manufacturers, of Greetland, Yorkshire, consisted of four partners, the brothers Samuel, Joseph, James, and William Law, who carried on business without any articles of partnership, and were entitled to the assets in equal shares. Samuel died in 1893, leaving his property in the business. Joseph died in 1899, leaving his property equally between his surviving brothers, who continued to carry on the business. Before Joseph's death he and James—and afterwards James alone—had the active conduct of the business, William living in London, where he only attended to matters arising there, and knowing nothing of the financial position of the firm. He received as his share of profits sums averaging about £600 a year.

On Joseph's death an account of the partnership assets, the only one seen by William for some years, was sent him, with a statement that it was for probate purposes only, and an account of Joseph's estate accompanied it. The former showed £33,814 14s. 9d. as the excess of assets over liabilities; the latter gave £19,027 9s. 4d. as the net value of the estate. In March, 1900, William was in want of money, and James proposed to purchase his share in the business for £10,000. William consulted a solicitor named Lacy, who went to Greetland armed with full powers to negotiate and complete a sale, and saw there James, his daughter Rachel, and James's solicitor, a Mr. Garsed. An agreement was arrived at for a sale at the price of £21,000, which was to include William's share both of the partnership assets and goodwill and of the estate of Joseph, and this was carried out by two deeds dated the 2nd of July, 1900, half of the purchase-money being then paid and the rest secured by a bond and payable six months later.

After the execution of the deeds William learnt that assets of the partnership consisting of mortgages for £10,550 were, and at the date of the sale had been, in existence, of which no mention had been made by James, and which were not included in the account referred to, and he commenced an action in the Queen's Bench Division on the 22nd of January, 1901, to recover half the value of such undisclosed assets as damages for fraudulent misrepresentation. This action was stayed by order dated the 25th of February, 1901, on the terms, agreed upon on the 15th of the same month, that all charges of fraud should be withdrawn and that £3,550 should be paid by James in full satisfaction of all William's claims whatsoever, and particularly of his claims in regard to the business of J. Law & Sons and the estate of Joseph.

Prior, however, to the said action William, who had assigned the bond to trustees, had joined with them in suing for the recovery of the second instalment of the purchase-money thereby secured, and this action was stayed on the 18th of January, 1901, on payment to the trustees of the sum claimed with interest and costs.

After the settlement of the action in February, 1901, William discovered that, as he had already had

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

reason to suspect, there were further undisclosed assets, consisting of securities for £12,250 as well as others to a very large amount, which had also existed at the date of the sale of his share to James, and he accordingly commenced the present action against Rachel Law and L. H. Longbotham, the executors of James (who had died in August, 1901), and against the executor of Joseph, for a declaration that the indenture of the 2nd of July, 1900, the order of the 25th of February, 1901, and the agreement of the 15th of February, 1901, were not binding on him, and should be set aside, and for consequential accounts and inquiries. William died on the 18th of March, 1903, and the action was continued by his son and executor, John Law, the present plaintiff.

The statement of claim alleged that prior to the contract of sale James showed to Lacy the accounts above referred to, and assured him that there were no assets beyond those therein mentioned; that James in breach of duty omitted to inform William of the £10,550 mortgages, or of the securities for £12,250, and, in fact, concealed both from him; that their existence was not known to William or Lacy at the date of sale, nor (as to the £12,250 assets) had they any knowledge or notice of their existence at the date of the agreement of the 15th of February, 1901, or before or at the date of the order of the 25th of February, or of the payment of the £3,550.

For the defence it was denied that the accounts were shown to Lacy or any assurance given to him as alleged, but it was pleaded that the assurance, if given, was true. It was admitted that there were mortgages not included in the account, but that account was not the basis of the sale agreement. The mortgages did not belong to the partnership but were the property jointly of Joseph and James, and of the latter by survivorship. James owed no duty to disclose assets. If he did not give information he did not improperly conceal assets. The settlement of February, 1901, was made with knowledge that there were undisclosed assets as to which it might be a question of law whether they belonged to the partnership or not. The order of the 25th of February, 1901, was an estoppel to the whole relief claimed. The facts as to undisclosed assets known to William on the 22nd of January, 1901, were known to him on the 8th of that month, when he commenced the action on the bond, and the settlement of that action was, it was submitted, an election to affirm the sale, which precluded him and the present plaintiff from obtaining its rescission. The settlement of the later action in February had a similar result.

By the reply it was pleaded that if the settlement of February, 1901, was come to on the footing that there were assets as to which there might be a question of law, whether they belonged to the partnership or not, such assets were concealed by James, as were also the facts on which such question of law arose; that if William at that time knew of some of the undisclosed assets, there were others of which he was not then aware; and that if the mortgages were, as alleged, made by Joseph and James, they represented moneys drawn from the concern during William's partnership without his knowledge and consent and not appearing in any partnership accounts.

Neville, K.C., Stewart Smith, K.C., and *F. Thompson*, for the plaintiff.

Sir E. Clarke, K.C., P. Ogden Lawrence, K.C., and *George Lawrence*, for the executors of James Law.

Warmington, K.C., Warrington, K.C., and *Austen Cartmell*, for the executor of Joseph Law.

KEKEWICH, J., said the statement of claim contained what amounted to allegations of fraud, which had not been proved. The case was mainly rested on the ground of *uberrima fides*, but it was unnecessary to go into that question, because both technically and from a common-sense point of view (which he preferred as the ground of his decision) the agreement of the 15th of February put an end to any duty which might have been incumbent on James Law to make disclosures to William. The latter's action in the Queen's Bench Division for misrepresentation was brought with full knowledge that the claim involved going thoroughly into the partnership accounts and the value of the assets, in order to ascertain the value of his share in July, yet he had thought it wise to settle the action for £3,550. Having done so, he could not go into the question of further assets, and his claim failed. His lordship dismissed the action, and the plaintiff appealed.

Neville, K.C., and *F. Thompson*, for the plaintiff.—This purchase is analogous to one by a trustee from his *cestui que trust* after the determination of the trust; it is the duty of the trustee to fairly and honestly disclose all necessary particulars, and not attempt a furtive advantage to himself by means of private information: Lewin on Trusts (11th ed.), p. 566. Where a confirmation of such a sale is relied on, it must be by a solemn and deliberate act, and the court will watch it with the utmost suspicion, especially where the original transaction was infected with fraud: *Ibid.*, p. 576. It is immaterial how many steps there are in an arrangement between trustee and *cestui que trust*, and if a subsequent transaction is set up as confirming the sale, it is a condition of that confirmation that the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case: *Ibid.*, p. 577. In Lindley on Partnership (6th ed.), p. 314, it is stated that "if one partner knows more about the state of the partnership accounts than another, and, concealing what he knows, enters into an agreement with that other relative to some matter as to which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand." Especial good faith is required in such a case: *Ibid.*, p. 316. A partner cannot buy from a co-partner without first putting him in a position to deal on equal terms, and he cannot do this without disclosing all he has become cognizant of in the course of the business: *Maddeford* v. *Austwick*, 1 Sim. 89. The language of Jessel, M.R., in *Dunne* v. *English*, L. R. 18 Eq. 524, 534, with regard to underhand dealings of an agent with his principal is also applicable. The analogy with the case of a trustee buying from a *cestui que trust* is not complete, but a partner is so far a trustee that he cannot deal with a co-partner without full disclosure. Besides, there was here a case of actual trusteeship by reason of the mortgages having been taken in the names of two of the partners only. The reasons given for the judgment were good enough if the parties were strangers, but not where a fiduciary relation existed. That raised the obligation (in the case of the one receiving the benefit) referred to by Lord Thurlow in *Fox* v. *Mackreth*, 2 Wh. & T. (7th ed.), p. 717. By section 28 of the Partnership Act, 1890, partners are bound to render true accounts and give full information of all things affecting the partnership to any partner or his legal representatives. There was a distinct representation here as to the value of the assets and of William's share; but our case does not rest on misrepresentation, but on James's duty to disclose. [VAUGHAN WILLIAMS, L.J.—"Concealing" in Lindley on Partnership means "not disclosing, knowing that the other man is ignorant." ROMER, L.J.—But what if the selling

partner knows of the existence of some assets beyond those disclosed ?] If by his own efforts he has discovered something, that is not sufficient to put the purchasing partner in the position of having made disclosure. The onus is on a trustee to prove that there has been full disclosure, and if he relies on information obtained elsewhere by the *cestui que trust* he must take care that it has placed the latter in the same position as if the trustee had performed his duty. [VAUGHAN WILLIAMS, L.J.—I want to define the information which the partner is bound to give.] All the information he possesses relevant to the subject-matter of the transaction. [VAUGHAN WILLIAMS, L.J.—That is a little too wide. Is he bound to give it if he knows the other knew it?] There can be no harm in ascertaining the amount of the other's knowledge. [ROMER, L.J.—If he has information which he has reason to believe the other has not, it is his duty to give it.] The settlement was a mere agreement to stay proceedings. There was nothing in the nature of a judgment, which would have been an estoppel. A consent order has no more force than an agreement between the parties: *Wilding* v. *Sanderson*, 45 W. R. 675, (1897) 2 Ch. 534, 550, *per* Lindley, L.J. If one can be set aside so can the other.

They also cited *Redgrave* v. *Hurd*, 30 W. R. 251, 20 Ch. D. 1.

P. Ogden Lawrence, K.C. (*Sir Edward Clarke, K.C.*, and *George Lawrence* with him), for the executors of James Law.—The basis of the relation between partners is mutual confidence, and when this is destroyed all relation between them in the way of trustee and *cestui que trust* is at an end. In this case mutual confidence was destroyed when William made independent investigations as to matters appearing in connection with Joseph's probate. William regarded himself as a sleeping partner; he had been receiving £600 a year, and was content with such a sum as would produce that income, and both he and Lacy persistently refused investigation of the partnership books. If one partner says in effect to another "Whatever my share is worth, I am willing to take so much for it," the bargain is always supported. It is otherwise with a bargain between solicitor and client, or between trustee and *cestui que trust*. The latter cannot waive investigation, but in the case of partners you have only to see that mutual confidence is not abused: *Knight* v. *Marjoribanks*, 2 Mac. & G. 10. Assuming, however, that there was suppression of facts, the result would be a voidable bargain, and William confirmed it. *Maddeford* v. *Austwick* does not apply, for the duty to disclose has been waived. The party who can avoid must elect once for all, and if he confirms after discovering part of the misrepresentations, he cannot, after further discoveries, rescind, though he may get damages: *Scarf* v. *Jardine*, 30 W. R. 893, L. R. 7 App. Cas. 345; *Campbell* v. *Fleming*, 1 A. & E. 40; *Elsey* v. *Adams*, 12 W. R. 586, 2 De G. J. & S. 147; *Clough* v. *London and North-Western Railway*, 20 W. R. 189, L. R. 7 Ex. 26, 34. [VAUGHAN WILLIAMS, L.J., referred to *Calisher* v. *Bischoffsheim*, 18 W. R. 1137, L. R. 5 Q. B. 449, and *Ex parte Banner*, 17 Ch. D. 480, 29 W. R. Dig. 24.] He can rescind as long as no election is made and the position of the parties not altered. [COZENS-HARDY, L.J., referred to *Miles* v. *New Zealand Co.*, 34 W. R. 669, 32 Ch. D. 266.] Counsel read from *Ex parte Banner*, at p. 490, and cited *In re Hawkins*, 43 W. R. 306, [1895] 1 Q. B. 404. [VAUGHAN WILLIAMS, L.J.—If a man is suing for £1,000, and the parties agree to settle for £500, both knowing it to be much less than was owing, and the defendant practically says, "I know I owe you a great deal more than £500, but I won't tell you how much," then there is no consideration for the settlement, for an agreement to take less than is due is no consideration.] Here both parties were perfectly aware of the circumstances, and were bound by the compromise, and the transaction cannot be re-opened.

Younger, K.C. (*Warmington, K.C.*, and *Austen Cartmell* with him), for the executor of Joseph Law.—The evidence shows that Lacy, at the Greetland interview, knew of at least some of the undisclosed assets, but concealed his knowledge. As to the election, it was made long before the order of the 25th of February. The effect of the action on the bond, to which William was a party, was to confirm the sale, the "unequivocal act" referred to by Lord Blackburn in *Scarf* v. *Jardine*, L. R. 7 App. Cas., at p. 360, being the issue of the writ on the 8th of January, or at all events the second writ dated the 22nd of January, which is the latest date that can be fixed for the election. The basis of action was that the relation of partners had ceased and that the relation constituted by the contract had been substituted. The parties were then absolutely at arm's length, and no fiduciary relation remained. It was admitted that nothing could be said against the contract if made between ordinary parties. There could be no damages unless the contract stood.

He also cited *In re Duncan*, 47 W. R. 379, [1899] 1 Ch. 387.

Neville, K.C., replied.

Cur. adv. vult.

Dec. 5.—COZENS-HARDY, L.J., read the judgment of the court as follows: This is an appeal from the judgment of Kekewich, J., who dismissed with costs an action seeking to set aside a sale by William Law to James Law of his interest in a partnership business carried on between William and James. The vendor and purchaser are both dead, but their representatives are before the court. Now, it is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser, who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows, and that, unless such information has been furnished, the sale is voidable and may be set aside: see *Maddeford* v. *Austwick*, 1 Sim. 89. The original sale on the 2nd of July, 1900, by William to James was for £21,000, payable half in cash and half at six months secured by a bond. Now we will assume that this sale could have been set aside by William on the ground that James had not disclosed the existence of partnership assets represented by mortgages and other securities to a very large amount standing in the names of James and his late brother Joseph, who had also been a partner. But shortly after the completion of the sale William undoubtedly ascertained the existence of some of what we will call "the suppressed assets." He thereupon consulted counsel, and his case then was, not merely that there had been no proper disclosure by James of the assets in question, but that the sale had been brought about by an actual representation by James that there were no partnership assets beyond those appearing in certain probate valuations, which certainly did not disclose the assets in question. We may here observe that the appellants do not raise any case of misrepresentation before us. They base their case solely on the ground of nondisclosure, giving rise to a right in equity to a rescission of the contract of sale. The counsel who was consulted advised that an action

should be brought for damages for misrepresentation, the measure of damages being one-half of the value of the omitted assets, and counsel added that, as there was some doubt whether all the assets had even then been discovered, it would be well to ask that an account be taken of all further assets belonging to the partnership, and to claim half of their value also. Following this advice, which was given on the 8th of November, 1900, William, on the 22nd of January, 1901, issued a writ in the Queen's Bench Division. This action was settled by an agreement dated the 15th of February, 1901, which was embodied in a consent order on the 25th of February, 1901, staying the action. All charges of fraud or fraudulent representations being withdrawn, the sum of £3,550 was paid by James to William in discharge of every claim relating to any matter whatsoever between the plaintiff and defendant and in full discharge thereof. Before this settlement was arrived at William had ascertained that there were still further partnership assets not disclosed by James, and he surmised and believed that there might be others, though he was not aware of their particulars or amount. Under these circumstances it was, of course, open to William, if he chose, not to insist on his full rights, and in particular not to obtain full disclosure of what the assets consisted, and to come to a settlement or compromise with James on that footing. And this is what he did. What his reasons were for so doing concerned him alone, and it would be idle now to speculate whether he was influenced by fraternal affection, or by an idea that his partnership drawings may have been greater than those of James, or by some other reason. But after the settlement so come to, in our opinion it was not possible for William to reopen the transaction. He deliberately made his election, and by that election he is bound: see *Clough* v. *London and North-Western Railway*, L. R. 7 Ex. 34. It cannot be sufficient to allege and prove that, if the action had been fought out, the plaintiff would have recovered damages greatly in excess of £3,550. No separate and independent fraud is even alleged in bringing about the settlement of February, 1901. William may have been induced to settle largely by reason of representations made by the daughter of James as to her father's health, but these representations were not untrue. He was not induced by any statement or assurance on the part of James or his advisers that there were no other suppressed assets. But the case against the appellant's claim now to rescind does not even rest solely on what we have just stated. We have purposely passed over two facts of great importance. William Law, after he had been advised by counsel, assigned the bond to secure the second instalment of £10,500 to trustees, and subsequently, on the 8th of January, 1901, William joined with the trustees in an action on the bond to recover this instalment. Proceedings in this action were stayed on the 18th of January on payment by James to the trustees of £10,532 1s. 8d., being the balance of all principal moneys and interest, with costs amounting to £3 5s. This was four days before the writ in the action for damages was issued. In point of fact William, with knowledge that the sale might be upset or that damages might be recovered, deliberately postponed proceedings with that view until after he had obtained payment of the balance of the purchase-money, to which he had no title except on the footing that the sale was not to be set aside. It is now too late for William to repudiate the contract of which he has thus deliberately secured the benefits. It has been strenuously argued that the duty resting on the purchasing partner continued in full force and effect up to and after the settlement of the action, so that James could not rely upon a binding election by William unless and until full disclosure had been made. We know of no authority which supports this proposition, and it seems to us to be contrary to principle. It seems impossible to hold that under such circumstances as existed here William could not, if he chose, come to a binding settlement or compromise or make a binding election not to rescind without full disclosure by James. In our opinion Kekewich, J., was right in the view which he took as to the effect of what was done in January and February, 1901, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, *Barfield & Barfield; Bower, Cotton, & Bower*, for *Longbotham & Sons*, Halifax; *Robbins, Billing, & Co.*, for *J. L. Garsed*, Elland.

From K. B. Div. (Stirling and Mathew, L.JJ.) — Oct. 27.

KISTLER v. TETTMAR. (a.)

Practice—Attachment—Disobedience of order—Personal service—Knowledge of order—Evasion of service.

On an application for a writ of attachment for disobedience of an order of the court, if it appears that the person against whom the attachment is sought knew of the existence of the order and evaded service of it, he cannot avail himself of the objection that personal service has not been effected upon him.

Appeal from an order of Phillimore, J., for the issue of a writ of attachment against the defendant, Mrs. Tettmar.

On the 3rd of June, 1904, judgment in the action was obtained against the defendant in default of appearance for £87.

On the 15th of July the judgment creditor obtained an order directing that the judgment debtor should attend before a master on the 23rd of July for the purpose of being orally examined as to what debts were owing to her and whether she had any means of satisfying the judgment. The memorandum required by ord. 41, r. 5, was indorsed on the order.

On the 18th of July an attempt was made to serve the order on the defendant at the house where she was living with her husband at Eastbourne. According to the affidavit of the clerk who was instructed to serve the order, he went to the house and the door was opened by the defendant's husband, who informed him that the defendant was within but could not see him; that he explained to the husband the nature of his business; that the husband then went in to inform the defendant, and on returning to the door informed him that the defendant could not see him, and would not make any appointment to see him; that he then handed to the husband a copy of the order and £1 for conduct money, and requested him to hand them to the defendant; and that on the husband's refusing to take them he left them on the door-mat.

The defendant did not attend before the master on the 23rd of July, and the examination was adjourned to the 26th of July, the master directing that notice of the adjourned appointment should be sent to the defendant by letter to her address. A letter to that effect was sent, and came into the hands of the defendant's husband, who instructed a solicitor to attend the adjourned appointment.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

On the 26th of July a clerk of the solicitor attended before the master and stated that the defendant was too ill to attend. The master thereupon adjourned the examination to the 2nd of August, to enable an affidavit of a medical man to be produced.

On the 28th of July the solicitor who was instructed by the defendant's husband wrote a letter to the plaintiff's solicitors saying that he had discovered that the service of the order for examination was effected by leaving a copy of it with a man at the house, which was no service on the defendant, and the letter also stated that the defendant was ill and incapable of travelling to London, and suggested that she might be examined at her house at Eastbourne.

The defendant did not attend on the 2nd of August, nor was any affidavit from a medical man produced.

On the 3rd of August the plaintiff took out a summons for a writ of attachment against the defendant for non-compliance with the order of the 15th of July.

At the hearing of the summons on the 9th of August, Phillimore, J. ordered that a writ of attachment should issue, the writ to lie in the office for seven days, and not to be executed if the defendant attended an appointment before the master before the vacation.

On the 12th of August an application was made to Phillimore, J., on behalf of the defendant to vary his order of the 9th of August. In support of the application an affidavit of the defendant's medical attendant, sworn on the 11th of August, was produced, in which he stated that she was, owing to illness, unfit to make the journey to London or submit to the examination, and that he had forbidden her to leave the house, and had given instructions to her husband that business matters were not to be mentioned to her. An affidavit by her husband sworn on the same date was also produced, in which he stated that, when the clerk called on the 18th of July, he told him that it was impossible for him to see the defendant on account of her extreme ill-health and that she was then in bed; that upon the clerk producing a document and £1 and asking him to hand them to the defendant, he told him that he could not on any account comply with his request, as to mention or discuss matters of business with her in her then state of health would have serious results, and that the clerk then left the document and the £1 on the door-mat and went away. He denied that he at any time went within and mentioned the matter to the defendant, or that he returned and informed the clerk that the defendant could not see him and would make no appointment to see him, and he stated further that, having been instructed by the doctor who was attending the defendant to keep all matters of business away from her, he came to the conclusion that the only course to adopt was to forward the document and the £1 to his solicitor, which he did.

Phillimore, J., discharged his former order, and made an order that a writ of attachment should issue, and should lie in the office for seven days from the date of the order, and if by that time the sum of £25 was paid by the defendant to the plaintiff's solicitors, then until the seventh day of the next sittings, otherwise the writ to issue.

The sum of £25 was paid accordingly, and the judgment debtor appealed.

Frank Mellor, for the judgment debtor.—A writ of attachment cannot be allowed to issue for disobedience to an order, unless the order has been personally served on the person against whom the writ is sought: see ord. 41, r. 5; *In re Cunningham*, 55 L. T. 766; *In re Holt*, 27 W. R. 485, 11 Ch. D. 168.

Llewelyn Davies, for the judgment creditor.—Where the person against whom the attachment is sought knows of the existence of the order and is evading service, the court will dispense with the necessity for personal service.

STIRLING, L.J.—As I understand this case, the learned judge in making the order for the writ of attachment to issue proceeded on this ground, that the judgment debtor knew of the order for her examination and was evading service of it, and that in those circumstances the objection that personal service of it has not been effected ought not to avail her. In my opinion the learned judge was right in the view which he took. The latest case which I can discover on the subject is *Hyde* v. *Hyde*, 36 W. R. 708, 13 P. D. 166. That was a case of sequestration against the property of a married woman for not complying with an order for the delivery of her children to her husband, and the same objection was taken, viz., that there had been no personal service of the order. There Cotton, L.J., said: "It is true that as a general rule no order will be made for sequestration or attachment unless it can be shown that there has been personal service of the order disobeyed, but there are exceptions to that rule. If it were proved, for instance, that the person was actually in court at the time the order was made, service would be unnecessary in order to obtain process for contempt, and personal service is also dispensed with if it is shown that the reason why there has been no personal service is that the person to be served has evaded service." Although that was a case of sequestration, I have no doubt that Cotton, L.J., was accurate in stating that the same rule applied to attachment, for it has always been held that a person cannot be in a position to obtain a writ of sequestration unless he is in a position in which he could obtain a writ of attachment. Then was the judgment debtor evading service? It may be that it would have been a better course if, instead of the clerk leaving the copy of the order with the husband, an application had been made for an order for substituted service under ord. 67, r. 6. But the question is whether the case comes within the rule laid down by Cotton, L.J. On considering the facts of the case, I am of opinion that the judgment debtor was evading service. The appeal must therefore be dismissed.

MATHEW, L.J.—I am of the same opinion. It was argued that the rule requiring personal service of an order, before a writ of attachment for disobedience to it could be issued, admitted of no exception, and that therefore a writ of attachment could not be issued in this case, although the judgment debtor knew of the order for examination, and was evading service of it. But the object of the rule is to make sure that the person against whom the order has been made has knowledge of the order, and in my opinion the authority referred to by Stirling, L.J., shows that the rule has an obvious and necessary exception where the knowledge which personal service is designed to give is obtained in another way, and where personal service is being evaded.

Appeal dismissed.

Solicitors for the plaintiff, *Hunt & Capron*, for *Hunt & Hunt*, Romford.

Solicitor for the defendant, *W. Hubert Smith*.

High Court of Justice.

Chan. Div. } Joyce, J. } Dec. 2, 3, 5, 6, 7, 8.

SEDDON AND LONDON SALT CO. (LIMITED) v. NORTH-EASTERN SALT CO. (LIMITED) AND OTHERS. (a.)

Company — Misrepresentation — Purchase of shares — Contract completed—Rescission.

Rescission will not, in the absence of fraud, be decreed of a contract for the purchase of shares in a company after the contract has been completely carried out by transfer and registration. The rule being the same in the case of choses in action *in this respect as in the case of a conveyance of land Repudiation of a purchase of shares in a company on the ground of misrepresentation must be made at the earliest possible moment. Mere silence will not amount to misrepresentation.*

Action.

The plaintiff Seddon was a salt manufacturer and merchant at Middlewich, and sold salt on the London market.

The defendants, the North-Eastern Salt Co. (Limited), traded at Middlesbrough, and their business was to sell salt, and in particular to sell on the London market and elsewhere the salt made by the defendants, the Cleveland Salt Co. (Limited), the Tees Salt Co. (Limited), Sir Christopher Furness, the Owners of the Middlesbrough Estate (Limited), and the Salt Union (Limited) (hereinafter called the salt manufacturing firms), who were the holders or owners or beneficially entitled to substantially the whole of the shares of the North-Eastern Salt Co. The last defendant was G. Hewett, who was formerly the managing director of the London Salt Co., who were the other plaintiffs in this action.

The business of the London Salt Co. originally belonged to a firm of salt dealers of the name of Burford, who became bankrupt, and it was sold on the 8th of November, 1902, for £3,250 to one Watson, a director of one of the defendant companies.

On the 11th of February, 1903, the London Salt Co. was formed, with a capital of £5,000 in shares of £1 each, and 3,320 shares were held by the salt manufacturing firms other than the Salt Union and their nominees, and 1,680 shares by the defendant Hewett, the managing director of the company. The company traded in London in salt and drysalt goods (among other things), and part of their business was the disposal in the London market of salt consigned by the defendants, the North-Eastern Salt Co. and the salt manufacturing firms.

In September, 1903, the plaintiff Seddon entered into negotiations for the acquisition of the business of the London Salt Co. by the purchase of all the shares in that company.

The negotiations were carried on with Grigg, the manager of the North-Eastern Salt Co., Storr, who was a director of the Cleveland Salt Co. and chairman of the London Salt Co., and the defendant Hewett.

On the 23rd of September Seddon had an interview with Hewett and Storr, when he alleged that they represented and warranted to him that up to the 30th of September, 1903, the company had made a trading loss of only £200 or not more than £250, and that on the faith of such representation and warranty, which he alleged were made on behalf of the defendants the salt manufacturing firms and by Hewett on his own behalf, he purchased the 1,680 shares of the defendant Hewett, on which 17s. 6d. had been paid, for £1,670, and the remaining 3,320 shares for £2,905.

On the other hand, Storr said he told the plaintiff that the only information he had as to the losses of the company was from the weekly profit and loss sheets, which showed that the loss was something about £200 and not more than £250, and that Hewett said nothing as to the losses.

As part of the arrangement Hewett resigned his position of managing director.

The plaintiff Seddon also agreed with the salt manufacturing firms as part of the transaction to take from the North-Eastern Salt Co. all the supplies of coarse salt required by the London Salt Co. for a period of seven years.

The transfers of the shares were dated between the 9th and 13th of October, but the registration did not take place till the 6th of November.

The plaintiff Seddon took over the business of the London Salt Co. on the 9th of October, 1903, and at once made an investigation of the books as to the position of the company, and discovered that the said representation and warranty on the faith of which he had acquired the shares in the company and paid the purchase-money was untrue. The plaintiff alleged that the loss which the company had made up to the 30th of September, 1903, as shown by the company's accounts as afterwards audited, instead of being from £200 to £250, was not less than £1,200 without writing off depreciation for casks and vans; and that the total trading loss of the company if the accounts were properly and fully taken was not less than £2,400.

The plaintiff further discovered that there were numerous debts of the London Salt Co. remaining due and unpaid, including one of £1,000 to the North-Eastern Salt Co., the existence of which had not been disclosed by Storr and Hewett.

On the 12th of October he wrote to Storr: "I must say that, whilst I was prepared for something pretty startling, the position disclosed by the books exceeds all anticipation. I understood from Mr. Grigg that whilst no profit was made no loss has been experienced. Mr. Hewett said in your presence that he estimated the loss at the outside £250. As a matter of fact the period ending the 30th of September will more probably show a loss of anything between one and two thousand."

Storr replied, on the 13th, that he was very much surprised. The position so far as they knew it by Hewett's reports and the weekly approximated profit and loss sheets showed a balance of loss of £208, and that beyond those figures they knew nothing, and suggesting that it would be better to refrain from further comment until the audit by Peat & Co. was concluded.

The balance-sheet as audited by Peat & Co. showing a loss of over £1,200 up to the 30th of September, was received on the 19th of December. On the 12th of January, 1904, plaintiff's solicitors wrote to the defendants setting out the representation that the loss would be about £200 but not more than £250, whereas it appeared that the loss actually sustained was about £2,500, and that they were instructed to take proceedings for return of the money overpaid and for an injunction, they alleging that the defendants had been doing business with former customers of the London Salt Co.

The writ in this action was issued on the 20th of January, 1904, and the plaintiff claimed against all defendants except the Salt Union (Limited), a declaration that the purchases of the shares of the London Salt Co. should be rescinded, and the repayment of the purchase-money, and in the alternative for damages, and also an injunction against all the

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

defendants except Hewett to restrain them from selling salt to former customers of the London Salt Co.

There was no allegation of fraud.

There was a very lengthy examination of accounts, the defendants alleging that the balance-sheet of Peat & Co. was drawn up on a wrong basis.

The case against the Salt Union (Limited) was dismissed after the opening of the case for the plaintiffs.

F. Gore-Browne, K.C., and *Muir Mackenzie*, for the plaintiffs.—The contract for the purchase by the plaintiff Seddon of the shares in the company was induced by an untrue representation as to the amount of the trading losses of the company. There was such a material misrepresentation as that the plaintiff is entitled, provided he can restore matters to their former footing, to have the purchase contract rescinded and to have back his money. A contract can be set aside even after completion for a material misrepresentation.

Younger, K.C., and *A. M. Talbot*, for the North-Eastern Salt Co.—There is no case against these defendants, who have only purchased salt from the salt manufacturers and sold it to the London Salt Co., and have done nothing else. The plaintiff does not allege that any representation was made by Grigg, the manager of this company, on which he relied; and, further, if Grigg made any representations he was not authorized by the North-Eastern Co. to make them, so that the plaintiff is not entitled to any relief against these defendants under the first part of his claim. There is also no evidence on which the plaintiff is entitled to an injunction against these defendants. The plaintiff did not acquire any part of the business of the North-Eastern Salt Co., he only agreed with the salt manufacturers to take all the coarse salt required by the London Salt Co. for seven years from the North-Eastern Salt Co. This does not prevent the North-Eastern Salt Co., who were not parties to it, from selling salt on the London market.

Hughes, K.C., and *H. E. Wright*, for the Salt Union (Limited).

Montague Lush, K.C., and *C. H. Sarjant*, for the salt manufacturing firms.—The case made against these defendants is that on the 23rd of September Hewett, in the presence of Storr, made a statement with regard to the trading losses of the company, and it is said that because Storr said nothing upon that occasion, on which he was not making any contract, that he acquiesced. The case against them must fail for the following reasons: (1) The only misrepresentation alleged is on the 23rd of September, which is prior to any negotiation for any sale of the shares by Hewett. (2) Storr had on that date no authority to bind anyone. (3) Silence cannot in the absence of fraud give rise to any action for rescission, because the basis of a rescission on an innocent misrepresentation is that something is said which the speaker honestly believes, but is mistaken about: *Smith* v. *Hughes*, 19 W. R. 1059, L. R. 6 Q. B. 597. (4) The plaintiff, upon his own evidence, did not rely upon this representation; it did not induce the contract, and it is always essential to prove that in order to get rescission. (5) The plaintiff, with the knowledge or belief that the loss exceeded £250, affirmed the contract by registering the shares and managing the business. He did not disclaim at the earliest possible moment. (6) On the 12th of January, 1904, the plaintiff, by his solicitor's letter, elected to affirm the contract and sue for damages and an injunction, and that election is final, and he cannot now claim to rescind the contract: *Scarf* v. *Jardine*, 30 W. R., at p. 897, 7 App. Cas., at p. 360. (7) There cannot be rescission after conveyance, and it is immaterial whether it is land or shares or anything else. The rescission of a contract is only applicable where there is something still to be done under it. There is no continuing contract subsisting between the plaintiff and the defendants: *Brownlie* v. *Campbell*, 5 App. Cas. 925. When a contract has been completed and there has been a conveyance a court of equity will not give relief unless fraud is proved. (8) There is no evidence that these alleged misrepresentations were incorrect.

W. F. Hamilton, K.C., and *T. A. Nash*, for the defendant G. Hewett.—There is no case against him. The only representation made by Storr and to which Hewett assented was that the trading loss of the company as shown by the weekly profit and loss sheets was something about £200, and not more than £250, and Seddon did not rely on this representation; and further that before the contract was completed Hewett had said he would not guarantee the figures as to the loss. Repudiation must be prompt, especially in the case of a purchase of shares by someone who practically becomes the owner of the company and has every opportunity of discovering what the true state of affairs is: *Brownlie* v. *Campbell* and *Sharpley* v. *Louth and East Coast Railway Co*, 2 Ch. D. 685. In the case of innocent misrepresentation where the contract has been completed there can be no rescission: *Soper* v. *Arnold*, 36 W. R. 207, 37 Ch. D. 96. Rescission can never be obtained unless the parties can be restored to their original position before the contract was entered into. Hewett resigned his managing directorship as part of the bargain. Seddon cannot restore him to that position if the contract is rescinded.

F. Gore-Browne, K.C., in reply.—The necessity for immediately repudiating a contract has been modified since the decision in the House of Lords in *Foster* v. *Mutual Reserve Co.*, 20 T. L. R. 715, where a delay of two years was held, under the circumstances of that case, not to deprive the plaintiff of the relief he sought. The defendants have not cited a single case saying that *choses in action* cannot be retransferred where there has been a misrepresentation of fact, although an innocent one. The cases with regard to *choses in action* show that after the whole thing has been carried out you can have an order putting the parties back in the same position that they were in before. As examples see *Attorney-General* v. *Ray*, 22 W. R. 498, L. R. 9 Ch. App. 397, relating to a grant of an annuity; *Newbigging* v. *Adam*, 35 W. R. 597, 34 Ch. D. 582, 37 W. R. 97, 13 App. Cas. 308, and *Rawlins* v. *Wickham*, 7 W. R. 145, 3 De G. & J. 304, cases as to partnership. These cases dispose of the distinction between executory and executed contracts. In all the real property cases the principle *caveat emptor* applies, but I submit that that doctrine does not apply to the purchase of shares where the representation is as to the merits of a business of which the price is ascertained. The partnership cases and grant of annuity cases are much nearer the present case than the real property cases: *Lagunas Nitrate Co.* v. *Lagunas Syndicate (Limited)*, 48 W. R. 74, [1899] 2 Ch. 392, where Lindley, L.J., said: "That a contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent." This was after the completion of the contract. The reason why a man who takes shares in a company must act promptly and repudiate his position at once is because other shareholders have taken shares or other persons have given credit to the company relying

on the fact that he has become a shareholder. In *Tennent* v. *City of Glasgow Bank*, 27 W. R. 649, 4 App. Cas. 615, it is put that after the rights of creditors have intervened rescission is altogether impossible. But in the present case the rights of third parties do not arise. The objection to the representation that Storr made is not that it does not state the truth so far as it goes, but that it conceals most material facts with which the plaintiff ought to have been made acquainted. The very concealment of it gives to the truth which was told the character of falsehood: see *dictum* of Lord Chelmsford in *Oakes* v. *Turquand*, 15 W. R. 1201, L. R. 2 H. L., at p. 342. It is immaterial that Storr did not mean to do wrong. If a man having knowledge makes an untrue statement, he must be treated in the same way as if he had made it with an evil intent. Seddon waited until he had received Peat's report before deciding as to keeping the business. On receiving it he consulted his solicitor. The delay after receiving the report was only a reasonable delay.

JOYCE, J.—The litigation in this case arises out of an arrangement for the acquisition by the plaintiff Seddon of the property of the London Salt Co., by the purchase of the shares of that company from the persons who really owned those shares. The claim made by the statement of claim is of a two-fold nature. In the first place it asks for a rescission of the arrangements and for restitution on the ground of misrepresentation. The second part of the claim put forward is for an injunction to restrain the defendants from selling on the London market to persons who were customers of the London Salt Co. prior to the said date, salt made or consigned by the salt manufacturing concerns. On the second part of the case, it is a little difficult to say on what theory it is founded, but certainly no evidence has been adduced before me in support of the second part of the claim, and I need not say anything more about it.

Now, then, as to the misrepresentation; a claim is founded upon an alleged misrepresentation, and it appears to me, as it has done all through, that the plaintiff's path to succeed in his claim is beset with difficulties. In the first place, there is no allegation of fraud, and, in point of fact, the imputation of fraud upon the defendants has been expressly disclaimed, and properly so. Therefore it is a claim to rescind or set aside, for an innocent misrepresentation, a contract for the sale of property, not executory but executed, and under which nothing whatever still remains to be done.

Lord Campbell lays down the law in reference to this principle, or rather, I should say, states what is the rule on the question, in *Wilde* v. *Gibson*, 1 H. L. C., p. 632. He says: "After the very attentive and anxious consideration which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that in the court below the distinction between a bill for carrying into execution an executory contract and a bill to set aside a conveyance that has been executed has not been very distinctly borne in mind. With regard to the first, if there be, in any way whatever, misrepresentation or concealment which is material to the purchaser, a court of equity will not compel him to complete the purchase, but where the conveyance has been executed I apprehend, that a court of equity will set aside the conveyance only on the ground of actual fraud." And Lord Selborne, in the case of *Brownlie* v. *Campbell*, 5 App. Cas. 925, 29 W. R. Dig. 232, says, at p. 936, after explaining the circumstances of that particular case: "The contract is ultimately entered into upon those terms. Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assume them to be errors unconnected with fraud in the particulars, and when the conveyance takes place it is not, as far as I know, in either country," that means in Scotland and England, "the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud or a case of misrepresentation amounting to fraud by which the purchaser may have been deceived."

Now I do not entertain the slightest doubt about that being the correct statement of the law. It has been acted upon by Cotton, L.J., in *Soper* v. *Arnold*, 36 W. R. 207, 37 Ch. D. 96, and still more recently by Farwell, J. This rule is not only a rule of equity, but it is also a rule of law. In *Kennedy* v. *The Panama and Royal Mail Co.*, 15 W. R. 1039, L. R. 2 Q. B. 580, Lord Blackburn, in delivering the judgment of the court, said: "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract."

In my opinion there can be no successful claim after completion for damages in respect of misrepresentation unless that misrepresentation was fraudulent. It appeared to me from the first that the absence of fraud and the absence of any allegation of fraud in this case was a fatal objection to the action, and I should be perfectly justified in disposing of it on those grounds, and those grounds alone, and saying no more about the facts of the case, but I will add just a few words about the facts, as they have been gone into so fully. If the plaintiff be right the contract in question of course is not a void contract, but a voidable contract, and it was the duty of the plaintiff, bearing in mind the peculiar nature of the property, to repudiate the contract at the very earliest possible moment when he found out that any misrepresentation had been made, if, in fact, any misrepresentation was made. In my opinion, the plaintiff did not do this, but taking possession, he went on treating the property as his own in many ways for several months, and continued to do so long after the time when he had the information which would lead him, and ought to have led him at once to the conclusion that he had been misinformed, if in fact he had been misinformed. Of course, I do not forget there is the letter of the 13th of October from Storr, but when you read that letter in connection with the context it is quite plain to my mind that that letter, taken with the preceding letter, or taken with any other letters you like, does not amount to an arrangement that the

plaintiff is to be entitled to go on dealing with the property as his own without prejudice to the question of whether he is to be entitled to rescind the contract and repudiate the property or not. As far as I can see, there never has been a suggestion about repudiating this contract, or repudiating the property and rescinding the contract, until the commencement of this action. In the solicitor's letter of the 12th of January, which precedes the commencement of the action, there is not even a suggestion of repudiating the property and rescinding, but all that he says is, "I am going to commence an action and claim against you compensation in damages." I think I ought to add also that upon the whole evidence I am not satisfied that there was any misrepresentation that induced the plaintiff, Seddon, to enter into the contract. I very much doubt whether there was any misrepresentation at all. Seddon's account is that in answer to his question Hewett made some answer and Storr said nothing. In the argument, I was referred to a passage in Lord Campbell's judgment in *Walters* v. *Moryan*, 3 De G. F. & J., at p. 724, where he says: "A single word or, I may add, a nod or a wink or a shake of the head or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for a specific performance of the agreement." But as far as I know it has never been held that silence amounted to misrepresentation. Of course there may be peculiar circumstances. A statement may have been made to somebody who remained silent, but, as far as I know, silence has never yet been held to amount to misrepresentation. However, Storr and Hewett were both called, and they gave quite a different account of the matter as to what happened, and I think there is no reason to question the veracity of either of them. I think, upon the whole, comparing all the evidence, that practically the only representation that was made, if any, was in effect, that the weekly balance-sheets do not show a loss of more than or as much as £250, and that was a statement which, in my opinion, was not untrue or substantially inaccurate. Further, I am not satisfied that the representation made had the effect of causing Seddon to enter into the contract now sought to be rescinded. It had no effect upon him at all. I think he wanted the business and that he intended to take all the risk, whatever it was. Under these circumstances, of course, that portion of the action founded on misrepresentation fails as well as the other, and it must be dismissed with the usual consequences.

Solicitors for the plaintiffs, *Grant, Bulcraig, & Co.*, for *Parker & Ayre*, Manchester.

Solicitors for the North-Eastern Salt Co., the Cleveland Salt Co., the Tees Salt Co., Sir Christopher Furness, and the Owners of the Middlesbrough Estate (Limited), *Crump, Sprott, & Co.*, for *Archer, Parkin, & Archer*, Stockton-on-Tees.

Solicitors for the Salt Union (Limited), *Field, Emery, Roscoe, & Medley*, for *Batesons, Warr, & Wimshurst*, Liverpool.

Solicitor for George Hewett, *J. H. Hortin*.

Chan. Div.
Warrington, J. } Nov. 17, 18.

In re TRENCHARD.
TRENCHARD *v.* TRENCHARD. (*a.*)

Will—Construction—Annuity—Charge on land—Estate duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 9, 14.

By his will T. gave to his wife an annuity of £500, and made it a first charge on specific freeholds, of which there was no specific devise.

Held, on the true construction of the will, that this was a mere personal annuity, not payable primarily out of the specific freeholds, but payable out of the personalty.

The statement in Theobald on Wills (5th ed.), at p. 442, discussed and explained.

By his will T. gave to his wife an annuity of £500, so long as she should remain his widow, and made this annuity a first charge on all his freehold properties at Greenwich. After giving various legacies, he devised and bequeathed all his real and personal estate otherwise undisposed of upon trust for sale and conversion, and to pay his funeral and testamentary expenses, debts, and legacies out of the proceeds, and to hold the residuary trust moneys upon certain trusts.

There was no specific devise of the Greenwich property. The residuary legatees contended that the gift to the wife was not an annuity but a rent-charge, and ought to bear its own share of the estate duty payable in respect of the testator's estate.

Rowden, K.C., and *Bradford*, for the widow.

H. Terrell, K.C., and *Clayton*, for the trustees and residuary legatees.

WARRINGTON, J.—In this case a question is raised as to the incidence of estate duty. The principal question is whether any part of the estate duty payable in respect of the testator's estate ought to fall upon an annuity given to his widow.

In support of the case for the residuary legatees, who seek to throw a portion of the estate duty on the annuity, it is contended that the annuity in this case is a part of the real estate—that is to say, it is to be treated as a legal rent-charge, payable exclusively or primarily out of the real estate; and that it stands on the same footing as if there had been a specific devise of part of the real estate; and that the case comes within *In re Jolly*, 48 W. R. 657, [1900] 1 Ch. 292, in which it was decided that the estate duty payable in respect of specifically devised real estate must fall upon that estate.

The material parts of the will are contained in paragraphs 5 and 7.

"5. I give unto my said wife so long as she shall remain my widow an annuity of £500 . . . and I declare that the said annuity shall be a first charge on all my freehold properties situate at Greenwich, in the county of Kent."

"7. I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees, upon trust . . . to sell, call in, and convert into money the same, or such part thereof as shall not consist of money, and out of the moneys produced by such sale, calling in, and conversion, and with and out of my ready money, to pay my funeral and testamentary expenses and debts, and the legacies bequeathed by this my will or any codicil thereto, and to stand possessed of the residuary trust moneys and the investments for the time being representing the same (hereinafter called "my residuary estate") upon

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

and subject to the trusts, powers, directions, and conditions hereinafter contained."

At first sight there seems to be little to be said on the words of the will for the contention that the annuity is really part of the real estate. It is an annuity given in the usual form for describing a personal annuity. It is true that it is declared to be a charge on specific real estate, but that again looks at first sight like nothing more than a security for payment of the annuity. According to the general rule, an annuity is included amongst legacies, and I should have thought that that rule would have extended to this annuity, especially as the estate at Greenwich is not specifically devised, but is included amongst the items devised by clause 7.

But I am referred to certain authorities and to Theobald on Wills (5th ed.), p. 442. It is there stated: "A gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable." If that is correct, it is obviously applicable to the will here, and I should be bound to hold that the annuity was a legal rent-charge. But is it correct? I was referred to all the cases which the learned author cites in support of his statement, except *Lomax* v. *Lomax*, 12 B. 285, which both parties agree does not support the proposition. But all these cases depend upon the construction of the particular will in each case.

In *Shipperdson* v. *Tower*, 1 Y. & C. C. 441, the testator directed his debts, funeral and testamentary expenses to be paid, and bequeathed several annuities and pecuniary legacies, and declared that the former should be charged upon his real estate. That was not a charge on specific real estate, but on all his real estate. By a subsequent clause he charged all his real estate with the payment of all his debts, funeral and testamentary expenses, and legacies, or of such part thereof as his personal estate not specifically bequeathed should be insufficient to pay and satisfy. The annuities were charged on the real estate, and the will expressly gave powers of distress and entry to the annuitants. It was held that the annuities were primarily, if not solely, charged upon the testator's real estate, and that under the term "legacies" the testator did not mean to include annuities. *Shipperdson* v. *Tower* therefore stands entirely alone and turns on a question of construction.

In *Patching* v. *Barnett*, 51 L. J. Ch. 74, 30 W. R. Dig. 54, the only point to which I need refer is this: The testator devised real estate to trustees upon certain trusts, and by a codicil gave an annuity to E. S. during her life, and charged the same on two specific real estates with usual powers of distress and entry in case the annuity should be in arrear. That is a gift which comes entirely by itself in a codicil, and deals with nothing else than the annuity. The Master of the Rolls dealt with it very much as I have indicated. That case again depended on the construction of the will. The Master of the Rolls thought the case ought to be decided according to the particular instrument, that the true intention of the testator expressed in the codicil was that E. S. should have a rent-charge charged on the estate, and not an annuity. He recognizes the authority of cases which say that "where there is a bequest payable out of personal estate, the mere addition of a charge on real estate does not exonerate the personalty."

That case undoubtedly comes nearest to supporting Mr. Theobald's proposition, but I do not think that it really does support it. In *Buckley* v. *Buckley*, 19 L. R. Ir. Ch. D. 544, the head-note is not quite accurate. It is necessary to look at the full statement of the will in the body of the report. The testator gave a great number of annuities or rent-charges. I will take one of them as an example. He says: "I give, devise, and bequeath unto my wife for and during the term of her natural life one annuity or yearly rent-charge of £150, the same to be a first charge on my property in High-street, Belfast, and to be payable on the days hereinafter mentioned." He gives another annuity or yearly rent-charge of £150 to his daughter, to be a second charge on his property in High-street, Belfast. This annuity he limits not only to his daughter, but to her children or other issue; and then he gives to his son Michael £100 a year during his life (not calling it an annuity), to be a third charge upon his property in High-street. Then follows another annuity or yearly rent-charge of £65 a year to another son, to be a fourth charge, and a similar annuity to a third son, to be a fifth charge on the property. Again, on the construction of this will, it seems obvious that what the testator was dealing with was this property, and that he was giving his wife and children charges on it. The Master of the Rolls decided that they were rent-charges and not payable out of the personal estate. He professes to follow *Lomax* v. *Lomax*, *Shipperdson* v. *Tower*, and *Patching* v. *Barnett*. Therefore *Buckley* v. *Buckley* also depended upon the construction of the particular will.

In re Thomas, Ir. Rep. [1896] 1 Ch. Div. 427, was an even more special case. The testator devised and bequeathed all his real and leasehold estate to his son L., and, after giving legacies to his daughters and others, directed that his daughters should reside with L., while they remained unmarried, and if any of them should not agree to this, "I direct that my son L. shall pay to them the annual sum of £200, said sum to be paid to them, or any of them, so long as they, or any of them, shall remain unmarried, and I charge all my real and freehold property with the said annual sum of £200, and in case all my said daughters shall marry, then the said annual sum shall cease." It was held that the annuity was charged only on the freeholds, and not on the leaseholds or other personalty. What was more natural than to find that the testator had charged that annuity on the real estate which he had given to his son? Moreover, the £200 is charged on freeholds only, and not on leaseholds. It is not an annuity at all; it is a charge on the freehold property. I conclude, therefore, that the statement in Theobald on Wills is not, as it stands, an accurate statement of the law. It is only accurate if it is read to be "a gift of an annuity, followed by a direction that it is to be a charge on certain land only, makes it a charge on that land only, and the personalty is not liable, if, according to the true construction of the instrument, that is the result."

Putting that aside, what is the position, when in the absence of anything else to lead to an opposite conclusion, a testator gives an annuity and charges it on real estate? For that purpose I will refer to *Paget* v. *Huish*, 11 W. R. 636, 1 H. & M. 663. Page-Wood, V.C., at p. 667, says: "The question on this special case is one which very frequently arises, whether certain annuities are given only out of particular property, or whether, though they be charged primarily on that, the personal estate of the testator is liable to make good any deficiency. There is also a further question whether the annuities are payable out of *corpus*, or only out of income. As to the first point, the authorities may be ranged under three heads. . . . The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; and there the personal estate is not only not exonerated, but remains primarily liable, just as in the case of a charge of debts. Another class is where the legacy or annuity is a specific gift

out of real estate which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, and if the specific fund fails the gift must fail with it. The third class is intermediate to these, when a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable."

Under which class does this annuity fall? I think it comes within the first class. It is contended that there is something in this will which enables me to hold that this is a mere rent-charge. It is said that since the Conveyancing Act, 1882, every annuitant has the right of distress and entry as a security for his annuity; that I must presume that the testator knew that, and therefore omitted to insert express powers of distress and entry in the gift; and therefore that this case is on all fours with *Patching* v. *Barnett*. But I have to determine this case as a question of construction. It goes no further to show that the testator knew that the annuitant would have powers of distress and entry; because, even if this were a personal annuity, since the Conveyancing Act, if it was charged on land, the annuitant would have powers of distress and entry. I conclude that this is a mere personal annuity, not payable primarily out of the Greenwich estate, but payable, I will not say primarily, out of the personalty. This is a mixed fund and the annuity is payable in the same manner as the other legacies out of the mixed fund, but with a charge on the Greenwich property.

I may say (though I need not deal with the question) that I can see a great deal of difference between a direction to pay testamentary expenses out of personalty and a direction to pay them out of a mixed fund. I think an argument may well be founded on that distinction, but I need not decide anything of the kind now. I hold that this is simply a legacy, payable like the other legacies, and the incidence of the estate duty will follow from that.

Solicitors, *Harston & Bennett; Ward, Perks, & McKay.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) May 19, 1904.

ROUSE v. DIXON. (a.)

Master and servant—Employer's liability—Accident—Compensation—Request for arbitration—Answer by respondent—Abandonment of proceedings—Right to institute subsequent proceedings under the Employers' Liability Act, 1880—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 1 (2) (b).

The plaintiff, a workman, having in the course of his employment sustained personal injuries, gave notice thereof to the defendant, his employer, and made a formal request for arbitration under the Workmen's Compensation Act, 1897. *The defendant filed an answer that the building on which the plaintiff was working at the time of the accident did not exceed thirty feet in height, and that consequently the Act did not apply. The plaintiff thereupon gave notice of abandonment of his claim for compensation under that Act, and the proceedings were abandoned, the defendant being paid the costs incurred by him in consequence thereof. Subsequently the plaintiff commenced an action claiming damages from the defendant in respect of the same injuries under the Employers' Liability Act,* 1880.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Held, that the workman, by filing the request for arbitration under the Workmen's Compensation Act, and by abandoning his claim under that Act when he found that the Act did not apply, and having costs allowed against him, had not exercised his option under section 1, *sub-section* 2 (b), *of the Workmen's Compensation Act,* 1897, *so as to debar him from bringing his action under the Employers' Liability Act,* 1880.

Appeal of the plaintiff from a decision of his Honour Judge the Hon. A. Russell, sitting at Croydon County Court.

The question raised in this case was whether a workman who had made a claim for compensation under the Workmen's Compensation Act, 1897, and which claim he had abandoned after an answer had been filed by the employer to the workman's request for arbitration, was debarred from bringing an action for damages in respect of the same injuries under the Employers' Liability Act, 1880.

The plaintiff, a workman in the employ of the defendant, on the 8th of September, 1903, sustained injuries through an accident arising in the course of his employment in certain building operations.

On the 30th of September, 1903, the plaintiff served a notice of the injury on the defendant, and on the 14th of October made a formal request for arbitration under the Workmen's Compensation Act, 1897.

The defendant filed an answer to that request stating, *inter alia*, that the plaintiff was not entitled to compensation under that Act as the building on which the accident occurred was under thirty feet high.

The plaintiff thereupon gave notice of abandonment of his claim for compensation under that Act, and the matter, therefore, not being proceeded with, the defendant was awarded the costs which he had incurred in respect thereof.

On the 21st of January, 1904, the plaintiff commenced an action claiming damages from the defendant in respect of the same injuries under the Employers' Liability Act, 1880.

At the trial of the action on the 1st of March, 1904, the defendant took the preliminary objection that the plaintiff, having made a request for arbitration for the assessment of compensation in respect of the same injuries under the Workmen's Compensation Act, had exercised his option under section 1, sub-section 2 (*b*), of that Act, his action under the Employers' Liability Act was barred.

The learned county court judge upheld the defendant's contention, and gave judgment for the defendant without hearing the case on its merits.

From this decision the plaintiff now appealed.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides:

Section 1.—"(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act. (2) Provided that: . . . (*b*) When the injury was caused by personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceeding independently of this

Act, except in case of such personal negligence or wilful act as aforesaid."

By section 7, sub-section 1, the Act does not apply to employment on, in, or about a building which does not exceed thirty feet in height.

Broxholm, for the plaintiff.—The learned county court judge was wrong. The object of section 1, sub-section 2 (*b*), is only to prevent the employer being made to pay twice over, and it does not enact that when once a workman has made a claim under the Act he is debarred from making any other claim at common law or under any other statute. There has been no decision upon the merits in respect of the first claim, which was abandoned as soon as it appeared that the building on which the plaintiff was working did not exceed thirty feet in height, and the plaintiff cannot therefore be said to have exercised an option which can be effective. *Edwards* v. *Godfrey*, 47 W. R. 551, [1899] 2 Q. B. 333, only decided that, if a workman desires to claim under the Workmen's Compensation Act after he has failed on a claim made independently of that Act, he can only do so in accordance with the procedure provided by section 1, sub-section 4, of that Act. The case of *Beckley* v. *Scott & Co.*, [1902] 2 Ir. Rep. 504, decided by the Court of Appeal in Ireland (Holmes, L.J., dissenting), and affirming the judgment of the King's Bench Division, is an authority for the proposition that an abortive proceeding under the Act of 1897 can be no bar to bringing an action under the Employers' Liability Act. [He was stopped by the court].

Griffith Jones, for the defendant.—Although the Workmen's Compensation Act gives to a workman a new and additional remedy in the event of personal injury, it provides by section 1, sub-section 2 (*b*), that he must exercise his option as to which remedy he will pursue—whether he will proceed for compensation under that Act, or bring his action at common law, or under the Employers' Liability Act, 1880. If he elects to proceed under the Workmen's Compensation Act he is debarred from bringing his action at common law or under the Employers' Liability Act. *Edwards* v. *Godfrey* decided that when once the option has been exercised no other proceedings can be taken, except as provided by section 1, sub-section 4. The decision of the majority of the court in *Beckley* v. *Scott*, it is true, is inconsistent with *Edwards* v. *Godfrey*, but the facts in the former case are identical with the present, and Holmes, L.J., there points out, at p. 534, that "when an option is given to a person to take either of two courses he is not to take both." The learned county court judge was therefore right in holding that the plaintiff had exercised his option, and that he was barred from claiming under the Employers' Liability Act.

Broxholm replied.

Lord ALVERSTONE, L.C.J.—After the differences of opinion which have been expressed by the judges in the Irish Courts upon this question, it is impossible not to see that the question raised is one of difficulty. But for those expressions of differences of opinion I should not, speaking for myself, have felt much difficulty in coming to the conclusion to which I have come, that the learned county court judge was wrong in holding that the plaintiff was not entitled to maintain this action. As I have often pointed out, this Workmen's Compensation Act is not an Act which pretends to deal in express terms with every particular case which may arise. A great many of its provisions are not framed in legal language at all, and that has to be borne in mind in construing the Act. There are various cases in which difficulties may arise in the application of the Act, and in such cases we have to bear in mind the main object of the Act.

In this case, the accident having happened on the 8th of September, the plaintiff commenced proceedings by filing a request for arbitration under the Workmen's Compensation Act. He was then met by the answer that the accident occurred at a building which did not exceed thirty feet in height. That being so, the workman abandoned his proceedings under the Workmen's Compensation Act, and subsequently began the present proceedings under the Employers' Liability Act. Now it is said that because the workman has in effect said, "I admit I was wrong and that I am not entitled to the benefits of the Workmen's Compensation Act," his rights independently of that Act are gone, and that he is barred from bringing an action under the Employers' Liability Act. I am only adopting the language of Fitzgibbon and Walker, L.JJ., in the case of *Beckley* v. *Scott & Co.*, when I say that I cannot accept that contention unless I am driven to it by clear words in the statute.

Section 1 (2) (*b*) says that when the injury was caused by the personal negligence or wilful act of the employer, "nothing in this Act shall affect any civil liability of the employer"—and that indicates a civil liability in the employer, and the right was given to the workman, at his option, either to claim compensation under the Act, or to take the same proceedings as were open to him before the Act. Therefore that shows that the workman was entitled to compensation; but the section goes on to say that the employer shall not be liable to pay compensation both independently of and also under the Act. To my mind the language of that sub-section points plainly to one or other of these remedies—that is, under the Act, or at common law, or under the Employers' Liability Act—being pursued; and I think that the objection to the workman proceeding under the latter Act because he had already made a claim, which he was not entitled to pursue, ought not to prevail. Now, do the words "may at his option" include the mere sending in of a claim? It seems to me that the exercise of the option is not final until the case has been tried on its merits. There is nothing in this section to show that because a workman has withdrawn from a proceeding which he found he could not pursue successfully, and has paid costs, the employer is free from liability. The section was really intended to prevent the employer having to pay two compensations.

I now come to the authorities. The case of *Edwards* v. *Godfrey*, decided by the Court of Appeal, was a decision on sub-section 4 of this section. Now, section 1 (4) of the Act provides: "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action that the injury is one for which the employer is liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiffs shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act." Now that is manifestly a provision in favour of both parties, to the workman as giving him under this section a right to claim compensation, after he has failed in an action to recover damages, and to the employer, as he obtains the deduction of the costs of the action from the compensation to be paid to the workman. All that *Edwards* v. *Godfrey* decides is that, unless a workman who has failed in an action under the Employers' Liability Act, then and there, makes an application to the judge trying the action for assessment of compensation, he cannot at a subsequent date

initiate proceedings for compensation under the Act. A. L. Smith, L.J., there says, after pointing out that a fresh action could not be brought: "The respondent"—the workman—"has availed himself of the right given him by that sub-section; he has exercised his option in favour of bringing a common law action, which has failed. Having been defeated in this action, there would, but for the provisions of section 1, sub-section 4, have been an end of any claim by the respondent against the appellant in respect of the injury. That sub-section, however, is in favour of the workman, and gives him a very great advantage where he has exercised his option, and finds too late that he has exercised it in the wrong way."

The Irish judges in the case of *Beckley* v. *Scott & Co.* very rightly criticize any attempt to extend the decision of *Edwards* v. *Godfrey*. To my mind the reasoning in that case is unanswerable. Mr. Griffith Jones has admitted that if the Irish case were an authority it would be against him. In my opinion the decision of *Edwards* v. *Godfrey* is not an authority in this case. No doubt questions of difficulty may arise under section 6; but in my opinion that section has nothing to do with the point here. Section 1 (2) (*b*) of the Act clearly recognizes the liability of an employer at common law, and under the Employers' Liability Act, 1880, as still existing; it merely provides that he shall not have to pay twice. A workman is only debarred from taking alternative proceedings where he has exercised an effective option. Where the workman has acquiesced in a preliminary objection to proceedings which he has by mistake commenced and has been ordered to pay the costs of those proceedings, I do not think he is debarred from bringing an action to recover damages under the Employers' Liability Act. For these reasons, I think the learned county court judge ought to entertain this case on its merits.

WILLS, J.—I am entirely of the same opinion. But for a certain expression used by A. L. Smith, L.J., in the case of *Edwards* v. *Godfrey*, I should have thought that the language of section 1 (2) (*b*) was quite clear. The question turns on what the Act means. The words are: "The workman may at his option." That must mean the exercise of an option by the workman when he has an option, and that it does not apply to a case where the workman has no real option and where there is no liability under the Workmen's Compensation Act—where, as in this case, the workman has filed a request for arbitration under the Act, and then, finding that the building in which the accident occurred is less than thirty feet in height, or some other fact depriving him of his claim, has withdrawn his request. In such a case no effective option is exercised. The workman can only exercise an option where an option really exists, and not where an alternative is adopted which according to the facts cannot exist. To my mind, the reasoning of the majority of the Court of Appeal in Ireland in the case of *Beckley* v. *Scott & Co.*, is entirely satisfactory. The court in that case was dealing with a state of facts similar to those in this case, where the workman was never able to claim compensation under the Workmen's Compensation Act at all.

As regards the case of *Edwards* v. *Godfrey*, there is one expression—and, I think, only one—in that case which can be relied upon as supporting the employer's contention that the workman had exercised an option which is irrevocable. A. L. Smith, L.J., said in that case: "Having been defeated in this action, there would, but for the provisions of section 1 (4), have been an end of any claim by the respondent against the appellant in respect of the injury." That does seem to me to mean that the mere bringing of an action was the exercise of an option which would have debarred the workman from bringing any further claim in respect of the injury, but for the provisions in section 1, sub-section 4. But that observation was quite unnecessary for the decision of the case. The real substance of the decision in *Edwards* v. *Godfrey* was, as my lord has said, that this special procedure having been provided in section 1 (4), if that remedy is not utilized as provided by the sub-section, any other must be barred by implication, and in such a case, therefore, the workman has no other remedy. And, if I may say so, that decision seems to me perfectly right. I think, therefore, the workman in this case is not barred from proceeding under the Employers' Liability Act.

KENNEDY, J.—I agree, and I am glad not to have to differ from the judgments of my lord and my brother, though I have felt more difficulty than they have felt, in coming to the decision at which I have now arrived, as I have been strongly impressed by the reasoning of the minority of the court in *Beckley* v. *Scott & Co*, and also—though not by the decision—by the trend of the reasoning in the judgment of A. L. Smith, L.J., in *Edwards* v. *Godfrey*. But it seems to me the expression quoted by my brother Wills from that judgment is rather an expression of opinion, and can only be treated with respect, and not as binding upon us. And, further, my difficulty, which I ought to state, having regard to the great importance of the question raised, arises upon what is the fair and natural interpretation to be put upon section 1 (2) (*b*) of the Act. The section distinctly lays down that the workman may at his option do certain things. What is it that he may do? It is not that he may either obtain compensation under this Act or damages at common law or under the Act of 1880. But he may, "at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act." It would have been very easy to say he may either obtain damages or compensation. In section 6 the word used is "proceed"—"the workman may at his option proceed," and the word "proceed" would seem to be satisfied by any formulated claim. For these reasons I have had a difficulty in coming to the conclusion that the decision of the learned county court judge was wrong in upholding the employer's contention that the workman had exercised his option.

I am not, however, prepared to differ from the judgments of the Lord Chief Justice and my brother Wills, and I am glad to take the view of the section that "option" here means and includes a right to take proceedings either at common law or under the Employers' Liability Act, after making a claim under the Workmen's Compensation Act which the workman was not entitled to make and had not proceeded with. The Act may possibly be construed as imposing only a unilateral restriction, so as to show that the decision of the Court of Appeal in *Edwards* v. *Godfrey* may be right as well as our present decision; because, as that sub-section (sub-section 4) is one which enables, in a particular case, compensation to be assessed under the Act of 1897 in a proceeding taken under the earlier Act, so it is fair to say that if in that particular case that procedure is not followed, then the workman shall be barred. It is possible to construe the Act so as to say that "option" means a right to take proceedings either at common law or under the Employers' Liability Act after making a claim under the Workmen's Compensation Act and not proceeding with it when it is found that the claim could not be maintained; and that the only limitation is in the converse case—namely, that if a claim

is brought under the Employers' Liability Act and the action is fought out on the merits and dismissed, then in that case the workman must be taken to have exercised his option finally, and to be barred. We have to leave outside our present decision the question whether, if the workman having made a claim under the Workmen's Compensation Act had gone on with that claim and fought it on the merits, he could then have brought this action under the Employers' Liability Act. In that case there might possibly be a defence of *res judicata* to subsequent proceedings under the Employers' Liability Act, as A. L. Smith, L.J., said in *Edwards* v. *Godfrey*, but I leave that question open. I confine myself to not dissenting from the judgments which have been delivered, though I must say that I cannot come to the same conclusion as my lord and my brother Wills with certainty.

Appeal allowed; order for new trial; leave to appeal.

Solicitor for the plaintiff, *David Gunnell.*

Solicitor for the defendant, *Newton G. Driver.*

House of Lords.

From C. A. (England). July 14, 1904.

MENDELSSOHN (*Appellant*) *v.* RATCLIFF AND ANOTHER (*Respondents*). (*a.*)

Stock Exchange—Broker—Bankruptcy—Completion by jobber with broker's customers—Right of jobber to sue broker—Stock Exchange creditor's right to petition in bankruptcy.

Where a broker on the London Stock Exchange was declared a defaulter, and there were due from him to a jobber £986 in respect of the purchase and sale of shares, and a further sum of £281 paid by the jobber to the official assignee under the Stock Exchange Rules in completing the broker's transactions, then the proceedings in the Stock Exchange liquidation are not a discharge of the broker, but an action is still maintainable against him by the jobber for both sums less the amount of dividend received.

The judgment in the action is sufficient to support a bankruptcy petition against the defaulter.

Decisions of the Court of Appeal (51 *W. R.* 3, [1902] 2 *K. B.* 653, *and* [1903] 1 *K. B.* 216) *affirmed.*

These were two appeals. The first was from an order of the Court of Appeal (Collins, M.R., and Stirling and Cozens-Hardy, L.JJ.) (51 W. R., 3, [1902] 2 K. B. 653), affirming judgment of Mathew, J (50 W. R. 106, [1901] 2 K. B. 844).

The respondents (the plaintiffs in the action) were jobbers on the London Stock Exchange, and at the mid-May settlement, the 15th of May, there became due from the appellant, who was then a broker on the Stock Exchange, the sum of £986 for differences in the purchase and sale of stocks. These contracts were carried over to the end of May settlement. On the 16th of May the appellant was declared a defaulter on the Stock Exchange, and all his contracts then open closed at the hammer prices under the rules of the Stock Exchange, and in the result a further sum of £281 became due from the appellant's principals, which the respondents received and handed over to the official assignee of the Stock Exchange, as they were required to do under the rules.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

In the liquidation of the appellant's estate on the Stock Exchange the respondents claimed and received a dividend of 2s. 6d. in the £ in respect of the two sums of £986 and £281. There were other assets out of which a further dividend would be paid, but the amount was doubtful. The respondents brought an action against the appellant to recover the debts due to them, and judgment was given in their favour for the two sums of £986 and £281, less the dividend received. The Court of Appeal affirmed this decision.

Muir Mackenzie and *J. B. Adkin*, for the appellant.

Rufus Isaacs, K.C. (*H. Carrington* with him), for the respondents.

Earl of HALSBURY, L.C.—In following the argument in this case I have had some difficulty, I confess, in knowing what the new point was; so far as I am concerned I have not been able to find anything new. I entirely concur with the judgments which have been pronounced by the original judge and by the Court of Appeal, and it seems to me that they had no alternative but to pronounce the judgments which they did pronounce considering the previous judgments in your lordships' House and the two judgments in *Ex parte Ward*, 31 W. R. 112, 20 Ch. D. 386, 22 Ch. D. 132.

There is really nothing new in this case; the only suggestion which your lordships have heard from the learned counsel is this—that some very learned persons had not a particular point before their minds and did not give an express judgment upon it. I have been unable to follow that suggestion.

Here is undoubtedly a debt—I do not propose to go through the whole of the circumstances by which that debt was arrived at, nor is it very material—there is a debt, a vested cause of action, and you can only get rid of that debt in one way or another. As Mr. Muir Mackenzie has very justly said, the proceeding under the Stock Exchangle Rules is not a release—he does not suggest that it is a release—there is no express bargain on the subject; but he says, from the fact of its being practically a *cessio bonorum* you must infer an agreement not to sue. I am wholly unable to follow that. I think the answer which has already been given by Mr. Rufus Isaacs is a conclusive one. I can find no trace of any bargain which can be relied on to show that there is any impediment to a right to sue.

With reference to the other question, the £281, it seems to me that that depends on totally different grounds. It is under a different contract which has no reference to the question we are discussing here.

I am, as I said originally, unable to follow the subtlety which has invented a new point in this case. Upon the facts it appears to me that there is no answer to the plaintiffs' demand; and under these circumstances I move your lordships that the appeal be dismissed with costs.

Lord MACNAGHTEN.—I am entirely of the same opinion. I do not think that Mr. Muir Mackenzie has made out from the contract in this case either any implied satisfaction or any agreement not to sue.

Lord JAMES.—If this had been a case of first impression, I should have been disposed to give considerable weight to the able argument of Mr. Muir Mackenzie; but I think the weight of authority is so strong against the case of the appellant that it is impossible for your lordships not to say that this appeal must be dismissed.

Lord LINDLEY.—I am of the same opinion. The first point that was made by Mr. Muir Mackenzie and which deserved attention was based entirely upon the possibility of inferring from these rules an agreement not to sue. If that could be made

out he would be right; but when the rules are looked at it appears to be absolutely impossible to arrive at any such inference. The inference is negatived completely by rule 54, to say nothing about the general view of the rules as a whole. In face of rule 54 to say that there is an agreement not to sue is to my mind absolutely impossible. With respect to the £281, it is a sum payable by the defendant to the plaintiffs under a special contract based upon the rules of the Stock Exchange. That is an obligation which creates a debt, and that obligation has never been discharged. I have no doubt that this appeal ought to be dismissed with costs.

SECOND APPEAL.

A bankruptcy notice was served on the appellant and a bankruptcy petition was presented by the respondents against him, founded on the above judgment debt; on this petition a receiving order was made, which order was affirmed by the Court of Appeal.

Muir Mackenzie said it would be useless to argue the second appeal.

Earl of HALSBURY, L.C.—I think so. I think it would be impossible for us after the judgment we have given to give judgment in your favour in the second appeal; it would be a contradiction.

Order of the Court of Appeal in each appeal affirmed, and appeals dismissed with costs.

Solicitors, *Osborn & Osborn; Michael Abrahams Sons, & Co.*

From C. A. (England). July 15, 1904.

MERCER *v.* LIVERPOOL, ST. HELEN'S, AND SOUTH LANCASHIRE RAILWAY CO. (*a.*)

Lands Clauses Acts—Notice to treat—Lease of adjoining land after service of notice—Injurious affection—Right to compensation of such lessee—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 68.

Where a landowner, after the service of a notice to treat for certain land under section 18 *of the Lands Clauses Act,* 1845, *granted a lease of adjoining land, and subsequently a sum was agreed upon between the owner and the undertakers as to the compensation payable under the notice to treat, and the undertakers proceeding under their powers injuriously affected the lessee's land,*

Held, that the lessee (who claimed under section 68) *was not entitled to compensation from the undertakers.*

Decision of the Court of Appeal (51 *W. R.* 308, [1903] 1 *K. B.* 652) *affirmed.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L JJ.) (51 W. R. 308, [1903] 1 K. B. 652), reversing a judgment of Lord Alverstone, L.C.J. (50 W. R. 155, [1901] 2 K. B. 753).

The facts are set out in the court below. Stirling, L.J., summarized them as follows:

On the 23rd of October, 1891, the railway company served on Lord Gerard, the owner in fee, under their special Acts, a notice to treat in respect of certain specified lands, the notice being in accordance with section 18 of the Lands Clauses Act, 1845, demanding from him particulars of his estate and interest in such lands and of the claims made by him in respect thereof, and stating that the railway company were willing to treat for the purchase thereof, and as to compensation to be made for damage that might be sustained by reason of the execution of the works.

On the 12th of January, 1892, Lord Gerard sent in his claim.

On the 14th of October, 1892, an agreement was made between Lord Gerard and the railway company as to the amount of the compensation, and on the 27th of February, 1894, a conveyance of the land by Lord Gerard to the railway company was executed.

On the 14th of June, 1892, before the abovementioned agreement was made or the conveyance executed, a lease was granted by Lord Gerard to the appellant of building land, not comprised in the notice to treat, on which the appellant proceeded to erect houses. It is to be taken that the appellant had no knowledge of the notice to treat having been served when the lease was granted, nor had the railway company any notice of the lease when this agreement with Lord Gerard was entered into or the conveyance executed. Subsequently to the date of the conveyance the railway company executed works which necessitated the lowering of a street on which appellant's land abutted, and thereby injuriously affected such land. The appellant, therefore, claimed from the railway company compensation under section 68 of the Lands Clauses Act, 1845, and the sum of £371 10s. was by the award of an arbitrator found as the amount of compensation. The question is whether appellant is entitled to this amount.

Cripps, K.C., Haldane, K.C., and *MacConkey,* for the appellant.

McCall, K.C., Horridge, K.C., and *W. H. Loraine,* for respondents.

Earl of HALSBURY, L.C.—In this case I cannot entertain any doubt that the judgment of the Lords Justices of Appeal was right. The position of things which is here disclosed upon the facts is that at the time when the notice to treat was given Lord Gerard was the owner not only of the land intended to be taken under the powers of the Act, but of other land which might or might not be injuriously affected, without any communication being made by him to the railway company of the possibility of his letting that land for building purposes on a building speculation, and without any communication to the railway company that he had done so. The compensation was ascertained not by the ordinary course of an inquiry by an assessment jury, but by a bargain between the parties. Of course, inasmuch as we have nothing at all before us as to what passed when that amount of £24,000 was agreed upon between the parties, all that we have to do is to look at the situation of the parties and see what they were assessing at that time. What they were assessing at that time is to be ascertained by the notice to treat and the claim made in pursuance of that notice to treat by Lord Gerard. Looking at those documents, it is impossible to doubt that what it was competent to the claimant Lord Gerard to claim, and what, unless it had been withdrawn from the power of the assessment jury, it would have been competent to him to claim before the jury, was compensation in addition to the purchase-money of his land for all injurious affecting of his other land. For my own part I cannot entertain the least doubt that any compensation that he might have claimed he was bound to claim then and there, taking it upon the hypothesis that it was tried before a compensation tribunal. Whether it was tried in that form or not, the theory of the bargain between the parties must be that the amount which was settled is that which would have been settled by a compensation jury. Then what is the bargain? £24,000 is given for all that he could have claimed

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

at that time, and all that he could have claimed at that time included the amount of compensation to which he would have been entitled for any injurious affecting of his lands. As, therefore, between the railway company on the one side and Lord Gerard on the other, it seems to me that that question is finally and absolutely determined by the bargain they agreed to instead of its being settled for them by the compensation tribunal. What happened between the parties to the building speculation and the claimant against the railway company does not affect the position of the railway company at all. That which they have agreed to, which was the foundation of their bargain, was everything that once and for all could have been obtained if they had gone before the compensation tribunal. No question is before us now, and no question can be before us, as to the relation that the settlement between the railway company and Lord Gerard bears to the relations between Lord Gerard and his lessee. I do not enter into the question as to whether he did or did not communicate the facts to the person to whom he was letting his land for 999 years on a building lease. It might be that he might be regarded as having, unknown to the lessee, done something in the nature of a breach of covenant for quiet enjoyment by having placed a disability on that part of the land which he had let for this long term, or it might be that in recovering that amount of money which he did recover he might be considered to be a trustee for so much of the compensation as was appropriate to the deterioration of the land which he had so let. That is another point of view from it might be regarded. I hesitate to make any suggestion because I do not think it would be to the advantage of these parties to encourage the idea of further litigation between them. The only matter with which we are concerned, the question between the railway company on the one side and Lord Gerard on the other, seems to me to be absolutely concluded according to the judgment of the Court of Appeal. That question, I think, has been finally and rightly determined between the parties. It would be a most monstrous thing to suppose, that after the railway company had given compensation, not only for the land that was taken, but for all injurious affecting of other land at the time that the notice to treat was served, without any notice to them of any further relation between the claimant against them and any one else they should be called upon to pay further and other compensation to some one else, although they had paid and satisfied the demand of the claimant, whose claim in the first instance was a claim including all this very compensation which it is now sought to recover against them. The suggestion that this compensation could be recovered again, and by a person to whom Lord Gerard has transmitted his rights of compensation without notice to the railway company certainly would introduce a confusion in the settlement of such matters which I should be very loth indeed to encourage. In these circumstances it appears to me that the judgment of Stirling, L.J., is absolutely right, and I move that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. As regards the question between the plaintiff and the railway company, I am unable to see any answer to the argument of Stirling, L.J. I am quite content with his judgment, and I am unable to add anything to it.

Lord LINDLEY.—This case is one of novelty and of great importance, not only to railway companies, but to landowners. I agree entirely in the judgment of the Court of Appeal, and I can add really nothing to the judgment of Stirling, L.J. The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat, to deal with any of his land either taken or injuriously affected by the company so as to increase the burden of the company as regards the compensation to be made in respect of such land or any of it. In this case it would be most unjust to the company to depart from this principle, as the company settled with the owner without notice of his dealings with his land after the notice to treat was given and after his claim was sent in, and he insisted all along on his right to have the streets lowered: see section 13, clause 7, of the special Act, 1886.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *J. Haslam Fox*, St. Helens, Lancashire.

Solicitors for the respondents, *Maples, Teesdale, & Co.*, for *Oppenheim & Son*, St. Helens, Lancashire.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling, L.J.) — Dec. 21.

In re AN ARBITRATION BETWEEN FRERE AND STAVELEY TAYLOR & CO. AND THE NORTH SHORE MILL CO. (*a*.)

Practice—Appeal from chambers—"Practice and procedure"—Order to arbitrator to state case—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 19—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.

Proceedings in an action were stayed under section 4 of the Arbitration Act, 1889, upon the ground that there was an agreement to refer the matter to arbitration, and the matter was accordingly referred. In the course of the reference questions of law arose, and one of the parties obtained an order, under section 19 of the Act, from the judge in chambers directing the arbitrator to state a special case for the opinion of the court.

Held, that this was not a matter of practice and procedure within section 1, sub-section 4, of the Judicature Act, 1894, and that therefore an appeal from the order directing the arbitrator to state a case did not lie direct to the Court of Appeal.

Appeal from an order of Jelf, J., in chambers.

An action was brought in the King's Bench Division by Frere and Staveley Taylor & Co. against the North Shore Mill Co. to recover damages for breach of a contract. The North Shore Mill Co. applied, under section 4 of the Arbitration Act, 1889, to stay the proceedings in the action upon the ground that the contract contained a submission to arbitration of any dispute or difference arising thereunder.

An order was made staying the proceedings, and the matter was referred to arbitration. In the course of the reference questions of law arose, and Frere and Staveley Taylor & Co. took out a summons (which was headed in the matter of the arbitration and not in the action) under section 19 of the Arbitration Act, 1889, for an order directing the arbitrator to state a special case for the opinion of the court. Jelf, J., in chambers, made the order.

The North Shore Mill Co. appealed.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Dec. 19.—*Danckwerts, K.C.* (*F. E. Smith* with him), for the respondents, took the preliminary objection that the appeal did not lie direct to the Court of Appeal. This is not a matter of practice and procedure within section 1, sub-section 4, of the Judicature Act, 1894. The practice and procedure mentioned in the section must be matters of practice and procedure in connection with a cause or matter in the High Court: *Watson* v. *Petts*, 47 W. R. 68, [1899] 1 Q. B. 54; *Long* v. *Great Northern and City Railway Co.*, [1902] 1 K. B. 813. The present application is not in the action, but in the arbitration.

J. A. Hamilton, K.C. (*G. D. Keogh* with him), for the appellants.—The cases relied upon in support of the preliminary objection do not apply. In *Watson* v. *Petts* the application was for a prohibition to a county court judge. In *Long* v. *Great Northern and City Railway Co.* there was no cause or matter in the High Court, the application being by the railway company for an order to have a question of compensation under the Lands Clauses Act, 1845, tried in the High Court. The court treated the matter as being in the Sheriffs' Court. Here there is an action in the High Court which is still alive, though the proceedings in it have been stayed, and the court can at any time remove the stay. A summons to direct an arbitrator to state a case under section 19 of the Arbitration Act, 1889, relates to the consultative jurisdiction of the court, and is part of the practice and procedure of the court. In *In re Portland Urban District Council* v. *Tilley & Co.*, [1896] 2 Q. B. 98, 44 W. R. Dig. 122, a Divisional Court held that an order of a judge at chambers giving leave to revoke a submission to arbitration was a matter of practice and procedure, and that an appeal lay direct to the Court of Appeal. That case is very similar to the present one. In *Rasch & Co.* v. *Wulfert*, 52 W. R. 145, [1904] 1 K. B. 118, this court heard an appeal from chambers in a somewhat similar case to the present. The appeal therefore lies to this court.

Danckwerts, K.C., replied.

Cur. adv. vult.

Dec. 21.—STIRLING, L.J.—In this case, which was heard before Collins, M.R., and myself, we reserved our decision upon the preliminary point raised, in order that we might consider whether the principle of the two cases of *Watson* v. *Petts* and *Long* v. *Great Northern and City Railway Co.* applied to the present case, where the facts are different. We have considered those cases, and have come to the conclusion that the principle of those cases applies and that the preliminary objection must prevail. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitor for the appellants, *James Neal*, for *Evans, Lockett, & Co.*, Liverpool.

Solicitors for the respondents, *Pritchard, Englefield, & Co.*, for *Simpson, North, & Co.*, Liverpool.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Aug. 10, 1904.

CORPORATION OF OLDHAM v. BANK OF ENGLAND. (*a.*)

Local government—Education—School board—Borough council—Acts of Parliament—Transfer of property—Vesting—Consols—Instrument of transfer—National Debt Act, 1870 (33 & 34 *Vict. c.* 71), *s.* 22—*National Debt (Stockholders' Relief) Act*, 1892 (55 & 56 *Vict. c.* 39), *s.* 4—*Education Act*, 1902 (2 *Ed.* 7, *c.* 42), *ss.* 5, 25; *Schedule II., clause* 1.

On the appointed day on which the Education Act, 1902, *comes into operation in any particular district the school board of that district is abolished by section* 5 *of the Act, and ceases to exist, and by virtue of clause* 1 *of Schedule II. of the Act the property of the school board is thereupon transferred to and becomes vested in the new education authority without the necessity of any instrument of transfer. This applies to stocks which, under the National Debt Act*, 1870, *could only be transferred by entry in books of transfer kept by the Bank of England, and the bank, consequently, cannot require such entry to be made or any further instrument of transfer to be executed even with regard to such stock.*

This was an appeal from a decision of Farwell, J.

The action was brought by the Corporation of Oldham against the Bank of England to obtain possession of annuities which were standing in the books of the bank in the name of the Oldham School Board.

The mayor, alderman, and burgesses of the borough of Oldham, acting by their council as the council for the county borough of Oldham, were, under the Education Act, 1902, the local education authority for the district of the borough.

The Act came into operation in this district on the 1st of January, 1904, which was the day appointed by the Board of Education. On that day there stood in the books of the Bank of England, in the name of the Oldham School Board, the sum of £780 0s. 2d., 2½ per cent. Annuities, representing moneys set aside by the school board to meet liabilities in respect of loans raised for the erection of elementary schools within their district.

The plaintiffs alleged that on the "appointed day," *i.e.*, the 1st of January, 1904, the school board ceased to exist by virtue of the provisions of the Act, that they had succeeded to, and had since exercised and were now exercising, the powers vested in the school board, and that the property of the school board, including the £780 0s. 2d. Annuities, had become vested in them and that no further transfer was necessary.

The bank, on the other hand, alleged that these annuities formed part of the National Debt, of which they had the management under the National Debt Act, 1870. Under that Act the person or corporation in whose name stock was standing in the books of the bank, or their attorneys, were alone entitled to transfer the stock, and any transfer must be signed by the stockholder or his attorney in the books kept by the bank. And it was enacted that, except as otherwise provided by Act of Parliament, no other mode of transferring stock should be good in law. The Education Act, 1902, did not vest the annuities in the plaintiffs so as to render any further transfer unnecessary, but they could only be transferred by entry in the books signed by the attorney of the board, and in no other manner.

The plaintiffs then brought the present action, claiming—(1) a declaration that they were entitled under the provisions of the Act to the £780 0s. 2d., and to the dividends due or to accrue due in respect thereof, and to all the rights of registered stockholders in respect of the annuities; and (2) an order on the defendants to pay to them the dividends now due or to accrue due in respect of the annuities, and to register the plaintiffs in the books of the bank as entitled to the annuities.

Farwell, J., held that the school board had not been dissolved for all purposes; that the annuities were not vested in the plaintiffs by the statute, but

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

were still vested in the school board, so that a transfer was necessary; but that the equitable title to the annuities was vested in the plaintiffs, and that they could themselves execute a transfer under section 4 of the National Debt (Stockholders' Relief) Act, 1892.

The plaintiffs appealed.

By section 5 (1) of the Education Act, 1902: "The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and school attendance committees shall be abolished."

By Schedule II., clause 1: "The property, powers, rights, and liabilities (including any property, powers, rights, and liabilities vested, conferred, or arising under any local Act or any trust deed) of any school board or any school attendance committee existing at the appointed day shall be transferred to the council exercising the powers of the school board."

Sir R. B. Finlay, A.G., and *R. J. Parker*, for the appellants.—The Education Act, 1902, in this case came into operation on the 1st of January, 1904, which was the appointed day fixed under section 27 (2). On that day the school board was "abolished" under section 5. That is to say, it ceased to exist, and there was henceforth no person who could transfer its property. On the school board thus ceasing to exist, its property was automatically transferred to and became vested in the council under clause 1 of Schedule II. That "transfer" in the Act means "vest in" is shown by sections 6, 7, 18 (1) (*d*), 20 (*b*). *Hyde Corporation* v. *Bank of England*, 21 Ch. D. 176, and *Morton* v. *Bank of England*, 52 W. R. 393, [1904] 1 Ch. 664, are in our favour.

Latham, K.C., Upjohn, K.C., and *Howard Wright*, for the bank.—The bank is bound by the National Debt Act, 1870, ss. 22 to 25, to allow transfers of stock by entries in its books alone. Stock can be vested by statute, but our contention is that the established practice of the bank will not be interfered with without express words, which are not found in this statute. The Act contemplates the necessity for further transfers, it does not rely on automatic vesting. In section 5 "abolished" means abolished for the purposes of that section, not that the school board shall cease to exist for all purposes whatsoever.

No reply was called for.

VAUGHAN WILLIAMS, L.J.—The particular question that we have to decide in this case is whether the terms of the second schedule of the Education Act of 1902 are such that the property, powers, rights and liabilities of any school board or school attendance committee existing at the appointed day are transferred by virtue of or under the Act of Parliament to the council exercising the powers of the school board, or whether some additional instrument is necessary before such transfer can be affected.

The suggestion is that, whatever may be the case with regard to other property, at all events in respect of stock which the Bank of England has to deal with and with respect to which, generally speaking, the practice is, and for a long time has been, that upon a transfer there is an entry of the transfer in the transfer books of the Bank of England, there is, it is argued, no vesting of the property independently of the execution of some instrument.

Now, part of the argument that was addressed to us was based upon the words "shall be transferred," and I will say something about that presently; but really the argument addressed to us by Mr. Upjohn did not ultimately rely upon the effect of the words being "shall be transferred" instead of being "shall vest," or similar words. The final argument addressed to us on behalf of the bank was an argument which would have applied equally whether the words were "shall be transferred" or "shall vest."

I will deal first, and very shortly, with the question of the meaning of the words "shall be transferred." There is no doubt that sometimes one does find in Acts of Parliament somewhat cognate to the present Act of Parliament the words "shall vest" as distinguished from the words "shall be transferred." If one looks at the Local Government Act, 1894, s. 5, sub-section 2, clause (*c*), one finds these words used, "the legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish," &c., "shall if there is a parish council vest in that council." It is quite true to say that the words used in the Act of 1902 are not "shall vest" but "shall be transferred," but if one considers it there is very good reason for using the future words here, and a reason which is quite consistent with holding that the property on the happening of "the appointed day" was to vest and vest independently of any future or additional instrument. It must be remembered that the Act of Parliament when it passed was contemplating the happening of a future event—the occurrence of a future day—that is, "the appointed day"—and it seems to me that that was quite a sufficient reason for the draftsman employing the words in the future form that he has done here. They were employed in that form in order to make them fit and suitable for what the Legislature contemplated—a future event—the occurrence of a future day, "the appointed day."

Now, the 5th section of the Act of 1902 provides: [His lordship read the section, and continued:] I cannot conceive myself but that the word "abolished" there involves dissolution; it means that the school boards and school attendance committees shall be abolished, and it really is not denied that the effect of that section is that from the happening of "the appointed day" the school board and the committee would be incapable of doing anything. The corporation of the school board would, in fact, by virtue of section 5, be dissolved in the same sense that it would cease to have a legal existence, could not sue, could not be sued, could not hold property, and could not transfer property; therefore if we accede to the argument that has been addressed to us on behalf of the Bank of England—namely, that some additional instrument of transfer or conveyance is essential to the passing of the property notwithstanding the occurrence of "the appointed day," this much is perfectly certain, that that instrument could not be executed by the school board.

Then it is said, "But with reference to the Bank of England and its relation to certain stocks there is an Act of 1892," the National Debt (Stockholders' Relief) Act, c. 39, and reference is made to section 4. It is said that the result of that section is that although a transfer could not be executed by the defunct corporation, the school board, yet a transfer of these stocks might be executed by the new educational body as being a body in whom the right to the stock is vested by Act of Parliament.

Now, I will say something more as to this section presently; but I shall at once point out that it is obvious that that Act of Parliament, if it gets over at all the difficulty arising from the cessation of existence of the school board, can only do so in respect of a very limited subject-matter. It is not suggested that it does so as to all property; it is not suggested that it does so even as to all stocks. It was men-

tioned in argument by counsel on behalf of the Bank of England that there were certain Colonial Government Stocks, for instance, which would not be governed by that section. The result is that it is quite plain that there is this difficulty about the transfer of property, if you give to the word "abolished" in section 5 that which, it seems to me, is its plain and obvious meaning. Also, we have got the words here "shall be transferred" applied not only to property, but to powers, rights, and liabilities. With reference to property it is quite true that with regard to some sorts of property you require a deed, and it may be in some cases a written transfer; but it is not true of rights and liabilities—at all events it is not true as to liabilities—that any transfer is, according to the general law, either necessary or proper; indeed such a transfer would not, according to law, transfer the property at all. So that the outcome is that those who put forward the argument which has been put forward on behalf of the Bank of England cannot really make it good unless in one section of one Act of Parliament they ask us to give a different meaning to the words "shall be transferred" in the case of some of the subject-matters dealt with by the section from what one would be bound to do in the case of others. It really, to my mind, could not be maintained for one moment that with regard to liabilities or with regard to certain species of property any transfer or additional instrument of transfer was necessary for vesting.

Now I think that it is really unnecessary for me to go at greater length through the numerous matters that one finds in the Education Act of 1902 which go to show, first, that "abolition" is used in the 5th section in its natural sense; and, secondly, that the words "shall be transferred" are used to the intent that the moment that the future day arrives all property of the school board, *ipso facto* by virtue of and under the Act of Parliament, shall vest in the new educational body without the aid of any additional instrument of any sort or kind.

I said that I would say a word more as to the Act of 1892. I do not know that it is necessary for me to do so, because in the view that I take of this case the question as to the effect of that section is no longer really of any importance. Its only importance arose because Farwell, J., in his judgment relied upon it as showing that in the case of certain stocks, transfers of which are entered in the Bank of England transfer book, you could get over the difficulty of there being no possibility of a transfer by the defunct school board by saying that it might be right that the Bank of England should in accordance with their practice insist upon having a transfer, and that at all events in the case of some stocks—that is to say, the stocks to which the National Debt Act, 1870, applied—you could get a transfer by a transfer being executed by the new educational body as being a body in whom by virtue of an Act of Parliament the right to stock was vested, and as to whom it was said (section 4, sub-section 1), "He shall by virtue of the same provision be deemed to make a valid transfer of the stock and to receive and give a valid receipt for any accrued or accruing dividends." It was said that the Act of 1892 gave an equitable right to the new educational body, and that they might without any transfer being executed even by them to themselves give a valid receipt for any accrued or accruing dividends of stock, and might also execute, afterwards or before, as they thought fit, a transfer to themselves.

As I have not to decide what the construction of that section is, I do not wish to say more than this—that it is my opinion, as at present advised, without absolutely deciding the point, that these words "vested in any persons" in section 4 mean legally vested. That is my view of that section.

Now, having disposed of those matters, I wish to say a word or two upon the argument that was addressed to us, that even assuming that the effect of the Act of 1902 is to immediately vest the property of the school board in the new educational body, yet there is a necessity for an additional deed. It is said in the first instance that it is essential to the long and venerable practice of the Bank of England that there should be some such document. I do not think that that can affect the construction of an Act of Parliament. Then it was suggested that there was something in the nature of this stock which really prevented it from its very nature from being transferred without some instrument of transfer. All I can say in answer to that is, that in so far as that is true (and in a sense it is quite true) it is equally true of a number of other things; it is equally true of every *chose in action* that if there was not a transfer by the Act of Parliament there might be a necessity for some deed or written transfer in order to accomplish the passing of the particular piece of property. I think that disposes of the argument put forward—namely, that notwithstanding that the words "shall be transferred" must be construed as "shall vest" on the appointed day, we ought not to hold that this stock so vests that the Bank of England ought to act upon the statute without the production of any written instrument. I think they ought.

It was said by Mr. Upjohn that in consequence of the Local Government Act, 1894, in which undoubtedly property, including the property in stocks, did vest without a transfer, an Act was passed in 1895, and he says that the passing of that Act recognized the proposition that the Bank of England ought not to act upon a statutory vesting without the production of some instrument of transfer. I do not agree with that. The Act of 1895 does not seem to me to have done anything of the sort. It recognizes and is passed upon the basis that the effect of the Act of 1894 was that without more the property vests in the person denoted by the statute as being the person in whom the property shall vest; but although that is true, and it does vest, and the Bank of England, until the passing of the Act of 1895, recognized for all purposes the statutory vesting of the property, they, of course, had to assure themselves of the identity of the person; they had to assure themselves that the person who came and claimed to be the statutory appointee or donee of the stocks was in fact the person that he pretended to be. In the statute of 1895 they got that by a certificate of the clerk to the county council. All one can say is, that at present no equivalent Act of Parliament has passed with reference to the Act of 1902. If it is desirable from a business point of view that such an Act of Parliament should pass, I do not suppose the Legislature, when once satisfied of that, from the Bank of England representations, would make any difficulty in passing an Act. I know nothing about how far it is desirable and how far it is not. If it is desirable, then I have no doubt it will be done. But as things stand, in my view it is perfectly plain under this statute that the stocks do vest by virtue of the words in the first clause of the second schedule, and, as far as the Bank of England is concerned, it has an absolute indemnity by the very words of the Act of Parliament, and is not put in any danger or difficulty at all. I do not suppose the Bank of England was thinking principally of any danger to itself, but was really thinking that it would be a matter of public convenience that the same formalities should be gone through in

respect of all transfers of stocks, and that it did not matter whether the transfer was a transfer by the terms of an Act of Parliament, or a transfer in any other way *inter partes*, or anything else. I daresay the bank think that it would be very much more convenient that all transfers should pass through the transfer book. If that is so, they will get legislation to that effect, but I offer no opinion about that.

I think that this appeal ought to be allowed.

ROMER, L.J. — The first clause of the second schedule to the Act of 1902, on which the question we have to decide turns, is certainly not happily framed; but on the construction of it, and having regard to the provisions of the Act as a whole, I come to the conclusion that the appeal should be allowed. I cannot take the same view of the construction of that clause as was taken in the court below.

For brevity I will refer to the old educational authority—that is to say, the school board or school attendance committee, which was abolished by the Act on "the appointed day"—as "the old board," and I will refer to the new educational authority as "the council."

Now, one thing, to my mind, is clear about this Act, and that is, that on what is defined as "the appointed day" the old board under the very words of section 5 of the Act was abolished, and I cannot find throughout this Act any indication that when the Act says abolished it does not mean what it says. I cannot think for myself of any word stronger in the English language—whether it is the word usually used for this purpose or not does not seem to me to matter—and I cannot find any word in the English language which more thoroughly expresses the non-continuance for any purpose of the old board than the phrase used by the Act of Parliament, that on "the appointed day" it shall be abolished. As I have said, there is nothing in the Act from beginning to end to suggest that after the abolition it is, in the eyes of the law, for any purpose whatever, to be regarded as existing; and, indeed, section 5 is borne out by the provision in clause 10 of Schedule II. of the Act, for that carefully provides that existing members of the old board shall continue to "the appointed day"; the reason being obvious, that on the abolition of the old board its members would also, of course, have ceased to occupy the position of members of any body whatever.

On the appointed day, therefore, to my mind, under this Act it is clear that for all purposes the old board ceased to exist, and the new body—the council—only comes into existence as a new educational authority, with its rights and duties, and its rights to take property, again, on the appointed day.

That being the position of affairs, let me for a moment consider the wording of clause 1 of the second schedule. It says that the property, powers, rights, and liabilities of the old board existing at the appointed day shall be transferred to the council. The transfer contemplated, whatever that may be, is a transfer to take place at "the appointed day." It could not take place before the appointed day by reason of the council not being in a position to take any transfer before that day. It could not take place after that because, as I have pointed out, after "the appointed day" the old board is abolished; and it is noticeable that the property which has to be transferred is the property existing at the appointed day—not the property before or the property after, but the property at that precise moment. The word "transfer," as used in the section, is a general expression, covering not only property, but powers, rights, and liabilities. It could not mean that in respect of powers, rights, and liabilities anything in the nature of an instrument in writing should be executed. Nor can I really conceive that under this section with regard to the property any distinction is to be drawn between one kind of property, and another kind of property which only passes at law by an instrument in writing. What the section, to my mind, contemplates is an immediate passing from the old body—the board—to the council, of all properties, powers, and liabilities. To my mind, under this Act of Parliament no writing or deed or any further act was contemplated. I think the transfer mentioned in the clause was intended to mean a transfer effected by the Act of Parliament—effected instantaneously on "the appointed day"—not before and not after; and, to my mind, the effect of this sub-section is clearly, on the construction of the Act as a whole, that without more than the operation of the Act of Parliament all property, powers, rights, and liabilities passed by virtue of the Act to the new body—that is to say, vested in the legal sense in the new body, and I think that that view is borne out by other considerations. If you look at another part of the Act you will find that the word "transfer" is used with reference to the officers employed by the old board. Clause 16 of Schedule II. says that the officers of any authority whose property, rights, and liabilities are transferred under this Act to any council shall be transferred to and become the officers of the council. There the same word, "transferred," is used with regard to officers as is used with regard to duties, powers, liabilities, and property. And I find again that sections 85 to 88 of the Local Government Act of 1894 are incorporated, as it were, in the Act of 1902 in this way. By Schedule II., clause 8, it is provided that the sections I have mentioned of the Act of 1894 shall apply with respect to any transfer mentioned in this schedule—that is to say, with regard to the word "transfer" that was mentioned in the first clause of the schedule; and reading those sections as applying with respect to the transfer mentioned in clause 1, what do I see? In section 86, for example, I see it is provided: "Nothing in this Act shall prejudicially affect any securities granted before the passing of this Act on the credit of any rate or property transferred to a council or parish meeting by this Act"; and in sub-section 2 of section 86 of the Act of 1894 it is provided: "It shall be the duty of every authority whose powers, duties, and liabilities are transferred by this Act to liquidate so far as practicable before the appointed day all current debts and liabilities incurred by such authority"; and in section 88, sub-section 1, there is this: "If at the time when any powers, duties, liabilities, debts, or property are by this Act transferred to a council or parish meeting, any action or proceeding, or any cause of action or proceeding, is pending or existing by or against any authority in relation thereto, the same shall not be in and any wise prejudicially affected by the passing of this Act, but may be continued, prosecuted and enforced by or against the council or parish meeting as successors of the said authority in like manner as if this Act had not been passed."

Those sections strongly bear out, incorporated as they are to the extent and the manner I have indicated, the view which I think is forced upon this court as to the true construction of clause 1 of the second schedule.

I might also refer, without going though them in detail, to the other provisions in this Act for insuring the continuance, without a moment's break, of the rights, duties, work, and general position of the old educational authority to the new. To my mind it would be inconsistent with the general scope of that continuity, if we did not give to clause 1 of

the second schedule the construction that I have indicated.

I can only say it is a pleasure also to think that our decision will very much enure for the benefit, as far as I can see ,of everybody concerned under this Act, and will afford the greatest protection to those who have to act upon it, and it certainly will be, as far as I can see, the very best indemnity to the Bank of England, for example, among others, which they could possibly have. It puts them in a far better position than they would be in under the interpretation adopted in the court below.

I think, for these reasons, the appeal should be allowed.

COZENS-HARDY, L.J.—I agree, and I have very little to add. Any other view than that which has been adopted by my lord and Romer, L.J., would, as it seems to me, make this Act of Parliament absolutely unworkable. The word "abolished" in section 5, as applied to school boards, is no doubt not a very happy word, and in this collocation is probably a novel word, but it seems to me that as applied to a corporation it must mean "dissolved." It must mean, as applied to the school board, that on the appointed day it ceases to exist. There is no provision in the Act of Parliament for the continuance of the school board, there is no possibility of any further election of members of the school board. There is nobody who could on the part of the school board do any of those acts which it was the duty of the school board to discharge before the appointed day.

The words in the schedule which have been so much discussed, "shall be transferred," seem to me must mean "shall vest," without more, on the appointed day. One interpretation must be given to all kinds of property and to everything which is covered by clause 1 of Schedule II. It cannot reasonably be suggested that it is to have a different meaning when applied to real property than that which it has when applied to stock.

To take the case which I ventured to put to counsel during the course of the argument, of schools with freehold property vested in the school boards. I failed to obtain any suggestion of how any further deed of transfer or conveyance to the new educational authority could be obtained after the appointed day, and I am certainly not prepared so to construe this section as to make an exception in favour of the Bank of England because they happen to have, under the Act of 1892, a section which may or may not enable the difficulty to be got over with reference to the particular stock with which that Act deals.

In my view, the conclusion at which we have arrived is very strongly borne out by section 88 of the Act of 1894, which is made applicable to this Act, and that is a section applying not merely to powers, duties, liabilities, and debts, but it speaks of "property" by this Act transferred. That makes it more easy to read the first clause of the second schedule in the way which I have suggested, that "shall be transferred" means "shall vest," without more, on the appointed day.

Solicitors, *Treasury Solicitor; Freshfields.*

High Court of Justice.

Chan. Div. } Dec. 14, 16, 20.
Kekewich, J. }

In re TASKER & SONS (LIMITED).
HOARE v. TASKER & SONS (LIMITED). (a.)

Company—Debenture—Issue as security for loan—Debentures returned to company with blank transfer on repayment—Registered owner—Subsequent transfer to purchaser for value—Priorities.

The company duly issued a series of debentures each of which was to rank pari passu *with the others. Certain of these debentures were issued as security for loans, and on repayment were returned to the company with blank transfers, but they were not transferred to the company, nor was the company entered on the register as the owner of the debentures. Subsequently these debentures were transferred to other persons for value by completing the blank transfers.*

Held, that the debentures so dealt with did not rank pari passu *with the other debentures of the same series, and that the company acting as they did had made a new issue of debentures.*

Further consideration on a debenture-holder's action.

The defendant company, on the 28th of February, 1896, executed a trust deed with a view of securing an issue of first mortgage debentures for £35,000 by which the defendant R. Ashby was appointed trustee of the property comprised in the deed on behalf of the first mortgage debenture-holders.

Article 47 of the articles of association provided that the directors may from time to time, at their discretion, raise or borrow any sum or sums of money for the purposes of the company, but so that the moneys so raised or borrowed at any one time owing shall not, without the sanction of a general meeting, exceed the nominal amount of the capital.

Article 48: "The directors may raise or secure the repayment of such moneys in such manner and upon such terms and conditions in all respects as they may think fit, whether by the issue of debenture or debenture stock of the company charged upon, or by charging or mortgaging in any manner whatsoever, all or any part of the property of the company (both present and future), including its uncalled capital for the time being."

Article 49: "Every debenture or other security created by the company may be so framed that the same shall be assignable, free from any equities between the company, and the original or any intermediate holders."

Article 112 (*k*): "The directors shall have power to borrow or raise any sum or sums of money on such security and upon such terms as to interest or otherwise as they may deem fit, and for the purpose of securing the same and interest, or for any other purpose, create, issue, make and give respectively, any perpetual or redeemable debentures or debenture stock, or any mortgage or charge on the undertaking, or the whole or any part of the property (present or future) or uncalled capital of the company, and any debentures or debenture stock may be issued to or deposited with any person lending money to the company by way of security, collateral or otherwise."

The debentures issued were subject to certain conditions, indorsed thereon, of which the following are material:

1. This debenture is one of a series of debentures of £20, £50, and £100 each, issued, or about to be issued,

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

by the company for an aggregate amount of £35,000, and the said debentures are all intended to be in the same form.

2. The debentures of this series shall rank *pari passu* as a first charge upon the premises within charged without any preference or priority one over another, and shall until the moneys hereby secured shall become payable be a floating charge upon such premises, but so that the company is not to be at liberty to create any mortgage or charge thereon in priority to or *pari passu* with the said debentures.

4. A register of the debentures will be kept at the company's registered office wherein there will be entered the names, addresses, and descriptions of the registered holders, and particulars of the debentures held by them respectively.

5. The registered holder of this debenture will be regarded as exclusively entitled to the benefit thereof, and the company shall not be bound to enter in the register notice of any trust affecting this debenture or to recognize any right therein in any other person save as herein provided.

6. Every transfer of this debenture must be in writing under the hand of the registered holder hereof or his legal personal representative.

9. The principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original and any intermediate holder hereof, and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the company.

This action was brought by the plaintiff on behalf of himself and all other debenture-holders for the appointment of a receiver and manager, and judgment was given on the 24th of July, 1903, appointing a receiver and manager and directing that the usual inquiries should be made. The master made his certificate on the 14th of July, 1904, in the first schedule of which he set forth a list of all the holders of mortgage debentures secured by the trust deed of the 28th of February, 1896. He also found that certain persons mentioned in the four parts of the second schedule claimed to be entitled as debenture-holders under the circumstances hereinafter set forth and left it for the consideration of the court to determine whether they were entitled or not to rank with the debenture-holders in the first schedule. The present summons was issued for the determination of this question.

In May, 1899, the company being pressed for money, borrowed £700 from one Allan Herbert, and issued to him debentures of the face value of £1,400 as security. The company also borrowed £1,000 from Robert Ashby, and issued to him debentures of the face value of £2,000 as security, and the arrangement was that on repayment by the company from time to time, Herbert and Ashby respectively should return to the company so many debentures as represented double the amount of the sum so repaid. Besides returning the debentures in accordance with the arrangement they executed forms of transfer in blank which were handed back to the company with the debentures.

The company, receiving applications for debentures after they had obtained the debentures back from Herbert and Ashby, issued the same debentures to the applicants and received the full face value of the debentures.

The company carried the matter through by filling in the transfers with the names of the applicants, the number and distinctive number of the debentures proposed to be issued, and on the execution of the transfer by the applicant registered the transfers, indorsed the debentures with a note of such transfer, and forwarded the debentures to the applicants.

In the first part of the second schedule are included the debentures issued to Allan Herbert and re-issued or transferred prior to the 31st of December, 1900.

In the second part are included the debentures issued to Robert Ashby and re-issued or transferred prior to the 31st of December, 1900.

In the third part are included debentures issued to Robert Ashby, and re-issued or transferred after the 31st of December, 1900.

In the fourth part are included debentures issued to R. Ashby to secure an advance, and after payment off of such advance deposited by the company as security for other loans by Allan Herbert and P. E. J. Talbot jointly, and also by Talbot alone. These sixteen debentures so deposited are in the name of Robert Ashby and no transfers of them have been registered although the advance by Ashby has been paid off and blank form of transfers signed by Ashby.

The total amount of debentures issued by the company did not exceed the limit of £35,000.

Ashton Cross, for the plaintiff.

W. R. Sheldon, for Messrs. E. & C. Paice, the holders of debentures in the first schedule for £4,700, who had obtained permission to intervene.—The debentures in the four parts of the second schedule are not entitled to rank *pari passu* with the first mortgage debentures. The issue of debentures to Herbert was a good issue, and on repayment of the loan he surrendered the debentures to the company. The debt was repaid by the company, not by the new holder. The company was in the position of a mortgagor entitled to a reconveyance, but the company could not keep the security alive for its own benefit to the prejudice of other mortgagees. If Miss Bingley paid money to the company on the faith of getting a transfer I could not dispute it, but there was an interval of two months between the surrendering of the debenture and the re-issue to her. If the company in fact redeemed them the other debenture-holders received the benefit. The company could not re-issue debentures under the guise of transferring them, because that would be *ultra vires*. There is practically no difference between this case and *In re George Routledge (Limited)*, *ante* p. 44, where it was held that on the transfer of debentures to the company the debt was gone and the security had ceased to exist. The company could by article 47, as between the company and the shareholders, borrow further money, but not as against the debenture-holders. When the debentures issued as security were paid off, transfers were executed, therefore there was an intention of merger. Condition 2 on the debenture would prevent the new issue of a debenture paid off. Under condition 6 a deed was not necessary for a transfer, and condition 9 is not applicable to debenture-holders *inter se*. If the company wished to borrow it must do so on second debentures.

He also cited *In re Regent's Canal Ironworks Co.*, 24 W. R. 687, 3 Ch. D. 43.

Petersen, for Miss Bingley, who held debentures in the first, second, and third parts of the second schedule, and Miss Whittaker, a debenture-holder in the third part of the second schedule.—In respect of one debenture Miss Bingley was a transferee, as she applied to the company for it before the company paid the money and received back the debenture. The company paid off Ashby as agent for Miss Bingley. The debentures are good in the hands of the present holders, who had no notice of any irregularity in the debentures. By the conditions indorsed on the debentures, which constitute a bargain between the company and all the holders of the debentures,

they are equivalent to bearer debentures. The company was never the registered holder nor transferee of these debentures; this distinguishes the present case from *In re George Routledge (Limited)*. It is not open to holders of debentures which are not impeached to impugn the debentures of Miss Bingley and Miss Whittaker on account of conditions 5 and 9, by which they are to be deemed to be exclusively entitled to the benefit of the debentures unaffected by any equities between the company and the original holders Herbert and Ashby. The restriction in the articles on the borrowing powers of the company is only binding on the shareholders. Even if the company acted *ultrà vires*, the registered holders are entitled to rank, relying on general principles.

Muir Mackenzie, for C. Hiscock and Mrs. White, holders of debentures in the first part of the second schedule, and for Allan Herbert and P. E. J. Talbot jointly, and Talbot alone, holders of debentures in the fourth part of the second schedule, adopted Petersen's argument. In *Routledge's case* the debentures were transferred to the company and registered, and therefore they were merged, and a subsequent issue could not be good; but in the present case the company intended to keep the debentures alive, and consequently there was no merger: *Thorne* v. *Cann*, [1895] App. Cas. 11. As regards Herbert and Talbot the company had power by article 112 (*k*) to deposit debentures as collateral security besides issuing them. The company merely had possession of the debentures returned to them with blank transfers, and the result is the same as if the parties had gone direct to Ashby for a transfer of the debentures. The debentures are good debentures entitled to rank *pari passu* in the first series.

E. Manson, for B. Gibbs, H. Cox, and E. A. Clark, holders of debentures in the first part of the second schedule, and A. Noyce and Miss Pledger, holders of debentures in the third part of the second schedule, adopted arguments of Petersen and Muir Mackenzie. The company never took a transfer, the legal title remained outstanding, therefore there could not be a merger. Conditions 5 and 9 come into operation and these are binding on all the other debenture-holders. There was no condition as to equities in *Routledge's case*.

Gatey, for the trustee of the debenture trust deed.

KEKEWICH, J.—The question in this case is one of some importance to those interested in the issue of debentures, and is completely new. I think it desirable to state what the whole question is, because some part of the arguments addressed to me have no direct bearing on the question for decision. I am not deciding any claim against the company. All the debentures specified in the second schedule of the certificate, parts 1, 2, 3, and 4, may be perfectly good as against the company, and yet on the point I have to decide my decision may be against these debenture-holders. The question which I have to decide is whether they are entitled to rank *pari passu* with the debentures specified in the first schedule. There is no question here of an improper issue of debentures. The articles of association conferred very large borrowing powers on the company, and expressly authorized an issue of debentures by depositing them as security for money advanced. I must take the master's certificate as it stands. The certificate, after finding that there were several debentures issued which rank against the assets of the company, sets out particulars of other claims which were for convenience divided into four different parts, but they all fall under one head and there is no distinction in substance between the four different classes.

What happened was this. The company issued debentures for £35,000 and from time to time paid off some of these debentures, and the debenture-holders who were paid off, at the request of the company, executed blank transfers. At a later date as part of an independent transaction, the company borrowed money from third persons, filled in the blank transfers with the name of the lenders, and registered them as the new holders of the debentures so transferred. Did that constitute a transfer of the original debentures, or was it an issue of new debentures belonging to a series different from the original debentures? I have assumed that there was such a series, and as a matter of fact there was no doubt about it. The first condition on the debenture before me states that it was part of an issue of £35,000, and the second condition expressly says that debentures of this series shall rank *pari passu*. Each holder of these debentures is told that as part of his contract, not only with the company, but also with the other holders, he is to have a debenture which is to rank *pari passu* with all the other debentures of this series, but that no other debentures are to be issued other than this series which shall rank *pari passu*.

I have to decide whether what has been done in the present case was an attempt to evade that condition and to make other debentures rank *pari passu* with those held under the first issue. There is no distinction between the different classes in the second schedule, in every case the transaction was the same in substance. The debt was paid off by the company, and there was a re-issue for advances, so that the same piece of paper was re-issued and a transfer executed in the manner mentioned before. Buckley, J., had before him recently *Re George Routledge & Sons (Limited)*, a case, on the facts, quite different from this, but which throws some light upon it. There the company on the payment off of the debentures took a transfer to themselves and then re-issued them, and the learned judge held that was bad. He said: "The result, to my mind, is that the debt and the security were both gone." No doubt the argument of those who disputed the validity of the debentures in that case was that there was merger, but I do not find that the learned judge stated any principles or cited any cases on that branch of the law. What he did say was that both the debt and the security were absolutely gone, and although the doctrine of merger must have been present to his mind, he did not go upon any technical ground of that kind, but he went on the substance of the thing that the debt was paid off. This was shown more clearly by the assigment of the debentures to the company itself. To my mind, though we have not the same facts here, yet the principle is the same, and the same result must follow. Everything depends on the payment off. It was an acceleration, as the debt was not due by the terms of the debenture, but the company could at any time buy up its debentures and secure them, if the creditor was willing, so as to prevent any charge against the company. In that case the debt is gone, and, to my mind, the security is gone also. Of course, it was perfectly competent for the company to arrange for the transfer of the debentures to any creditors. Then the company became merely an intermediary between the person who desired to transfer and the person who wished to advance the money. If that were done in the present case nothing could be said against it; but the money was not paid at the time, being advanced at a subsequent period as part of a distinct transaction. I cannot see that there was any power in the company to do anything of the kind it has done here. I do not decide anything as to the rights of these debenture-holders against the company; it may be that as

against the company the registered holders are right. I am trying whether as between the different debenture-holders they are entitled to rank in the first series. I think that when the debentures were repaid the debt was gone, and that when the company borrowed further money, whether secured by depositing the debentures as collateral security or by issuing them in the ordinary way, they issued new debentures. I do not think the facts as to the debenture issued to Miss Bingley after the letter of the 7th of February sufficient to enable me to say that in point of fact there was a transfer from Ashby to Miss Bingley. Therefore, I hold that the only persons entitled to rank as holders in the first series of debentures are those mentioned in the first schedule.

Solicitors for the plaintiff, *Wood & Wootton.*

Solicitor for E & C. Paice, *Ernest Bevir.*

Solicitors for Miss Bingley and Miss Whittaker, *Taylor, Hoare, & Pilcher.*

Solicitors for Hiscock, Mrs. White, Allan Herbert, and Talbot, *Mackrell, Maton, & Co.*

Solicitors for Gibbs, Cox, Clark, Noyce, and Miss Pledger, *Turner & Co.*

Solicitor for R. Ashby, the trustee of the trust deed, *P. J. Nicholls.*

Chan. Div.
Swinfen Eady, J. } Aug. 3-9; Nov. 23.

SOOTHILL UPPER URBAN DISTRICT COUNCIL *v.* WAKEFIELD RURAL DISTRICT COUNCIL AND OTHERS. (*a.*)

Local government — Contract — Validity — Pecuniary penalty—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 174, *sub-section* 2.

An urban authority contracted with a rural authority to supply the latter with water in bulk, water so taken to be paid for quarterly. It was provided that in case any such quarterly payment was in arrear for one month interest should become chargeable at the rate of five per cent.

Held, that the contract was not within section 174, *sub-section* 2, *of the Public Health Act,* 1875; *but,* semble, *if it were, the payment of interest as aforesaid would be sufficient pecuniary penalty to satisfy the statute.*

Action.

This was an action by the plaintiff council against the defendants on an agreement dated the 31st of January, 1895, and made between the plaintiff council and the Wakefield Rural District Council.

The said agreement was for the supply of water in bulk by the plaintiff council to the Wakefield Council.

In this action the plaintiff council claimed as against the Wakefield Council a declaration (*inter alia*) that the agreement of the 31st of January, 1895, was valid and binding on the Wakefield Council.

The defendants contended that the said agreement was bad under the Public Health Act, 1875, s. 174, sub-section 2, by reason of the absence of a penalty clause, as required by that section.

By a clause of the said agreement, after providing that the water taken was to be paid for by quarterly payments, it was agreed as follows: "If any such payment shall be in arrear and not paid for the space of one calendar month from the day when the purchasers have received from the vendors the account for water delivered under the provisions hereof, the purchasers shall pay interest to the vendors after the rate of 5 per cent. per annum from the said quarterly day until payment, but this provision shall not be construed in any way to restrict the right of the vendors to require immediate payment thereof after the expiration of such month."

The plaintiff council maintained that the above provisions as to the payment of interest amounted to a pecuniary penalty within the meaning of section 174, sub-section 2, of the Public Health Act, 1875, and that consequently the agreement of the 31st of January, 1895, was good.

Eve, K.C., and *Clayton,* for the plaintiff council.—The provisions of section 174 of the Public Health Act, 1875, only apply to contracts which are necessary to carry that Act into execution: *Attorney-General* v. *Gaskill,* 31 W. R. 135, 22 Ch. D. 537. This contract is not such a one. But even if it be, as regards the part of the contract relating to the payment of money there is a penalty—viz., interest which becomes payable if such moneys are not paid punctually.

Micklem, K.C., Parker, and *Toulmin,* for the defendants.—The agreement is bad and is not binding on the defendants. There is no penalty as required by section 174 of the Public Health Act, 1875. That section is for the protection of an urban authority and the ratepayers, and unless such a contract as the present one complies with its provisions, it cannot be enforced.

Eve, K.C., replied.

SWINFEN EADY, J., in giving judgment, said: The plaintiffs in this action seek a declaration that the agreement of the 31st of January, 1895, is valid and binding, and they claim to recover the balance of certain moneys thereunder. The Wakefield Council deny that the agreement is valid on the ground that the agreement does not specify any pecuniary penalty pursuant to section 174, sub-section 2, of the Public Health Act, 1875. [His lordship after dealing with certain questions raised by the action, and not material for the purposes of this report, continued as follows:] I now come to the objection taken by the defendants to the validity of the agreement of 1895 on the ground of the absence of any pecuniary penalty as provided for in section 174, sub-section 2, of the said Act. Assuming that this sub-section is obligatory, and not merely directory (*vide Young* v. *Mayor of Leamington,* 31 W. R. 925, 8 A. C. 517, and *British Insulated Wire Co. (Limited)* v. *Prescot Urban District Council,* 44 W. R. 224, [1895] 2 Q. B. 463), it applies only to contracts made by an urban authority, and therefore it has to be considered how the plaintiffs, who are an urban authority, are affected by it. The provisions of section 174 are for the protection of an urban authority and of the ratepayers of their district. The penalty in sub-section 2 is a penalty to be made payable to, and in no case by, the urban authority, in case the terms of the contract are not duly performed—that is, not duly performed by the other party. The "price to be paid" is a price to be paid by the urban authority for the work, materials, matters, or things to be furnished, had, or done to or for the urban authority. Accordingly this sub-section can, from the nature and terms of it, only apply to cases where work, materials, matters, or things are to be furnished, had, or done to or for an urban authority, for a price in money to be paid by the urban authority. In such cases the contract is to specify the time within which the contract is to be performed, and shall specify some pecuniary penalty. The provisions of sub-sections 3 and 4 of section 174 also show that the section refers only to contracts where the money is to be paid by the urban authority,

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

and do not include cases where the contract is to be carried out by the urban authority, and the consideration to be paid to it.

In the present case it is the urban authority, the plaintiffs, who are to supply water to another person for a price in money to be paid to the urban authority. Is the urban authority to stipulate that if they do not carry out the terms of the contract—that is, if they do not supply the water—they shall themselves pay a penalty? This is absurd. Are they, then, to stipulate that if the purchasers do not pay the price in money they shall pay some pecuniary penalty? Obviously not, for the penalty is to be paid in case the contract is not duly performed within the stipulated time, and not if the price is not paid. Here the urban authority has, in fact, stipulated that if the price is not punctually paid interest thereon at 5 per cent. shall be paid, and it might be contended that this is sufficient penalty within the meaning of the statute. But the real answer to the argument is that the present contract for the supply of water by an urban to a rural authority is not within the section at all.

The plaintiffs therefore, in my opinion, are entitled to succeed and to obtain judgment for the amount claimed.

Solicitors for the plaintiffs, *Jaques & Co*;

Solicitors for the defendants, *Blundell, Gordon, & Co.*, for *H. Beaumont*, Wakefield.

Chan. Div.
Warrington, J. } Nov. 16.

In re CHAYTOR.
CHAYTOR *v.* HORN. (*a.*)

Will—Tenant for life and remainderman—Postponement of conversion—Unauthorized securities—Enjoyment in specie.

A testator devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert, with power to postpone conversion at their discretion, and to retain any investments subsisting at his death, whether authorized by his will or not, and to invest the proceeds and hold the investments upon trust to pay the income thereof to his wife for life. The trustees proposed to sell certain shares in a coal mining company, as being of a speculative, though not of a wasting, character. Pending sale they refused to pay the widow the full dividends on these shares.

Held, there is no difference for this purpose between unauthorized securities of a wasting and unauthorized securities not of a wasting character; and that the widow was only entitled to interest at 3 per cent. on the value of the shares in question at the testator's death.

Bulkeley *v.* Stephens, 3 *New Rep.* 105, 12 *W. R. Dig.* 3, *not followed.*

Summons.

The testator devised and bequeathed all his real and personal estate not by his will otherwise disposed of to trustees upon trust to sell and convert the same, with power to postpone conversion at their discretion, and to retain any investments subsisting at his death, whether authorized by his will or not, and at their discretion to invest the residue (after payment of debts and legacies), and to stand possessed of the residuary trust moneys and the investments for the time being representing the same in trust to pay the income thereof to his wife for life.

The testator died possessed of preference and ordinary shares in a coal mining company. The trustees sold some of these on the ground that they were of a speculative, though not of a wasting, character. They decided to sell more when opportunity arose, and refused to pay the widow the full dividends on these retained shares.

The widow took out a summons in which she claimed the full dividends.

Carson, K.C., and *Waggett*, for the plaintiff.

Rowden, K.C., and *Christopher James*, for the remaindermen.

Sheldon, for the trustees.

WARRINGTON, J.—The only question I have to decide is whether the tenant for life in this case is entitled in specie to the income of certain unauthorized securities, which the trustees are retaining at present until an opportunity of conversion arises, or whether under the trusts of the will she is only entitled to interest at a certain rate on the value of those securities.

I will get rid of one point at once. It is conceded that the preference shares come within the definition "preferred stock of any . . . public company" in clause 11 of the will. Therefore, they are authorized securities, and it is well settled that the interest on them is payable to the tenant for life.

As regards the unauthorized securities, there is no express gift of the income of the funds or items of property forming part of the testator's estate during postponement of conversion, but I am invited to find such a gift by construction. What is the general principle applicable to such a case as this, where there is an express trust for conversion, and a power to retain securities of every kind, authorized and unauthorized, and there is no express gift of the income pending conversion? It is that the tenant for life is entitled to the income of authorized securities, but not to that of unauthorized securities, but only to interest at 3 per cent. on their value at the testator's death. That was the rule adopted in *In re Thomas*, 40 W. R. 75, [1891] 3 Ch. 482. The rule is expressed to the same effect in Theobald on Wills (5th ed.), pp. 480-481, and in *In re Woods*, [1904] 2 Ch. 4, 52 W. R. Dig. 198, it is assumed to be the rule. The only point in which the last case is distinguishable from the present one is that in *In re Woods* the securities were wasting securities. Is there anything to take this case out of the general rule? Far from that, the words of this will are adverse to the contention of the tenant for life. The trustees are to sell and convert the real and personal estate. They may retain any investments subsisting at the testator's death as long as they think proper. The only trusts in favour of beneficiaries are trusts of the "residuary trust funds," which are defined as the "residuary trust moneys"—that is, the proceeds of conversion—"and the investments for the time being representing the same"—that is, representing the proceeds of conversion. I take that to mean that the tenant for life is entitled to the income of the trust moneys—that is, to the proceeds of conversion and the income of the investments made with those moneys (of course, including in that any authorized property which is retained, for that is the same as if the trustees had sold them and re-invested the proceeds of sale in the same securities), but not the income of investments, which do not represent trust property all, but are items of property retained by the trustees until they could realize them. In order that the tenant for life should not lose income altogether, the court steps in and says the value of these investments shall be taken as the proceeds of sale, if they had been sold at the testator's death.

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

Then I am asked if I cannot find an express gift, to find an implied gift of this income to the tenant for life. That argument will not do. But whether I find a gift or not, it is argued that the rule to be applied distinguishes between unauthorized securities of a wasting nature and those which are not wasting. Many cases have been cited, but none support the distinction except *Bulkeley* v. *Stephens*, 3 New Rep 105, 12 W. R. Dig. 3.

In all the other cases, in one form or another, what was given was the income of the estate, and not, as here, the income of the residuary trust funds. It seems that the distinction is that the question in those cases was whether the doctrine of *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, ought to be applied. *Bulkeley* v. *Stephens*, if properly reported, would seem to depart from the principle covering the point. The case is not satisfactorily reported. The will is not set out at length, and, according to the facts, the precise question was not raised. The question was only as to part of the income and for the first year after the testator's death. The case is not mentioned in any of the text-books, except Seton on Decrees (6th ed.), p. 1688. It is not cited in any of the recent authorities; certainly not in *In re Thomas*, 40 W. R. 75, [1891] 3 Ch. 482. It was decided before *Brown* v. *Gellatly*, L. R. 2 Ch. 751, 15 W. R. Dig. 105, but was not referred to in that case.

It seems to me, therefore, that I am not bound to treat it as a binding authority. It is not consistent with the result of the other authorities which is stated in Theobald on Wills (5th ed.), p. 480, and, in my view, correctly stated. He says: "Where a residue is given upon trust for sale and investment, and the income is then given to a tenant for life, the tenant for life is, in the absence of proper directions, only entitled to such income as the estate would produce when converted and invested in accordance with the directions of the will"; and, at p. 481: "Power conferred upon trustees to postpone a sale, or to retain securities unconverted will not alter the rights of tenant for life and remainderman." *Bulkeley* v. *Stephens* does not appear to be consistent with that statement. The question I have to determine is one of construction, but I decline to follow it.

It is settled by *In re Woods* that the widow must have interest at 3 per cent. out of the actual income received in respect of these unauthorized securities calculated according to their value at the testator's death.

The rest of the dividends will have to be invested as capital, and she will have the income of those investments as well as the actual dividends on the preference shares.

Solicitors, *Bompas, Bischoff, Dodgson, Coxe, & Bompas; Stibbard, Gibson, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) May 13, 1904.

REX *v.* RECORDER OF BATH. (*a.*)

Licensing Law—Order by justices directing alterations in licensed premises—Appeal to recorder—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 27—*Licensing Act,* 1902 (2 *Ed.* 7, *c.* 28), *s.* 11 (4).

On an application by the owner and licensee of a fully-licensed house for the renewal of his licence, the licensing justices granted a renewal, but made an order under section 11, *sub-section* 4, *of the Licensing Act,* 1902, *directing certain alterations on the premises.*

Held (*by* Lord Alverstone, L.C.J., *and* Wills, J., Kennedy, J., *dissenting*), *that an appeal against such order may be made to the recorder of the city in which the licensed premises are situated.*

Rule *nisi* for a *mandamus.*

In this case a rule *nisi* calling upon the Recorder of Bath to show cause why a writ of *mandamus* should not issue commanding him to hear and determine the appeal of the applicant, C. S. McCoombe, against an order of the licensing justices for the city of Bath.

McCoombe was the owner and licensee of a fully licensed public-house in the city of Bath, and on the 4th of February, 1904, he applied to the justices at the annual licensing sessions for the city for the renewal of his licence.

The justices required him to produce a plan of the premises under section 11, sub-section 4, of the Licensing Act, 1902, and adjourned the application to the 29th of February, on which date they granted the renewal of the licence, but made a separate order that a door at the back of the premises should be closed, and that the doorway and passage leading therefrom in the direction of the bar should not be used by customers.

McCoombe appealed against this order to the quarter sessions for the city of Bath, but the recorder refused to hear it on the ground that he had no jurisdiction, as an appeal from licensing justices lay only to the quarter sessions of the county. McCoombe thereupon applied for and obtained the above rule *nisi.*

Section 11 (4) of the Licensing Act, 1902, provides: "On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them and to be deposited with their clerk, and, on renewing any such licence they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the business premises where intoxicating liquor is sold or consumed, but any such order shall be subject to an appeal to a court of quarter sessions, as provided by the Alehouse Act, 1828. . . . If the licensed person makes default in complying with any such order, he shall, on summary conviction, be liable to a fine not exceeding twenty shillings for every day during which the default continues." By section 27 of the Alehouse Act, 1828: "Any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act may appeal against such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen. . . ."

J. A. Simon showed cause on behalf of the recorder.—An appeal against an order made under section 11, sub-section 4, of the Licensing Act, 1902, does not lie to the recorder, but only to the quarter sessions of the county. Section 27 of the Alehouse Act, 1828, gives a right of appeal to any person aggrieved under that Act to quarter sessions. Section 105 of the Municipal Corporations Act, 1855 (5 & 6 Will. 4, c. 76), provided that the recorder should not have power to grant any licence to any person to sell excisable liquors by retail: see *Reg.* v. *Deane*, 2 Q. B. 96, and *Reg.* v. *Cockburn*, 4 E. & B. 265. The provisions of that section are re-enacted in section 165 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). By section 34, sub-section 1, of the Licensing Act, 1902, all the Licensing Acts from 1828 to 1902

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

are to be construed as one Act. Since the Licensing Act of 1872 (35 & 36 Vict. c. 94), section 75 of which repealed section 27 of the Act of 1828, except as to the renewal or transfer of licences, appeals from licensing justices have not lain to the recorder; it cannot have been intended by section 11, sub-section 4, to renew the right of appeal in such cases to the recorder.

He referred to *Bushell* v. *Hammond*, 52 W. R. 453, [1904] 2 K. B. 563.

Foote, K.C. (*Douglas Metcalfe* with him), in support of the rule.—An appeal against an order under section 11, sub-section 4, of the Act of 1902, for alterations in licensed premises, lies to the recorder. That sub-section gives the licensing justices power to make an order as to structural alterations, non-compliance with which order is punishable on summary conviction with certain penalties, and against such order appeal lies to the recorder. The order is a substantive one, and not merely a condition of the renewal of the licence. The words "on renewing any such licence," in sub-section 4, merely point to the time and occasion on which an order for structural alterations may be made. *Bushell* v. *Hammond* has no bearing on the present case.

KENNEDY, J.—In this case I regret that I have the misfortune to differ from the conclusion at which my lord and my brother Wills have arrived, and so I will shortly state the reasons why I am unable to take the same view of the question that has been urged before us by counsel in support of the rule. Since the passing of the Municipal Corporations Act, 1882, recorders have not had to deal with any questions of discretion which involve the granting or withholding of a licence. It was considered by the Legislature that it was expedient that recorders should not have that power, and in fact all such appeals with regard to matters of administration and discretion have been sent to the justices of the county assembled in quarter sessions. It is true that the recorder might still have to deal with cases which affected persons who use or keep licensed premises with regard to breaches of the law; but the matter with which we are now concerned is not an appeal with regard to a breach of the law, but is, in effect, an appeal with regard to a grant or renewal of a licence and nothing else. It has been pointed out that the grant of a certificate for a licence and the making of the order for closing the door in question are two distinct and separate orders, but I can see nothing in section 11, sub-section 4, of the Licensing Act, 1902, which can prevent the licensing justices from granting a renewal of a licence embodying in the order of renewal an order for certain alterations to be made on the premises. In such a case I do not hesitate to say that an appeal would lie to county quarter sessions and not to the recorder. The making of an order under this section is in the nature of an administrative act done by licensing justices. I do not think I am entitled to reverse, unless the section is clear upon the point, a practice that has been acted upon for more than sixty years, and to say that for the first time on a pure question of administration an appeal will lie to the recorder, namely a question as to that which the licensing justices might think fit to order and to be done on an application for the renewal of a licence. I do not think it can depend upon the circumstance that the justices in such cases make two orders instead of one. It is true that this is not an order made as a condition of granting a licence, but it is in effect the granting of a licence upon terms, and if the justices found that their order was not carried out they would doubtless refuse to renew the licence the following year. When there has been a long-established practice that an appeal against an administrative order should not lie to the recorder, and this sub-section does not compel it, it seems to me that the argument of counsel showing cause in this case ought to succeed, and I have therefore come to the conclusion that this rule ought not to be made absolute.

WILLS, J.—I regret that in this case I am unable to come to the same conclusion as my brother Kennedy. I think that the words "on any application for the renewal" in the Licensing Act, 1902, s. 11 (4), merely indicate the occasion on which the justices may make an order such as the one in this case. It seems to me that the justices' certificate for a licence, which is the preliminary thing, has never been treated or described as an "order," and it is a mistake to think that the two things may be treated as one. The question does not admit of very much argument. I have felt the force of much of what has been said by my brother Kennedy, but I cannot help thinking his argument has been addressed rather to the policy of the law than the language of the section. At the time of the passing of the Act of 1902 it was a common thing for justices to grant a licence on an undertaking which they had no right to ask for, but the procedure was effective as, unless the undertaking was carried out, they could refuse to renew the licence the following year. Sub-section 4 of section 11 of the Licensing Act, 1902, has substituted for that, a power to the justices to make an order when they granted a renewal and to impose a penalty for disobedience to such order. I think this legislation supersedes the prohibition in section 165 of the Municipal Corporations Act, 1882. I think the order is quite distinct from the renewal of the licence, and that the Legislature has really said that the appeal from the order should lie to the recorder. This is not a case in which it can be said that success on appeal would in effect confer a jurisdiction on the recorder to grant, renew, or transfer a licence since the licence and the order are distinct from one another. If the order was not complied with the licence is not *ipso facto* revoked, and if a sale under such circumstances took place it cannot be contended it was a sale on unlicensed premises. In my opinion this rule should be made absolute.

Lord ALVERSTONE, L.C.J.—I also regret to differ from my brother Kennedy. If I thought that section 11 (4) of the Licensing Act, 1902, provided for the renewal of a licence on terms or conditions I should have concurred in the judgment of my brother Kennedy. On looking at the previous section I think the words "on any application for the renewal of a licence" are merely an indication of the time and occasion of making the order, and do not make the order a condition of the renewal of the licence. It is agreed, I think, that the licensing justices had first issued the certificate for the licence, and if that is so, I think it is impossible to contend that by subsequently making the order the licence was granted conditionally. Section 27 of the Alehouse Act, 1828, gives an appeal to quarter sessions apart from the recorder. The prohibition of an appeal going to the recorder extends only to matters involving the grant or renewal of a licence. The order in this case is to be appealed against as if it were an order referred to by section 27 of the Alehouse Act, 1828, and can therefore go to quarter sessions or the recorder. In my opinion section 11 (4) of the Licensing Act, 1902, contemplates an order and not a renewal of a licence. If what is done under the section is a renewal of a licence on a condition, I agree that in that case the appeal would be against a renewal of a licence, and should go to quarter sessions.

I think the Legislature has taken it out of the cate-

gory of a renewal, and has in terms created the power to make an order with penalties for disobedience to it, and the appeal against such order may be to the recorder.

I think, therefore, this rule must be made absolute.

Rule absolute.

Solicitors for the applicant, *Woodcock, Ryland, & Parker*, for *J. Wall*, Bath.

Solicitors for the respondent, *Gribble, Oddie, Sinclair, & Johnson*, for *E. N. Fuller*, Bath.

K. B. Div. (Channell, J.) April 18, 19, 1904.

SMITH (*Appellant*) *v.* DAUNEY (*Respondent*). (*a.*)

Inland Revenue—Inhabited house duty—Dwelling-house—Occupation—Furnished house not lived in during year of assessment—House Tax Act, 1851 (14 & 15 *Vict. c.* 36), *s.* 1.

Where the owner of a dwelling-house keeps it furnished and ready for habitation as a dwelling-house he is chargeable to inhabited house duty in respect thereof under section 1 *of the House Tax Act*, 1851, *notwithstanding the fact that during the year of assessment no person has actually lived, dwelt, or slept in such house.*

Case stated by Commissioners for the General Purposes of the Income Tax and for executing the Acts relating to inhabited house duties for the division of the Isle of Wight.

The respondent appealed against an assessment to inhabited house duty made on the sum of £100 at 9d. in the £ for the year ended the 5th of April, 1901, upon the annual value of a certain dwelling-house belonging to him, situated at Luscombe-road, Shanklin, in the Isle of Wight.

It was admitted by the appellant on behalf of the Crown that the dwelling-house in question for the entire year ended the 5th of April, 1901, although furnished, had not been used for the purposes of residence, and that no one had dwelt therein or slept therein.

The premises in question, with a garden attached, are held by the respondent, under a lease for a term of 990 years from 1865 or thereabouts, at an annual ground-rent of £15.

The respondent furnished the house in 1877, and it was furnished during the year of assessment (1900-1), and still remains so furnished.

The premises were furnished by the respondent with the intention primarily of using them for occasional residence as a country residence for himself and his family, and up to the year 1895 he resided with his family in the house for a few weeks in most years.

In the year 1896 the respondent let the house as a furnished residence to a Mr. Wardlaw, whose tenancy expired in 1898.

In each year since the latter year, with the exception of the year of assessment (1900-1), the house has been let by the respondent as a furnished house for a few weeks, but the respondent or his family have only resided in the house for about a month in 1902.

At no time during the year of assessment (1900-1) was the house let or actually resided in by any person whomsoever, nor (except as hereinafter appears) was any caretaker employed to look after it. During the year of assessment the house was only used by the respondent for keeping his furniture in. The furniture was not packed away and the carpets were kept down, and the premises were ready for the use of the respondent or any person to whom he might let them as a furnished residence. The keys were kept by the respondent's agent at Shanklin. The windows and doors were occasionally opened by the agent to air the house. A gardener has always been employed by the respondent, and was so employed during the year of assessment once a week, or, if necessary, twice a week, for the purpose of attending to and keeping the garden referred to above in order, and occasionally some of the produce, such as a few apples and pears, was during the year of assessment and is now sent to the respondent.

For the year of assessment and for the previous and subsequent years the income tax Schedule A, land tax and poor rates, and other rates were paid by the respondent in respect of the house, the respondent being assessed as the occupier thereof, and inhabited house duty has also been paid in respect of the premises by the respondent for all the above years except the year of assessment (1900-1), the respondent being assessed as the occupier thereof.

The respondent claimed that the house was not chargeable with duty as an inhabited dwelling-house within the meaning of the House Tax Act, 1851, 14 & 15 Vict. c. 36, inasmuch as it was not inhabited, dwelt in, or slept in at any time during the period in question, and that there was no statutory enactment or legal decision which declares that an uninhabited house shall be deemed an inhabited dwelling-house if it has furniture in it. In support of his contention he referred to the case of *Riley* v. *Read*, 27 W. R. 414, 4 Ex. Div. 100.

The surveyor of taxes contended that the inhabited house duties are imposed by the Act 14 & 15 Vict. c. 36 on inhabited dwelling-houses of the yearly annual value of £20 and upwards, and that that Act kept alive the various powers, provisions, rules, regulations, directions, exemptions, forfeitures and pains contained in the unrepealed sections of the Acts 43 Geo. 3, c. 161; 48 Geo. 3, c. 55; 57 Geo. 3, c. 25; 5 Geo. 4, c. 44; 6 Geo. 4, c. 7; 2 & 3 Will. 4, c. 113; and 3 & 4 Will. 4, c. 39, and made them applicable to the assessment and collection of the inhabited house duties as fully and effectually as if they were re-enacted therein; that every inhabited dwelling-house is required by law to be assessed, and that the house assessed in this case was undoubtedly a dwelling-house, and that it was not necessary that a dwelling-house should be slept in or dwelt in to render it liable to assessment; that in view of 6 Geo. 4, c. 7, ss. 2, 3, a house furnished as a dwelling-house, although not dwelt in for any particular year or portion of a year, could not be taken or deemed to be unoccupied and not liable to assessment, and that the case of *Riley* v. *Read* relied on by the respondent was not a case in point. The house referred to in that case was a building, the ground floor of which was occupied for the ordinary purposes of a club, and the upper floors as offices, and it had never been furnished as a dwelling-house or used as a residence.

In further support of his contention that it was not necessary that the house should be slept in to render it liable to assessment to the inhabited house duties, he referred to 57 Geo 4, c. 25, ss. 1, 2, and 5 Geo. 4, c. 44, s. 4, by virtue of which it was necessary that, before exemption could be granted in respect of a dwelling-house used solely for trade or professional purposes, the person claiming exemption should prove residence in a taxable dwelling-house elsewhere, and that this proof was required until the Act 30 & 31 Vict. c. 90, s. 25, abolished its necessity, some sixteen years after the present Inhabited House Duty Act, (14 & 15 Vict. c. 36).

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The commissioners were of opinion that the contention of the surveyor could not be sustained. The Acts of Parliament referred to impose a tax on inhabited dwelling-houses only, and the question for their consideration was whether this building was an inhabited house within the meaning of those Acts, though no person dwelt therein, inhabited it, or slept thereon. The statutes say that what is taxable is an "inhabited dwelling-house." If "Inhabitable dwelling-houses" were the thing mentioned no difficulty would have arisen, but as the Acts speak not of "inhabitable dwelling-houses," but of "inhabited dwelling-houses," they were of opinion they were bound to put a construction on the word "inhabited." Was this such a place, since no person resided on or dwelt therein? If there were any statute defining the expression and showing that the term "inhabited" was meant to apply to such a case as the present, or if there were any authority to show that the expression might apply to a mere constructive occupation—in other words, if there were an Act of Parliament or decision of a court of law which showed that a dwelling-house might be taxed as an inhabited dwelling-house in which no person slept, dwelt, or resided, though furnished—they would be bound by such Act or decision, but in the absence of that they felt they must put their interpretation on the words of the statute, and they were accordingly of the opinion that the interpretation of "inhabited" is "to dwell," "to live," "to hold as dweller," "to occupy for all purposes of life," or "occupied by inhabitants," and they were unable to interpret the expression in any other mode.

The commissioners therefore disallowed the assessment.

Sir E. Carson, S.G. (*S. A. T. Rowlatt* with him), for the appellant.—The house in question is an "inhabited dwelling-house" within the meaning of section 1 of the House Tax Act, 1851. That section provides that "there shall be assessed, raised, levied, collected, and paid . . . upon inhabited dwelling-houses in and throughout Great Britain the several duties set forth in the schedule to this Act annexed, payable according to the annual value of such dwelling-houses." The test to be applied in making the assessment is whether or not the house is "occupied," not whether it is "inhabited." This house having been furnished and ready for residence during the year of assessment was an "occupied" house: see per Lush, J., in *Reg.* v. *St. Pancras Assessment Committee*, 25 W. R. 827, 2 Q. B. D. 581. The tendency of the Legislature has been throughout to subject occupied property to rates and taxes. A house in the condition in which this house was during the year of assessment is assessable to inhabited house duty. There is no express decision on the point, but in Scotch cases there are several *dicta* which support the contention that occupation, as distinct from habitation, is sufficient to render a house liable to inhabited house duty: *In re Glasgow Coal Exchange* (*Limited*), 1 Tax. Cas. 211, 16 Sc. L. R. 457; *In re Scottish Widows Fund Assurance Society*, 1 Tax. Cas. 245, at p. 251, 17 Sc. L. R. 317; *Corporation of Glasgow* v. *Inland Revenue*, 18 Sc. L. R. 1, at p. 3.

A. T. Lawrence, K.C. (*C. C. Scott* with him), for the respondent.—The respondent is not liable to inhabited house duty in respect of this house for the year of assessment in question. The words "inhabited dwelling-houses" must be construed according to their common ordinary meaning. As no person lived in this house during the year it was not inhabited in the ordinary sense of the word. A house is not liable to the duty unless during the year of assessment it has been slept in, and even then it may not be liable in certain cases—for example, where the house is left in charge of a caretaker: see *per* Pollock, B., in *The London Library* v. *Carter*, 38 W. R. 478.

He cited *Clifton College* v. *Thompson*, 44 W. R. 410, [1896] 1 Q. B. 432; *Riley* v. *Read*, 27 W. R. 414, 4 Ex. D. 100; *Lambton* v. *Kerr*, 43 W. R. 541, [1895] 2 Q. B. 233; and *Grant* v. *Langston*, [1900] A. C. 383, 48 W. R. Dig. 75.

Rowlatt replied.

CHANNELL, J.—In this case there is a question of some nicety arising under a somewhat peculiar fact. There is a house which during the year of assessment was fully furnished and ready for occupation as a dwelling-house, but, in point of fact, during the year nobody slept in it or inhabited it in the ordinary sense of physically inhabiting it or living there. It was a house in the Isle of Wight that the owner had been in the habit of visiting from time to time with his family as a country residence, and also, in recent years at any rate, had been in the habit of letting furnished to other people to occupy in a similar way, but when he was not there in residence and had not let it he did not leave any servant or caretaker of any kind living in the house. There was a house agent close by who had the key of it, and he showed people over the house, if necessary, and he occasionally sent in someone to open the windows and air the place, and so on. But at no time during the actual year of assessment was the house lived in in the ordinary way. It was ready for use as a dwelling-house and ready for habitation, but it was not in point of fact inhabitated. At the same time it was occupied, because leaving the furniture there is for ordinary purposes, certainly including in particular the purpose of rating to the poor rate, occupation. It is a certain amount of use of the house, and I do not think it is questioned that what happened in this case would amount to occupation, although it is said, and certainly in the ordinary use of the word rightly said, it was not in fact inhabited.

Under these circumstances is the inhabited house duty payable? The duty is imposed in respect of inhabited houses, not of habitable houses. That much is, of course, quite clear. It was so in reference to the old Acts, and it is so in express terms in reference to the Act which really is the one I have to consider—namely, the Act of 14 & 15 Vict. c. 36 (1851)—which reimposed the inhabited house duty which had been an existing tax, and which had been taken off some few years before. When this Act was passed, the window tax, which was a tax which existed for a great number of years, was taken off, and the inhabited house duty was restored, probably with variations as regards amount or anything of that sort, which does not concern me here. There was the tax imposed upon inhabited dwelling-houses by the first section, and by the second section all the powers, provisions, rules and regulations, directions, exemptions, fines, forfeitures, pains and penalties contained in any of the prior Acts with reference to the duties on inhabited houses were to be enforced in reference to the duties as reimposed. When you come to look at those various provisions, it is quite clear that in all the provisions in reference to the mode of charging the duty in reference to the period during the year of assessment for which relief from the duty was to be granted, the word that occurs is "occupied" and not "inhabited," and it appears as if the Legislature were treating the two words as meaning the same thing. Unless you can say either that "inhabited" means "occupied" or that "occupied" means "inhabited" you will get into difficulties in some one or other of the sections throughout the Act. There is a substantial difficulty to see how the thing

is to be worked out. Before going to the clauses of the Act it seems to me as well to refer to the *dicta* upon the subject—I think there are only *dicta*—to which I have been referred. In Scotland it has been stated in two or three cases, and particularly emphatically and clearly in one case—*Glasgow Corporation* v. *Inland Revenue*—that "habitation" in this section is the same thing as "occupation." The Lord President says: "It is needless to say at this time of day that an inhabited house does not mean a place of residence—that habitation in the sense of the statute may consist of any kind of occupation of a house or building. If it be not unoccupied—that is to say, without any use made of it at all—then it is an unoccupied house within the meaning of the Act, and, being occupied, it is also within the meaning of the statute an inhabited house." If that passage correctly states the law in England as well as in Scotland—and there is no reason why it should be different—because this statute and the tax extends to Great Britain, and it is given in Scotland on the same terms as it is given in England—the present case seems to me to be quite clear. It is said, however, that there are *dicta* in England to the contrary, and the principal one, and probably the latest one, and one which certainly I should be inclined to follow if I were clear that it applied to the present case, is a statement by Wright, J., in the case of *Clifton College* v. *Thompson*. There was a question of a master's house and some other buildings in reference to Clifton College, and in dealing with one question the learned judge said: "That being so, the only ground on which the Crown could succeed would be that the college is assessable for the remainder of the premises as being a dwelling-house, or as including some other dwelling-house to which the rest is attached and occupied with that dwelling-house. But the premises which I have just mentioned"—I think he is referring to the chapel, library, sanatorium, gymnasium, racquet courts, fives courts, swimming baths, museum, and so forth—"do not appear to me to be capable of being treated as inhabited dwelling-houses at all. Boys do not dwell in or inhabit any class-room or gymnasium, or any of these other places; they neither dwell there or inhabit there, nor does anybody else so far as the case shows." Then we come to the passage there was a question about. "Then in addition to that on the second point to which I have adverted" (and I think that was shown by Mr. Lawrence to mean "the second point upon which I am now adverting") "it seems to me that the weight of authority in this country is to the effect that nothing is inhabited as a dwelling-house for the purposes of these Acts unless someone sleeps there." There is no doubt he had been referred to the Scottish cases, and to this particular one from which I have read a passage, and also had been referred to a case of *Riley* v. *Read*, which is an English case which has something on the point in it, but not very much; but he had also been referred to another case in England. He had not been referred to many cases, but he deals with it in this short way in his judgment: "It seems to me that the weight of an authority in this country is to that effect that nothing is inhabited as a dwelling-house for the purposes of these Acts unless someone sleeps there." As I say, if I knew exactly what authorities the learned judge was referring to, and that he had this point in his mind, I think I ought to follow that; but I am not quite able to understand. In the first place, he does not tell us which are the cases he does refer to which lead him to that conclusion, and in the next place what he is referring to is not so much to the fact that somebody does sleep there or that there is no sleeping accommodation, but he is referring to the character of the use that is made of the place—as a class-room, gymnasium, and so on—and I do not think he is meaning to say that if those places included a bedroom for a caretaker or somebody or other that the assessability for inhabited house duty would depend upon whether or not the bedroom was slept in during the year of assessment. I think he is rather referring to the character of the occupation of what he had before him—that it was not occupation including sleeping accommodation or occupation in the nature of it. In point of fact, laying stress not only upon the word "inhabited," but upon the phrase "inhabited dwelling-house." There being somewhat of an uncertainty as to what that means, the fact that it is only a *dictum*, and the fact that there are clear decisions in Scotland, seem to me practically to leave this quite open, so that I have to go back and look at the statute a little more carefully than I have hitherto done. In this case it seems to be admitted—I think it would have to be admitted, but it seems to me expressly admitted—that if this gentleman in the year in question had done that which in most of the years since he has had the house, he has done—namely, lived in it for a few weeks, or let it for a few weeks—then he would have been assessable to the inhabited house duty for the entire year. All the provisions which deal with dividing up the year of assessment into periods for which the tax is to be paid and periods for which it is not to be paid, clearly seem to deal with the question of occupation and not habitancy. The word "occupied" at any rate occurs in all of them, and the test is when it comes to be occupied and so on. It is "occupation" in all those sections that govern the question whether or not a portion of the year is a portion in respect of which the tax is to be paid. That being so, if it is correct to say that this house would have been taxable for the whole year if the owner of it had left it for the greater part of the year in exactly the condition in which he has left it—namely, furnished, with a key at a house-agent's close by, nobody actually in it—but had gone down and lived there in the summer for a month with his family and his servants, then one has to see how that would come about. It seems to me that it would come about in this way: When the assessment is made, if the person whose duty it is to go and make the assessment goes to the house, and finds it furnished and in that sense occupied, he has not to inquire whether anybody was sleeping there the night before, or whether anybody is going to sleep there on that night, but he is to assess it. That, I think, appears from the 10th section of the Act of 1803, and the 15th section of the same Act. The 10th section reads thus: "And every dwelling-house, cottage, or tenement of whatever description occupied at the time of making the assessment shall be brought into charge in respect of the duties set forth in the schedule marked A by the respective assessors." Now, that schedule marked A relates to the window tax and not to the inhabited house duty. The section then continues: "And in their default by the respective surveyors and inspectors herein mentioned, according to the number of windows therein, subject to the powers of discharging the same as after-mentioned." Then we get to the portion that seems material for the present case: "And every dwelling-house, cottage, or tenement and other the premises therewith occupied and hereby charged" clearly relate to the premises which are, for the purposes of the charge, to be included with the dwelling-house in the charge, such as certain outbuildings and things of that sort, and amongst other things they include the garden, provided it does not exceed one acre. That is, "the premises therewith occupied and hereby charged"—not all the premises therewith occupied, but so much of the premises therewith occupied as is

hereby charged. The section then goes on: "As set forth in Schedule B, being together the annual rent of £5 or upwards, shall also be brought in charge in the like manner, according to the full and just yearly rent at which the same is really and *bonâ fide* worth to be let in respect of the duties set forth in the said schedule marked B." And if any assessor omits to charge and so on then he is subject to a penalty, "whether the occupier of any such house, cottage, or tenement shall be entitled to be discharged from the same in manner hereinafter mentioned or not." The 15th section corresponds with it, but relates to houses which are unoccupied at the time of making the assessment. It says: "Every house or tenement which shall happen to be unoccupied at the time of making the assessment shall be inserted as such in the assessment with the annual rent at which the same might be let if the same shall amount to £5 or upwards, and the assessors, and in their default the surveyors and inspectors, shall cause the same to be certified to the said commissioners from the time of such house or tenement coming into the occupation of any person or persons." So that if the house is occupied at the time of making the assessment, it is to be charged subject to the right of the right of the person to be discharged if any of the provisions of the statute enable him to be discharged. It seems to me, therefore, at the time of making this assessment the assessor would have to put this house in to assessment, because he would find it occupied, and that it would not be his business to inquire: "Was it slept in last night? Is it going to be slept in to-night?" or anything of the sort. It is occupied, it is habitable, it is a dwelling-house, it is ready for occupation as a dwelling-house, and not for something else. If it had no bedroom furniture in it or anything of that sort, but only class-room furniture or gymnasium apparatus or something of that sort, it would come under a different category as not being a dwelling-house at all, apart from the word "inhabited." But in the condition in which this house is, it is "occupied" as a dwelling-house although not "inhabited" as a dwelling-house, because it has the full furniture of a dwelling-house there, and is "occupied" for rating purposes. It seems to me, therefore, it is to come into charge, and, as I say, I think that is admitted in the argument for the respondent here, because it is agreed that he would be chargeable for the whole year if he had occupied or inhabited it at any period. That being so, it seems to me that even if the first operative words, as I may call them, of the section granting the tax would not in their ordinary interpretation of house duty cover it, it is brought in by this section, which directs that it shall be charged subject to such power as there is for the person charged to be discharged under any of the various sections of the Act. If that is the true interpretation, it is, I think, quite clear that there is no section of the Act under which the respondent can get discharged on the ground neither he nor anyone else had slept in the house during the year in question. None of the sections in reference to dividing up the period into times the house is occupied and times when it is unoccupied apply, and it seems to me that the result, therefore, will be practically that which the Scotch judges appear to have said it was—namely, that for the purposes of this statute a house is to be deemed to be an inhabited dwelling-house if, in point of fact, there is an occupier of it. Of course the fact of there being an occupier of it does not necessarily make him an inhabitant of it. There may be an inhabitant of a house who may be a servant, and his inhabitance may amount to occupation by somebody else, his master. That is the sort of case which may no doubt arise; but it seems to me that if, as here, such occupation as there may be of the house is an occupation of it as a dwelling-house as distinguished from the case dealt with by Wright, J., of a class-room and gymnasium, and things of that sort—if this house is ready to be slept in when the owner or anyone he sends there wants to sleep there, then it is inhabited within the meaning of these statutes. I think that it is the better interpretation on the whole. You have either to read "inhabited" in the first part as meaning "occupied," or "occupied" in a great many of the other parts as meaning "inhabited," and there is a choice between the two, and, having regard, amongst other things, to the analogy of rating, although it depends on different words, I think on the whole that the proper conclusion to come to is that the tax here has been imposed upon a house under such conditions as this one. I may just add that if the proposition contended for, that a house which was in the condition in which this house has been for the whole year could be released from a proportion of the tax by reason of its being in that condition for a portion of the year, could be maintained, it seems to me absolutely certain that this question must have arisen long ago, because it is an extremely common case. The particular case that has arisen here—namely, the house being occupied, uninhabited in this way for the entire year—is no doubt a somewhat rare one. It is not often that furnished houses are left without someone sleeping in them and unprotected for an entire year, and that accounts for the question not having arisen and been decided during the number of years which have elapsed since this tax was imposed. If the other proposition were contended for, it would be a very strong argument indeed against it, that it had never been set up during all this number of years. From the first imposition of the tax I suppose nearly one hundred years have passed, and considering the number of cases in which houses must have been left in this sort of state for a portion of the year, it would be a very strong argument against such contention; but that contention has not been set up, and it is to a considerable extent in consequence of that position of things that it appears to be agreed that relief does not exist for the portions of the year for which the house is in this condition, and it seems to me that it is taxable when it is for the whole year in that same position.

On the whole, therefore, I think my judgment must be for the Crown.

Judgment for the Crown.

Solicitor for appellant, *Solicitor of Inland Revenue.*

Solicitors for respondent, *Worthington, Evans, Bird, & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Dec. 16.

ALIANZA CO. (LIMITED) v. BELL (SURVEYOR OF TAXES). (a.)

Inland revenue—Income tax—Profits—Trade carried on abroad—Exhaustion of nitrate grounds—Deduction—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, case* 1, *rr.* 1, 3; *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

A company registered and having its head office in

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

England purchased nitrate grounds abroad. The business of the company was to manufacture nitrates and iodine from the caliche which was dug up from the surface of the nitrate grounds. The chief value of the grounds consisted in the caliche, and when that had been worked out the land, machinery, and plant would be of little value. The exact amount of caliche used by the company in any year could be ascertained without difficulty. In assessing the profits of the company to income tax under Schedule D of the Income Tax Acts the company claimed a deduction in respect of the cost of the raw material caliche as being a disbursement or expense for the purpose of their trade.

Held, that the caliche represented capital of the company, and that the exhaustion of the caliche was in the nature of exhausted capital for which no deduction was allowable.

Judgment of Channell, J. (ante, *p.* 23, [1904] 2 *K. B.* 666), *affirmed.*

Appeal from the judgment of Channell, J., on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London under 43 & 44 Vict. c. 19, s. 59.

The case is reported *ante*, p. 23, [1904] 2 K. B. 666, where the case stated by the commissioners is fully set out.

Channell, J., affirmed the decision of the commissioners.

The Alianza Co. appealed.

Danckwerts, K.C., and *A. M. Bremner*, for the appellants.

Sir Robert Finlay, A.G., and *S. A. T. Rowlatt*, for the Crown.

The following authorities were referred to in addition to those cited in the court below: *Gresham Life Assurance Society* v. *Styles*, 41 W. R. 270, [1892] A. C. 309; *London County Council* v. *Attorney-General*, 49 W. R. 686, [1901] A. C. 26; *Reid's Brewery Co.* v. *Male*, 39 W. R. 459, [1891] 2 Q. B. 1; *Lawless* v. *Sullivan*, 29 W. R. 917, 6 App. Cas. 373; *Morant* v. *Wheal Grenville Mining Co.*, 3 Tax. Cas. 289; *Lee* v. *Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. 1; *Gowan* v. *Christie*, L. R. 2 H. L. Sc. 273; *Campbell* v. *Wardlaw*, 8 App. Cas. 641, at p. 649, 32 W. R. Dig. 176; *Attorney-General* v. *Ashton Gas Co.*, *ante*, p. 49, [1904] 2 Ch. 621.

Cur. adv. vult.

Dec. 16.—COLLINS, M.R., read the following judgment: The appellants are an English company who own a large tract of nitrate grounds in Chile. The upper stratum of these grounds consists of a substance called "caliche." This upper stratum, which contains about 30 per cent. of nitrate of soda, is loosened in the ground by explosives, and is then dug up, carted away, and utilized for the production of nitrate and iodine. The appellants are assessed to income tax under Schedule D, and claim, for the purpose of computing the balance of their profits and gains, to deduct a sum representing the cost price to them of the amount of "caliche" consumed in the year's working. Assuming that this sum can be calculated, as they contend it can, the question is whether they are entitled to make the deduction. They fully admit that if the tax was levied under Schedule A they could not support the deduction, but they claim that their position is radically different under Schedule D. Channell, J., affirming the view of the commissioners, has disallowed their claim, and against his decision they now appeal.

Their contention is that the sum deducted represents only the cost of the raw material consumed in the year and stored in the ground till consumed, and that there can be no distinction in principle between raw material acquired once for all and stored and the like material acquired from time to time as it is wanted for the purpose of manufacture. In my opinion, this contention is concluded by authority. The point has been frequently discussed in other cases where capital has been embarked in a wasting subject-matter, such as a coal mine, and the same argument has been advanced and overruled. I think those cases establish that on this particular point the provisions of Schedule D are no more favourable to the appellants than those of Schedule A. The words of Schedule A, No. III., under which this case would have fallen had the property been situate in England, are these: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited." The provisions of Schedule D, first case, rule 3, are as follows: "In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made . . . nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern. . . ." The cases by which the contention for the appellants is concluded are *Addie* v. *Solicitor of Inland Revenue*, 2 Rettie 431; *Knowles* v. *McAdam*, 46 W. R. 114, 3 Ex. D. 23; and *Coltness Iron Co.* v. *Black*, 6 Rettie 617; in the House of Lords, 29 W. R. 317, 6 App. Cas. 315; the first and last decided in Scotland, and the second in England. They are all reported in vol. 1 of the Tax Cases. The first and third raised the question of deductions claimed for the cost of sinking pits; the second for exhaustion of coals. In the English case it was held in the Exchequer Division that a deduction for exhaustion of coal might be made; in the Scotch cases, the first decided before, and the second after, the English case, the opposite view was taken, and the deduction for pit sinking was disallowed. The last case, *Coltness Iron Co.* v. *Black*, was taken to the House of Lords, where the Scotch decisions were approved and the English decision overruled. They were all treated as involving the same question. Thus barely stated, they conclude the case for the appellants, which could not have been argued but for a certain complication, which I have purposely omitted, and which, in my judgment, does not affect the decision, but upon which Mr. Danckwerts rested the whole of his argument. That complication arose thus. By section 8 of the Customs and Inland Revenue Act, 1866 (29 & 30 Vict. c. 36), it is enacted that the concerns described in No. III. of Schedule A, under which the concerns in question fell, "shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III." This enactment was treated in the courts below in all the three cases as bringing them within Schedule D, and the Scotch

cases, therefore, are express decisions on Schedule D. In reviewing the whole question the House of Lords, in affirming those decisions, though they pointed out that they were to be dealt with under Schedule A, found no fault whatever with the reasoning or the result. On the contrary, Lord Cairns says (6 App. Cas., at p. 324): "I do not think this question is affected by 29 & 30 Vict. c. 36. That Act provides that mines shall be charged and assessed according to the rules prescribed by Schedule D of the principal Act, so far as such rules are consistent with No. III. of Schedule A. But the thing to be assessed remains the same." Lord Blackburn goes a little more into detail. He says (at p. 337): "I see that in *Addie* v. *Solicitor of Inland Revenue* reliance is placed in the judgment of the Lord President on the third rule as to concerns under the first case of Schedule D, that no deduction is to be made 'for any sum employed, or intended to be employed, as capital.' But I do not think reliance can be placed on this. If from the nature of the concerns in No. III. an allowance ought to be made for capital, then this rule should be rejected as inconsistent with No. III. If no such allowance should be made, the rule is not required." He decided, therefore, in disallowing the deduction, that this result followed from Schedule A itself, not because Schedule D would not have worked the same result as the Scotch court had held, but because it was not required. Lord Penzance did not refer to the point at all. The result is that the authority of the Scotch cases stands unimpaired on the construction of Schedule D. But though this would be enough to decide the appeal, the matter does not rest there, since there is also English authority for the application of the same principle to cases under Schedule D. In *Gillatt* v. *Colquhoun*, 33 W. R. 258, 2 Tax Cas. 76, a case under Schedule D in which a deduction was claimed in respect of the depreciation in value of a leasehold interest by efflluxion of time, A. L. Smith, J., said (at p. 83): "It seems to me also that in the case of the *Coltness Iron Co.* v. *Black*, which, as was pointed out by Mr. Grantham, was with regard to mining under Schedule A, the learned law lords who decided that case undoubtedly laid down that which seems to me to be applicable to Schedule D as well as to Schedule A—namely, that diminishing capital or exhausted capital cannot be brought into your profits and gains when making out your accounts either under Schedule D or Schedule A." Again, in *City of London Contract Corporation* v. *Styles*, 2 Tax Cas. 239, another case under Schedule D, the same principle was upheld in the Court of Appeal. The deduction was there claimed in respect of a portion of the sum paid by the company in purchasing the benefit of certain unexecuted contracts which the company was formed to take over, and from executing which their profits were realized. The argument there, as here, was, "You can use your capital in purchasing contracts from which you derive your annual profits. It is capital to start with, but then you use your capital wholly and exclusively for the purposes of your concern." To which Bowen, L.J., answers: "You do not use it 'for the purpose of' your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern." The deduction was disallowed. That the principles governing this question are the same under both schedules was again asserted by the Scotch Court in *Edinburgh Southern Cemetery Co.* v. *Kinmont*, 17 Rettie 154, 2 Tax Cas. 516: see particularly the judgment of Lord McLaren, 17 Rettie, at pp. 165, 166, 2 Tax Cas., at p. 531. As pointed out by Channell, J., the question in these cases is not whether the deduction might be made in a theoretically perfect balance-sheet, but whether it is a deduction permitted by the Act. For the reasons I have given I regard this question as concluded by authority, and, therefore, it is unnecessary to examine it once again *ab initio*. The judgment of Channell, J., must be affirmed.

STIRLING, L.J., read the following judgment: The Alianza Co. is an English company incorporated under the Companies Acts, 1862 to 1890, with its registered office in London. The memorandum of association bears date the 11th of June, 1895. The objects for which the company was established were therein stated to be (amongst others) (*a*) to acquire and take over nitrate grounds known as Alianza, in Chile, with the buildings and machinery thereon, and a site for the erection of a manufactory and for refuse grounds, and also other lands adjoining the nitrate grounds and certain other lands, all being the property of Messrs. Gibbs; (*b*) to carry on the business of manufacturers and exporters of and dealers in nitrate, iodine, and other products. The company has, in accordance with these provisions of the memorandum, become the owner of the nitrate grounds, lands, buildings, and machinery mentioned in the memorandum, and has erected a factory on the site therein referred to. The nitrate grounds are of considerable extent, and contain deposits of a substance called "caliche," being the raw material from which nitrate of soda and potash and iodine can be manufactured. The company has worked these deposits and manufactured the "caliche" so obtained into the nitrates and iodine by the sale of which the company has realized very considerable profits. It is not disputed that, in accordance with decisions of the House of Lords in *San Paulo (Brazilian) Railway Co.* v. *Carter*, 44 W. R. 336, [1896] A. C. 31, the company is liable to be assessed in respect of such profits under Schedule D, case 1, of the Income Tax Act, 1842; but a question has arisen whether, in making such assessment, there ought to be deducted from the admitted receipts of the company any sum in respect of the cost price of the "caliche" worked up by the company in the course of each year. The company claims to be entitled so to do on the ground that such cost is an expense "wholly and exclusively laid out or expended for the purposes of such trade," within the meaning of the first rule applicable to the first and second cases under Schedule D. *Primâ facie*, the claim appears to be reasonable, for such an expense ought certainly to be deducted by a prudent trader from his gross receipts before he arrives at the amount of his profits for any particular period. But the answer on behalf of the Crown is that, however this may be, the deduction in question is forbidden by the terms of the Income Tax Act itself, and reference is made to the third rule applicable to the first case under Schedule D. That rule reads: "In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern; nor on account of any capital withdrawn therefrom; nor

for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern. . . ." With this there ought to be borne in mind section 159, which provides that "in the computation of duty to be made under this Act in any of the cases before mentioned . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments, nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed or loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation." It is clear from these enactments (as has been repeatedly pointed out) that the law does not permit, as regards such assessments, all deductions which a prudent trader would make in ascertaining his own profits. In the present case the particular words relied on are those which prohibit deductions "for any sum employed or intended to be employed as capital in such trade." This prohibition was given effect to by this court, affirming the decision of a Divisional Court, in *City of London Contract Corporation* v. *Styles*, 2 Tax. Cas. 239. In that case the company had purchased for the sum of £180,000 the premises as a going concern of Charles Phillips & Co., contractors for public works and engineers, with their contracts, plant, and materials. From their receipts in carrying on the business they claimed to deduct a sum of £80,000, which (as they stated) "substantially represented a portion of the purchase-money paid to Charles Phillips & Co. for the purchase of the contracts and business on which the said net profits were realized. . . . The said business consisted entirely of partially executed or wholly unexecuted contracts and of the rights thereunder and the benefits to accrue therefrom": 2 Tax. Cas., at p. 241. The argument was that this £80,000 was money "wholly and exclusively laid out or expended" for the purposes of the business. The court decided against the claim of the company, Fry, L.J., saying: "It appears to me that this £80,000 was a sum 'employed or intended to be employed' as capital in the trade of the company; therefore it is a sum from which no deduction can be made under the Income Tax Acts": 2 Tax Cas., at p. 245. Now in the present case the cost price of the "caliche" deposited in the nitrate grounds formed part of the price paid by the Alianza Co. for the acquisition by them from Messrs. Gibbs of those nitrate grounds and other property. The argument urged before this court by Mr. Danckwerts was precisely that used in the case of *City of London Contract Corporation* v. *Styles*; and in my opinion effect cannot be given to that argument without departing from the decision in that case, which is binding on this court. That decision, however, does not stand alone. The same view was taken by the Court of Session in Scotland in a series of cases—viz., *Addie* v. *Solicitor of Inland Revenue*, 2 Rettie, 431, 1 Tax Cas. 1; *Coltness Iron Co.* v. *Black*, 6 Rettie, 617, 1 Tax Cas. 287, which was affirmed in the House of Lords, 29 W. R. 717, 6 App. Cas. 315, 1 Tax Cas. 311; *Inland Revenue* v. *Farie*, 16 Sc. L. R. 189. It is true that in all these cases the assessment was made under Schedule A, to which the rules under Schedule D were made applicable by 29 & 30 Vict. c. 36, s. 8, only "so far as such rules are consistent with" Schedule A. It is also true that Lord Blackburn, in advising the House of Lords in *Coltness Iron Co.* v. *Black*, held that recourse ought not to have been had in *Addie's case* to the third rule under the first case in Schedule D; but neither he nor any of the other noble lords who took part in the decision cast any doubt on the construction placed on that rule by the judges in Scotland. The only authority in the appellants' favour is *Knowles* v. *McAdam*, 26 W. R. 114, 3 Ex. D. 23, but this case was overruled by the House of Lords in *Coltness Iron Co.* v. *Black*, no doubt on the ground that an erroneous construction had been placed by the Exchequer Division on the statute 29 & 30 Vict. c. 36, s. 8, already referred to. But at the same time I am unable to see that anything was said which lends support to the argument on behalf of the present appellants. It was said that the Alianza Co. is entitled to apply capital in payment of dividends, and the case of *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. D. 1, was referred to. I do not think it necessary to discuss the vexed question whether capital can be lawfully applied in payment of dividends, and, if so, in what circumstances. It is sufficient to say that I am not satisfied that such capital (if any) as may be lawfully paid away by a company to its shareholders in the shape of dividends would be regarded by the Legislature as an unfit subject for assessment to income tax, or would not fall within the prohibited deductions in respect of "capital withdrawn" or sums "employed or intended to be employed as capital." For these reasons I think that the appeal fails and ought to be dismissed.

MATHEW, L.J.—I am of the same opinion. The objections to the assessment have been sufficiently dealt with in the judgment of Channell, J., and I cannot add anything to the reasons given in the judgments of the Master of the Rolls and Stirling, L.J., for dismissing the appeal.

Appeal dismissed.

Solicitors for the appellants, *Ashurst, Morris, Crisp, & Co.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div.
Swinfen Eady, J. } Oct. 27; Nov. 1.

In re CAYLEY.
AWDRY *v.* CAYLEY. (*a.*)

Will—Construction—"The death duties payable out of my estate"—Settlement estate duty—Estate duty—Specific fund—Finance Act, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-section* 1.

The expression in a will "the death duties payable out of my estate," if expressly directed to be paid out of a fund therein specified, falls within section 19, *sub-section* 1, *of the Finance Act*, 1896, *and is an "express provision" within the sub-section. It therefore extends to all death duties, settlement estate duty, as well as estate duty, and therefore the duties on certain chattels settled by the will must be borne by the specific fund.*

In re Lewis, [1900] 2 *Ch.* 176, *discussed and distinguished.*

The decision in In re Pimm, Sharpe *v.* Hodgson, 52 *W. R.* 648, [1904] 2 *Ch.* 345, *adopted.*

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

Originating summons.

This was a summons taken out for the purpose of determining, among other matters, the question whether in respect of a will certain settlement estate duty was payable out of certain settled chattels or out of a fund therein specified.

The facts were shortly as follows: By her will, dated the 3rd of July, 1899, a testatrix bequeathed certain pecuniary legacies therein specified, which she declared should be "free of all death duties." She made also certain specific bequests therein mentioned, and bequeathed certain chattels to the plaintiffs upon trust for some persons with divers remainders over. She then bequeathed a fund which she expressly specified, to the executors and trustees of her will upon trust to pay thereout her funeral and testamentary expenses and debts and the legacies which she had bequeathed in her will, and also to pay thereout "the death duties payable out of my estate," and to stand possessed of the residue of the said fund upon trust as to a part for the defendant, and as to the remainder on trusts therein declared. She bequeathed the residue of her property to the defendant.

The testatrix died on the 10th of May, 1903.

Subsequently this summons was taken out by her executors and trustees.

T. A. Nash, for the plaintiffs.

Ward Coleridge, for the defendant, cited *In re Lewis, Lewis* v. *Smith*, 48 W. R. 426, [1900] 2 Ch. 176; *In re King, Travers* v. *Kelly*, 52 W. R. 230, [1904] 1 Ch. 363; *In re Clemow, Yeo* v. *Clemow*, 48 W. R. 541, [1900] 2 Ch. 182; *In re Treasure, Wild* v. *Stanham*, 48 W. R. 696, [1900] 2 Ch. 648; *In re Maryon-Wilson*, 48 W. R. 338, [1900] 1 Ch. 565, 570; the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19, sub-section 1.

A. Adams, for the tenants for life of the settled chattels, referred to *In re Leveridge, Spain* v. *Lejoindre*, 50 W. R. 205, [1901] 2 Ch. 830; *In re Pimm, Sharpe* v. *Hodgson*, 52 W. R. 648, [1904] 2 Ch. 345; the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13.

SWINFEN EADY, J.—The question is whether the settlement estate duty on the settled chattels is payable out of those chattels or out of the specific fund bequeathed "upon trust to pay thereout my funeral and testamentary expenses and debts, and the legacies bequeathed by this my will, and the death duties payable out of my estate." Does this trust amount to "an express provision to the contrary" within section 19, sub-section 1, of the Finance Act, 1896? Unless it does, the settled chattles must bear the duty payable under section 19. On the other hand, if the trust amounts to "an express provision to the contrary," effect must be given to it under the section.

The language of the testatrix is very wide. She directs "the death duties payable out of my estate" to be paid out of the specific fund. It is clear that settlement estate duty is a death duty. In section 13 of the Finance Act, 1894, where the expression "death duties" occurs, the expression is defined as including estate duty, and therefore settlement estate duty. A direction to pay "the death duties payable out of my estate" out of a specific fund would *primâ facie* include all death duties—*i.e.*, settlement estate duty as well as estate duty. In *In re Lewis* there was a direction to pay "all duties payable by law out of my estate" out of a specific fund. It was contended that the testatrix had contracted duties of two classes—namely, duties payable by law out of her estate—*i.e.*, duties payable by reason of death *simpliciter*, and duties payable by reason of something else—viz., the disposition she had made, such as the legacy duties. Kekewich, J., did not adopt this construction, but held that the "duties payable by law out of any estate" meant the duties thrown upon the residuary estate, and did not include settlement estate duty, which the law has said shall be payable out of the settled legacy. I am, however, not embarrassed by the expression "by law" in the present case. In the recent case of *In re Pimm* the testator, after settling certain freeholds, directed "my debts, funeral and testamentary expenses and duties" to be paid out of residue. Farwell, J., said: "The expression 'my duties' is certainly a wide phrase, and I see no ground for restricting its generality. I think it is a compendious way of expressing what he had in his mind, and that he meant to say 'all duties to which my estate is liable by reason of any of the dispositions I have made in my will.' I can see no other sensible construction of this direction in the residuary clause of the will. The duties are payable to the revenue, but they arise under the provisions of the testator's will, and in this sense are the testator's duties. . . . The result is that in this case the settlement estate duty as well as the estate duty are payable out of the general residuary estate."

In the present case I am of opinion that the expression "the death duties payable out of my estate" extends to all death duties—viz., settlement estate duty as well as estate duty. It is a convenient and compendious expression, and I can see no reason to restrict its meaning. The duties must, therefore, be borne by the specified fund.

Solicicitors, *Wood, Bigg, & Nash*, for *W. J. & D. Awdry*, Chippenham; *Bell, Brodrick, & Gray*, for *Gray & Dodsworth*, York.

Chan. Div.
Warrington, J. } Oct. 26.

In re MANSER.
ATTORNEY-GENERAL *v.* LUCAS. (*a.*)

Will—Legacy—Charity—Repair of burial grounds—Restriction to members of a particular sect—Advancement of religion.

A bequest for the purpose of keeping in order burial grounds which are restricted to the use of the Society of Friends is a gift for the advancement of religion, and, consequently, a valid charitable bequest.

Adjourned summons.

By his will, Alfred Manser, who died on the 27th of October, 1902, and was a member of the Society of Friends, gave various legacies, and continued as follows: "As to all the rest, residue, and remainder of my estate and effects both real and personal I give, devise, and bequeath the same to the said Edmund Lucas and George Bell Gripper upon trust to pay the following legacies and annuities—that is to say, to pay to the Hertford and Hoddesdon Preparative Meeting the sum of £1,000, I directing that the meeting shall appoint five of their members to receive and give a receipt for the same, and that the same shall be invested by the five members and the interest applied by them under the order of the said Preparative Meeting for the sole purpose of keeping in good order the existing burial grounds under the care of the meeting, and in particular the grave of my late wife."

Under the care of the Preparative Meeting were the following existing burial grounds: (1) Cottered (now

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

disused), which John Exton gave by will "unto all Christian people to bury their dead frank and free without money and without price, so long as the world should endure"; (2) Hoddesdon; (3) Hertford, a piece of arable land used by the people called Quakers as a burying place; and (4) Ware (now disused).

Five members of the Preparative Meeting were duly appointed to receive the legacy, but the executors declined to pay it on the ground that it was void.

The Attorney-General, to whom the question of the legacy had been certified by the Charity Commissioners, took out this summons asking for an order directing the executors to pay the legacy to the Preparative Meeting.

E. Beaumont, for the summons.—This is a valid charitable trust, although restricted to the benefit of the members of a particular society. These trusts are sufficiently for the benefit of the public to support this legacy. A trust to keep in repair a church, or even the ornaments of a church, is good; therefore a gift to keep in repair the churchyard round the church is good: *In re Vaughan*, (1886) 33 Ch. D. 187, 192.

H. Terrell, K.C., and *A. D. Tyssen*, for the representatives of Henry Manser, the residuary legatee.—To be a good charitable legacy a gift for the repair of a burial ground must come within one of the four classes mentioned by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 583, 40 W. R. Dig. 217. It must be a trust for the relief of poverty, for the advancement of education, for the advancement of religion, or for other purposes beneficial to the community. This case is obviously not within the first two heads. We submit, further, that it is not for the advancement of religion. A gift for keeping up a meeting-house would be good, but Quakers do not hold any settled religious service on the occasion of a funeral. A trust for the benefit of the members of a particular society such as a club or a friendly society is not a charity: *In re Clark's Trust*, 24 W. R. 233, (1875) 1 Ch. D. 497. The Society of Friends is simply a club. A burial ground belonging to the Church of England is not in the same position, because it is within the Church Building Act, 1803, which allows land to be given for burial grounds, and money not exceeding £500 to be given for the repair of churchyards. Such a gift would not be valid without the Act, and it does not apply to Quakers. The gift in *In re Vaughan*, 33 Ch. D. 187, for the repair of a churchyard was only supported on the ground that it was legalised by the Act. There is no case in which a gift of a burial ground for dissenters has been held to be a public charity.

Cann, for the executors.

M. Romer held a watching brief for the Preparative Meeting.

WARRINGTON, J.—Is a gift of money for the purpose of providing a burial ground a good charitable gift? If it is, it seems to me that a gift of money for the purpose of keeping such a burial ground in order would also be a good charitable gift. Now, is a gift of a burial ground for the benefit of the Society of Friends a good charitable gift? In my opinion it is. A gift of money for the purpose of providing, or, as in this case, for the purpose of keeping in good order, a burial ground, though that burial ground may not be a parish churchyard, and though it may be connected with the meeting-house of or for the benefit of members of a particular religious community, may, in my opinion, be supported as a gift for the advancement of religion, and therefore be a good charitable gift. There can be no doubt that a gift of money to be invested in the purchase of land or in the purchase of a building to be used as a chapel or meeting-house for the purposes of a particular Christian denomination would be a good charitable gift, as would be also money to be expended in the maintenance or "keeping in good order," to use the words in this will, of such a building. The same would be true of the ornaments of the building and the furniture or things necessary for the celebration of worship of whatever form conducted in that building. It seems to me that it is impossible to distinguish between money given for any of those purposes and money given for the purpose of providing or keeping in repair a burial ground, which I think most people would regard as ancillary to a building devoted to religious purposes in the way I have mentioned. I think one naturally connects the burial of the dead with religion. *In re Vaughan*, 33 Ch. D. 187, has been referred to as not supporting this view. That was a case of money given for the repair of a churchyard, and the question arose whether money so given was validly devoted to charitable purposes. North, J., found that it was. He found a good reason in his mind for so holding in the words of the Church Building Act, 1803, and he decided it on the words of that Act. It does not at all follow that if he had been driven to it he would not have decided it in the same way on other grounds, and I cannot see, therefore, that the case is any authority against the view which I have just expressed. But I think that he did also decide it on the broader ground. If one looks at the passage referred to in 33 Ch. D., p. 192, where the learned judge sums up what he had been saying in reference to the Church Building Act, I think one can see what his true view was. He says: "To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's house' and a gift to keep in repair the churchyard round it, which is often called 'God's acre.'"

It is admitted that a gift to keep in repair a Quaker's meeting-house would be a perfectly good gift. If so, on this view a gift to keep in repair a Quaker burial ground would be a perfectly good gift.

There will be a declaration that the legacy is valid, and a direction that it shall be paid, with interest at 4 per cent., to the five members of the Preparative Meeting upon production of evidence of their appointment.

Solicitors, *Treasury Solicitor; Horsley & Weightman; R. C. Swaine*, for *H. S. Hawks*, Hertford.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Jan. 20.

HARGROVES, ARONSON, & CO. v. HARTOPP AND ANOTHER. (a.)

Landlord and tenant — Building let in flats — Roof retained by landlord—No express covenant by landlord to keep roof in repair—Negligence in user of roof by landlord.

The defendant was the owner of a building let out in flats, and the plaintiff was a tenant of one of the flats. The roof was not demised, but remained in the possession and under the control of the defendant. The defendant neglected to clean out the gutters and pipes, and further neglected to repair them after notice had been given to him by the plaintiff, whereby the plaintiff suffered damage.

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Held, that apart altogether from any implied obligation upon the defendant to repair the roof retained in his possession and under his control, if there be evidence of negligent user of the roof by him whereby his tenant suffered damage, an action is maintainable by the tenant.

Appeal by the defendant from a decision of his Honour Judge Rentoul at the City of London County Court.

By an agreement dated the 14th day of November, 1902, the defendant demised to the plaintiff a flat on the third floor of premises situate at Nos. 39, 40, 41, Foster-lane, Cheapside. The lease contained a covenant by the plaintiff to keep in good repair, and a covenant by the defendant that the plaintiff should peaceably hold and enjoy, the premises demised.

The roof of the building was not demised by the agreement, but remained in the possession and under the control of the defendant. There was no express covenant by the the defendant to repair, or keep in repair, the roof.

Owing to the defective condition of the roof, water went through to the plaintiff's premises and caused certain damage, in respect of which the plaintiff brought an action in the county court, and recovered the sum of £38. The learned county court judge found that the defendant had repaired the roof in the past at the request of his tenants, none of whom had in fact repaired, or been called upon to repair it; that in January and July a proper inspection of the condition of the roof had not been made; that in July at the request of the plaintiff the defendant had remedied certain defects in the roof, but in October, owing to the work and inspection having been negligently effected, the gutters and pipes became choked, causing water to come down into the plaintiff's premises, whereby the plaintiff sustained damage; that the plaintiff immediately gave notice to the defendant on the 22nd of October, but that the surveyor of the defendant did not attend until the 26th of October, during which interval further damage was sustained. The learned county court judge held that the defendant had been negligent in not keeping the gutters clean, and in not attending quickly enough after he had notice.

The defendant appealed, on the ground that the learned judge was wrong in law in holding that the defendant was under any liability to use reasonable care in keeping the gutters and pipes in question in good order.

Holman Gregory, for the appellant.—The defendant proved that there was no structural defect in the roof, and seeing that as a matter of law there was no liability on the defendant to repair, there was no cause of action against him. It is, of course, settled law that if the landlord does not covenant to repair he is not liable to repair: *Gott* v. *Gandy*, 23 L. J. Q. B. 1. *Miller* v. *Hancock*, 41 W. R. 578, [1893] 2 Q. B. 177, is no authority against the defendant, because there the plaintiff was a stranger invited to go on the premises. The landlord cannot be liable under the covenant for quiet enjoyment, because here there is no act of commission on the part of the landlord: *Harrison* v. *Muncaster*, 40 W. R. 102, [1891] 2 Q. B. 680 (see Lord Esher, M.R., at p. 684). There have been American decisions in my favour where the facts were precisely the same, *Krueger* v. *Ferrant*, 43 Am. Reps. 223—"In a lease there is no implied covenant on the part of the lessor to repair, and this applies to the case of distinct tenements under a common roof and the want of repair of the roof." *Carstairs* v. *Taylor*, 19 W. R. 723, L. R. 6 Exch. 217, is in my favour.

Sturges.—It has been decided that the landlord must take reasonable care: see all the judgments in *Miller* v. *Hancock*. So again all the judgments in *Carstairs* v. *Taylor* favour the view for which I am contending. I submit there is a duty upon the landlord to keep the roof in proper repair: *Blake* v. *Woolf*, 47 W. R. 8, [1898] 2 Q. B. 426.

Gregory replied.

Lord ALVERSTONE, L.C.J. — This case raises intricate points and is one of the instances which are not infrequently occurring of important points arising in small county court cases which require as much consideration as though they involved large sums of money and were being dealt with in the High Court without the formalities of such proceedings. We have come to the conclusion after the able argument addressed to us that upon the facts as we presume them to have been found in this case we ought not to interfere. I will say a word later with respect to the proposition which Mr. Gregory invited us to decide, but I think it proper to state first what I understand to be the facts. The learned county court judge found that the roof was not demised to the plaintiff in this case, and there is no evidence that any of the tenants, of whom the plaintiff was one, had any access to the roof or special privilege to go upon the roof, and the tenants had not in fact repaired the roof nor were called upon to repair it. Secondly, the learned county court judge has not based his judgment upon any neglect of the defendant, the landlord, of a duty to repair the roof. There was evidence that at one time the roof was out of repair and the repair was done. But it seemed in the opinion of the learned county court judge that neither the pipes nor the gutter were cleared in January or July, and that the roof was not inspected; further, that after notice on the 22nd of October the defendant's agents did not go to inspect in the time they ought to have done, whereby damage was sustained. We ought not to interfere in this case if there be a right of action to some part of the damage. We have got to deal with that state of things having regard to the findings of the learned county court judge, and seeing whether the learned county court judge has decided rightly in law upon these facts.

We have three findings of the learned county court judge: The roof was under the control of defendant, the gutter was not clear, and the defendant did not go quickly enough. Under the circumstances is the learned county court judge right in the view he has taken where the roof is under control and in the possession of the landlord? I do not wish to decide, nor is it necessary to decide in this case, that there is in all cases an obligation to repair on the landlord. We may have to decide that some day, but Mr. Gregory has ingeniously suggested that the landlord cannot be liable in this case because what he has been charged with is an act of omission and not of commission. I think that is a fallacy, because it seems to me, assuming the landlord to keep control of the roof and retain it in his possession and not to clear it out after he has notice, it may very soon amount to an act of commission—viz., allowing gutters to choke after he has notice. Assuming that the landlord has retained control of the roof and has, as in this case, repaired it when called upon, and has inspected it from time to time, is he liable to an action where the gutters are choked by neglect to repair them and when he knows they are in a dirty condition? Is there any authority that bears that out? It is strenuously urged by Mr. Gregory that unless there is an obligation upon the landlord to repair his neglect to clear out the gutters cannot be regarded as a breach of obligation to keep the roof in proper condition and proper repair. I think the cases have differentiated between mere obligation to repair and

user when a part of the property is repaired and retained in the possession of the landlord, where there has been negligence on his part, and *Carstairs* v. *Taylor* is a case in which a similar point arose. In *Carstairs* v. *Taylor*, where the defendant had let to the plaintiff the ground floor of a warehouse, the upper floor being kept by the defendant himself, and a rat ate a hole in a pipe, whereby the rain came through into the plaintiff's premises and damaged his goods, it was held that the defendant was not liable, either on the ground of an implied obligation or that he had brought the water to the place from which it entered the warehouse. Mr. Gregory pressed us to say that the judgments rather contradicted the view that there was any obligation to repair. I do not think they went so far. I see the Chief Baron says that, conceded an implied covenant, the landlord would not be liable for mischief arising out of accidents of this kind. He decided that as the rat had caused the damage it was not his liability. Bramwell, B., adopts the same view, and says that the defendant can only be liable if he was guilty of negligence. And Martin, B., on p. 223, says: "Probably the defendant was under a liability to use reasonable care in keeping the roof secure, but he cannot be held responsible for what no reasonable care and vigilance would have provided against." That case was decided in 1871.

In *Miller* v. *Hancock* which is so frequently cited in this class of case, the defendant was the owner of a building the different floors of which were let separately, the staircase remaining in his possession and control. The plaintiff, a stranger, while coming down the staircase, slipped, owing to the defective condition of the staircase, and sustained injuries. The decision was in favour of the plaintiff, on the ground that there was by necessary implication an agreement by the defendant with his tenants to keep the staircase in repair, and inasmuch as the defendant must have contemplated that it would be used by persons having business with his tenants there was a duty on his part towards such persons to keep it in a reasonably safe condition. I am bound to say, now I have my attention drawn to these judgments by Mr. Sturges, there is much in favour of the view that as part of their reasoning in reference to the case of *Smith* v. *London and St. Katharine Docks Co.*, L. R. 3 C. P. 326, they considered that there was a duty on the part of the landlord to the plaintiff in that case, apart from any question of a covenant to repair. It may be that that arises from the fact that they were dealing with the question of access to the house and it may be that they were considering it only from the point of view of deciding what was the right of the plaintiff, who was a stranger invited to go there, but I am bound to say that both Lord Esher, M.R., and Bowen, L.J., did use plain expressions in their judgments which would indicate that in their opinion there would be an obligation in respect to property the control of which still remains under the landlord, though such expressions went to a greater extent than was necessary for the actual decision in that case. But I do not think the judgment of Kay, L.J., goes so far, though he does say at the beginning of his judgment: "The question here raised is whether the duty to keep the staircase in a safe condition fell upon the landlord or the tenant."

I do not think Mr. Gregory is correct in saying that *Miller* v. *Hancock* has not some bearing in favour of the plaintiff. But I am content to decide the case on the basis that the landlord had retained in his possession the roof; the tenants had no special right to go on the roof to clean out the gutters, and there was evidence before the learned county court judge of negligence on the part of landlord; neglect to clear out the roof in the first instance and neglect to clear out after he had notice, and that being my view of the law and of the findings of fact, I think the judgment proceeded on the right basis and we ought not to interfere.

The American cases, though similar to this case, only involve questions of liability to repair and do not involve negligent user of part of the premises which remain under the control of the landlord. I do not decide the more difficult question whether there may not in all circumstances be an obligation to repair. There is an authority in 11 Modern Reports 7 that there may be an obligation to repair. I do not wish to decide that, but what I decide is, where the landlord is found to remain in possession and there has been negligent user on his part an action is maintainable.

KENNEDY and RIDLEY, JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Church, Adams, & Prior.*

Solicitor for the respondent, *C. Haddon Gray.*

K. B. Div. (Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Nov. 20, 21; Dec. 19.

WOLFE *v.* CLERK OF THE SURREY COUNTY COUNCIL AND ANOTHER.
REEVE *v.* THE SAME. (*a.*)

Election law—Registration—County vote—Ownership qualification—Freehold estate of vicar in parish church building and its site—Pew rents—Occupation—Representation of the People Act, 1832 (2 & 3 *Will.* 4, c. 45), *s.* 24.

Section 24 *of the Reform Act*, 1832, *enacts that no person shall be entitled to a parliamentary county vote in respect of his estate as a freeholder in any land or building "occupied by himself," if such land or building so occupied is of such value (now* £10 *per annum) as would confer on him the right of voting for a borough, whether he shall or shall not have actually acquired the right to the borough vote in respect of such building or land* (i.e., *by being registered*).

A vicar was the owner, in his capacity of vicar, of a freehold estate in merely the parish church building and the land on which it stood and the graveyard adjoining; he also received as vicar for his own use the "pew rents" —i.e., *moneys paid by persons for the use of sittings in the pews of the church during divine service—to the amount of* £40 *a year. The said church building and land were situate within a parliamentary borough.*

Held, that the vicar did not in these circumstances "himself occupy" the said church building and land within the meaning of section 24 *of the above Act, and consequently was not by virtue of that section, prevented from having the parliamentary county vote as owner of a freehold estate in the said church building and land.*

Semble, *the fact that, in the case of a new parish church erected under the Church Building Acts, neither the Order in Council creating the new parish nor the deed of consecration of the church, contains the special provisions relating to pew rents embodied in the Church Building Acts, does not render the collection and receipt of pew rents by, or on behalf of, the vicar, illegal.*

These were two cases stated by the revising barrister

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

of the Wimbledon Division of the County of Surrey, and the main question raised in each was as follows:

Where a vicar in his capacity of vicar is the owner of a freehold property (situate within a parliamentary borough) consisting only of the parish church building and the land on which it is built and the graveyard adjoining, and actually receives for his own use "pew rents"—*i.e.*, sums of money paid by persons for the use of sittings in the pews in the church during service—amounting to a greater sum than £10 a year, is the vicar to be deemed to be "in occupation" of the said church and land within the meaning of section 24 of the Reform Act, 1832, which in effect enacts that where a person holds freehold property in a borough of sufficient annual value (£10) to confer on him the right of voting for the borough, he shall not, if he be himself in occupation of the said freehold property, be entitled to be registered as a parliamentary elector for the county in respect of his ownership of the said freehold property.

WOLFE *v.* CLERK OF THE SURREY COUNTY COUNCIL.

The Reverend Edward Wolfe, in December, 1903, was inducted vicar of the parish or vicarage of St. Thomas, and had duly claimed to have his name entered on the list of parliamentary electors for the Wimbledon Division of the County of Surrey in respect of the ownership of freehold property in the said parish, the nature of his qualification, as stated in his claim, being "freehold benefice," and the description of the qualifying property being "the vicarage church of St. Thomas, Telford-park, Streatham."

The claimant in his capacity of vicar was the owner of a freehold estate in the said church building, the land on which it stood, and the graveyard adjoining; and he received for his own use an income at the rate of about £40 a year, derived from the "pew rents"—*i.e.*, the sums paid by persons for the use during divine service of sittings in the pews of the said church. The said church building and land was situate in the Parliamentary Borough of Battersea (Clapham Division).

The claim had been duly objected to by one of the respondents, the main ground of objection being that, in the circumstances above stated, the claimant himself "occupied" the said freehold land and building in respect of which he claimed the county vote, and consequently, by virtue of section 24 of the Reform Act, 1832, was prohibited from having a county vote in respect of that property.

The revising barrister held this objection to be good, and disallowed the claim.

From this decision the claimant now appealed; the clerk of the county council and the objector were made respondents.

The case stated by the revising barrister was as follows:

"The vicarage of St. Thomas is a new district, parish, or chapelry, cut out of the new parish of Christchurch, in the ancient parish of Streatham, in the Streatham ward of the metropolitan borough of Wandsworth and the Clapham Division of the parliamentary borough of Battersea and Clapham. The claimant lives in the dwelling-house in the said parish of St. Thomas in the said parliamentary borough. The deed of consecration, dated the 21st of December, 1902, recites that whereas the minister, churchwardens, and certain inhabitants of the parish of Christchurch have represented to the bishop that by deed dated the 30th of March, 1899, made between Lees Knowles of the one part and the Ecclesiastical Commissioners and their successors of the other part, a piece of land was conveyed to the Ecclesiastical Commissioners and their successors to be held for the purposes of certain of the Acts of Parliament for building churches, and to be appropriated as the site of the then intended new church of St. Thomas with the surrounding yard and enclosure thereto belonging, and recites that a commodious building was erected thereon and completed and fit for divine service; that it was intended that the said church should be enlarged as soon as practicable, and that when so enlarged it would contain 850 sittings, of which 300 sittings should remain for ever free and unappropriated; that by deed dated the 1st of November, 1899, the right of the patronage and the nomination of the said intended new church of St. Thomas should be vested for ever in certain trustees parties to the last-mentioned deed, and recites that the said minister, churchwardens, and inhabitants of Christchurch have besought the bishop to consecrate the said building as and for a church; and the consecration deed then declares the said building duly consecrated. The said consecration deed contains no reference to sittings or pews save as hereinbefore stated. The claimant was duly inducted into the said vicarage by deed dated the 29th of December, 1903, which recites that the vicarage of St. Thomas, Telford-park, was constituted by an order of his Majesty in Council, dated the 9th of July, 1903, gazetted the 17th of July, 1903. I have informed myself of the contents of this Order in Council by referring to the *Gazette*. The said Order in Council states that the Ecclesiastical Commissioners, acting in pursuance of 59 Geo. 3, c. 134; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; and 19 & 20 Vict. c. 55, assign a district chapelry to the consecrated church of St. Thomas in the new parish (sometime chapelry district) of Christchurch. The boundaries of the district chapelry of St. Thomas are defined by the order. The order assigns to the minister of the said chapelry all the fees for marriages, baptisms, churchings and burials. This constituted St. Thomas a parish by statute. I saw in the Order in Council no reference to churchwardens or to sittings or pews. The freehold of the piece of land, constituting the site of the church and the surrounding yard and the enclosure thereto belonging vested in the claimant on induction as vicar of the said new parish by statute. The church has not been enlarged since the date of consecration. The church is fitted with sittings or pews consisting of rows of benches open at the ends, and fixed on the floor, each bench is numbered and has room for several sitters. Sittings are let one or more to any person applying for same, they are let for half a year, and not longer, no pew or seat is sold outright. The sittings are let in writing specifying the number of the pew or sitting and the price. No such writing or copy thereof was produced to me. The sittings are let for use during the ordinary public services only and not for additional or special or semi-private services; and if the seatholders are not in their places at the commencement of divine service the claimant, or those acting for him, can put strangers into the seats that are let but not occupied. The letting of sittings is actually done by the churchwardens; the claimant's churchwarden collects the seat money and hands it over to the claimant, less the cost of collection, for the claimant's own use and benefit. The amounts collected from letting the sittings do not appear in any of the accounts of the parish of St. Thomas. All the sittings are letable, but in fact many are untaken, although to let. There are no declared free places in the church at present. The scale of rent for sittings is fixed by the claimant in consultation with the churchwardens. The receipt of pew rents has been so far at the rate of £40 a year. Before the claimant was instituted or inducted to the living a number of questions were

put to him in print or writing, and he answered them, returning the paper to the registry of the diocese. Some of the questions related to the sources from which the claimant's income might come, and the claimant made it plain by his answers to the said questions that he should look to his seat letting for part of his income. Income derived from letting of sittings is uncertain and fluctuating, and greatly dependent on the circumstances of the people and the character and ability of the vicar. There is no residence attached to the church. There is no glebe or tithe, there is no income from land unless as or save as hereinbefore appears. No documents were produced in court save copies of the consecration and induction deeds before mentioned, and a copy of the forms of declaration and oaths usually made or taken before institution. No evidence or proof of right to charge for sittings, or of an assignment of pew rents, save as above was given. I find as a fact that there has been no assignment of pew rents whatsoever to the said new church, or vicarage, or benefice. I am of opinion that neither the churchwardens nor the claimant have or has any legal right to reserve, for money to be paid to the claimant, any seats in the church, and that the price could not be recovered in an action. The churchwardens are under the circumstances aforesaid the claimant's agents. The claimant and the churchwardens are acting in good faith, and the said letting is, under the circumstances, not unreasonable. Similar letting of seats, outside the law, is practised in several churches of new parishes in South London to the knowledge of the bishop and other ecclesiastical authorities. In the greater number of new parish churches in South London there is no letting of seats. The parishioners of the claimant's parish do not contest or dispute the letting of seats by the claimant. The letting is likely to continue in the near future in the parish, and an income of over £10 will continue to the claimant from this source. The claimant occupies as owner the said freehold land, and the said land and the church building, and also occupies as tenant or owner a house in which he lives in the said parish (all within a parliamentary borough) of such value as would confer on him the right of voting at parliamentary and other elections for the said borough in respect of a £10 tenement qualification. The claimant's case was based solely on the pew rents. It was contended by the objector that the pew rents were unlawful, as there was no statutory or other authority or sanction for charging for the pews or sittings; and the income was in its nature too fluctuating and uncertain, and that under the circumstances there was no income and receipt sufficient in law from land within the parish such as to entitle the claimant to a parliamentary county vote in respect thereof. Further, in the alternative, that the claimant was in occupation of land alone, or land and building, of sufficient value to confer on him the borough vote, and that under section 24 of the Reform Act he could not successfully claim the county vote, and that the subsequent statute exempting ecclesiastical buildings from rating did not affect the question; and that the claimant could not sever the property occupied by him as owner and tenant so as to get two votes—I held (*a*) that the claimant's freehold land is of the value of £10 a year and upwards, and that he has a yearly income of that amount from the said land, and that the said income derived as aforesaid is sufficient in law to confer the freehold vote; (*b*) that he occupies the land within the meaning of section 24 of the Reform Act. I disallowed the claim and struck out the claimant's name and the names of seven other persons who were objected to for the same reasons and under similar circumstances."

REEVE *v.* CLERK OF THE SURREY COUNTY COUNCIL.

This was the appeal of the Rev. Arthur Reeve, whose claim to a county vote for the same division was disallowed on the same grounds.

The claimant was the vicar of St. Peter's, a new parish cut out of the ancient parish of Croydon pursuant to the Church Buildings Acts. The parish of St. Peter's was constituted about the year 1854. The Ecclesiastical Commissioners settled a scale of pew rents and assigned pews to be let by the churchwardens, and directed the churchwardens how the pew rents should be dealt with. They collect the money and pay the vicar.

The barrister was of opinion that in this case the pews and sittings at St. Peter's were let by the churchwardens, and the rents were collected and expended by them as public parish officials, pursuant to statutory authority, and not as agents or servants of the appellant; saving in this respect the revising barrister found that there was no material difference in the facts of this case and the preceding one.

The two cases were argued together.

Daldy and *J. de Montmorency*, for the appellants in both cases.—Each of these vicars (the claimants) though owner of a freehold estate in the land on which his parish church stands, is not an "occupier" thereof within section 24 of the Act of 1832; and the receipt of the pew rents does not constitute an occupation of the freehold: *Beswick* v. *Alker*, 21 W. R. 272, L. R. 8, C. P. 265.

They referred also to *Griffen* v. *Deighton*, 5 B. & S. 93; *Capell* v. *Aston Overseers*, 8 C. B. 1; *Burton* v. *Aston Overseers*, 8 C. B. 7.

Roskill, K.C., and *W. Casson*, for the respondent objectors in each case.—In each of these cases the freehold of the church building and the land on which it stands is vested in the vicar as owner, and as the vicar also receives for his own use the pew rents—a profit arising out of the freehold—he must be deemed to be "in occupation" of the freehold: *Robson* v. *Hyde*, Caldecott 310, at p. 315; *Rex* v. *Agar*, 14 East 256. The right of the churchwardens to the possession of the pews is subordinate to that of the vicar: Phillimore Ecclesiastical Law (2nd ed.), 1463-4. The vicar could maintain an action for trespass against a churchwarden for entering the church and interfering with the pews: *Jones* v. *Ellis*, 2 Young & Jervis 265.

Daldy replied.

Cur. adv. vult.

Dec. 19.—The following written judgment of the COURT was read by

KENNEDY, J.—The question for our consideration in the first case is whether the revising barrister was right in holding that the appellant "occupied" within the meaning of the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 24, the land situate within the parliamentary borough of Battersea in respect of which, as a freehold of the requisite yearly value, the appellant has claimed to be placed upon the list of voters for the Wimbledon division of the county of Surrey.

The facts which are really relevant appear to us to be few. The appellant is the vicar of St. Thomas, Telford-park, Streatham. The vicarage was constituted by Order in Council dated the 9th of July, 1903. The deed of consecration of the church is dated the 21st of December, 1902. It recites the earlier deed bearing date the 30th of March, 1899, whereby the land on which the church was afterwards built was conveyed by the donor to the Ecclesiastical Commissioners, for the purpose of the Church Building Acts, and as the site appropriated to the

intended church; the building of the church, its intended enlargement, and the intended provision in the church, when enlarged, of 850 sittings, of which 300 should remain free and unappropriated. The appellant, as vicar, annually receives from the churchwardens for his own use and benefit the proceeds of pews which have been appropriated and let by them, to the amount of £40. The churchwardens collect the pew rents and deduct the cost of collection before making the payment of the receipts to the appellant. The case states the finding of the revising barrister that the churchwardens are the appellant's agents. The learned barrister appears to think that the collection of pew rents in this church is illegal. We are not prepared to adopt this view. The Church Building Acts, beginning with 58 Geo. 3, c. 45, make provisions for the letting of the pews and the employment of funds so raised in the payment of the incumbent: see Cripps's Law Relating to the Church and Clergy (6th ed.), pp. 412-419. The letting of sittings in this church, which was built under these Acts, was contemplated at the time of the deed of consecration, as appears from the recitals in that deed. It is true that neither in the deed nor in the Order in Council creating the parish do we find the special provisions relating to pew rents intended by the legislation of the Church Building Acts. But if the point were material we should not find ourselves able, on this account, to hold that the collection of pew rents in this church was contrary to law.

The real question, however, which the case is intended to raise for our decision is whether or not the revising barrister was justified in disallowing the vicar's claim to a vote for the county on the ground that, within the meaning of the Reform Act, 1832, s. 24, he "occupied" the land—the land on which the church stands and the graveyard adjoining. As to this, the finding of the revising barrister as to the agency of the churchwardens for the appellant in regard to the collection and application of pew rents does not appear to us to be material. We are of opinion that the decision of the revising barrister should be reversed. The vicar has, no doubt, legal possession of the freehold. He has, even as against the churchwardens, the right to the keys of the church: *Ritchings* v. *Cordingley*, L. R. 3 Ad. & Ecc. 113. But to create an occupation there must be an actual as well as a legal possession. "Occupation includes possession as its primary element; but it includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession and may maintain trespass against any one who invades it; but so long as he leaves it vacant he is not rateable for it as occupier. If, however, he furnishes it and keeps ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year": per Lush, J., in *R.* v. *St. Pancras Assessment Committee*, 25 W. R. 827, at p. 829, L. R. 2 Q. B. D., p. 588. "Legal possession is not enough to make an occupier assessable to the poor rate": per Lord Esher, M.R., in *Crowther Smith* v. *New Forest Union*, Ryde's Rating Appeals, 1886-1890, 311. Is the legal possesion of the freehold in such a case as the present coupled with the receipt of pew rents sufficent to create an occupation? No case has been cited to us which so decides. In *Beswick* v. *Alker*, which was, in regard to the material facts, practically identical with the present case, there are *dicta* which tend the other way. Bovill, C.J. (L. R. 8 C. P., p. 268), said: "There is nothing to show that the respondent is in the occupation of any land. A right to receive pew rents is not an occupation of land." We do not think that the judgment can be claimed by the appellant as a direct authority in his favour, because, according to the view taken by all the judges who heard the argument, they felt themselves somewhat cramped by the meagre statement of the case. "With the scanty information we have," said Brett, J., "it must be taken that the claimant has such a freehold interest in these pew rents as would entitle him to a vote for the county, but for the objection put forward by the appellant . . . there is no statement here that the respondent occupies the church." Still, the *dictum* of Bovill, C.J., that the clergyman's right to receive pew rents—an interest which, in *Ex parte Arrowsmith, In re Leveson*, 26 W. R. 600, 8 Ch. D. 96, James, L.J., described as "a profit arising from the use of the freehold," and Thesiger, L.J., as "a profit derived from the benefice"—does not constitute an occupation of land is a weighty authority in the appellant's favour. For, unless such receipts of pew rents constitute occupation, it is difficult to see in what respect a person in the position of the appellant can be said to occupy the land on which the church stands, or to be more than merely its legal possessor. The respondent naturally relies upon the cases of *Robson* v. *Hyde* and *Rex* v. *Agar*. On the facts these cases are distinguishable from the present one. In neither did the land consist of the parson's freehold, but the question, which was one of rateability, arose in regard to the interest, coupled with the receipt of pew rents, in a parochial chapel; in the earlier case there was a building leased to trustees and used for services of the Church of England, in the latter a Methodist chapel. The respondent relied mainly upon the *dictum* of Buller, J., in the earlier of the two cases, which was decided in the year 1783. "This case does not resemble the case of a clergyman. But, if it did, I am very far from being satisfied that a member of the Established Church, a parson or vicar, who has the profits of the pews given him by the parish in increase of his benefice, is not rateable for such profits." The language of the learned judge clearly shows that he was not intending to express a confident opinion; and we are no means sure that, rightly understood, the *dictum* is really relevant to the matter we are considering. Clergy have always been rated for their tithes, and the learned judge may have meant that he was far from satisfied that, if a parish gave a parson the pew rents in addition to the tithe (or other payments or endowment in lieu of tithes), the amount upon which he should be assessed for rating purposes should not be correspondingly increased. In our view, the receipt of the pew rents in the present case shows, as its amount exceeds 40s. a year, a value in the freehold from which the pew rents arise, sufficient to entitle the appellant to the county vote in respect of his freehold, as was held by this court recently in *Vickers* v. *Selwyn*, 52 W. R. 153; but does not, either by itself, or taken in connection with the fact of the appellant's legal possession of the land and of the church which stands upon the land, constitute an "occupation" of land within section 24 of the Reform Act, 1832.

Holding this view of the case, we do not think it necessary to express any opinion upon the point, which has been suggested, that the occupation mentioned in the section must be taken to mean an occupation of property in respect of which a person is liable to the payment of rates, and that, inasmuch as since the passing of the Poor Rates Exemption Act, 1833 (3 & 4 Will. 4, c. 30), ss. 1 and 2, a church such as the one in question is not such property, there cannot be an "occupation" of a church by the parson within the meaning of the Reform Act, 1832, s. 24.

With regard to the second case before us, the circumstances, as appearing in the case stated by the

revising barrister, are not in any substantial matter distinguishable from the circumstances of the first case, unless a distinction can be based upon the finding in the second case, that the pews were let and the rents collected by the churchwardens and expended by them as public parish officials pursuant to statutory authority, and not as agents or servants of the appellant. In our view this matter is not really material, and in reversing the decision of the revising barrister in this case also, we have nothing to add to that which has already been set forth in our judgment.

Appeal allowed; leave to appeal given.

Solicitors for the appellants, *Ayrton, Biscoe, & Barclay.*

Solicitors for the respondents, *Russell-Cooke & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) } May 5, 6, 1904.

GUARDIANS OF BIRMINGHAM UNION *v.* GUARDIANS OF TEWKESBURY UNION. (*a.*)

Poor law—Settlement—Husband and wife—Settlement by residence for one year—Departure of husband before completion of year—Continued residence of wife—Whether wife removable when husband has no settlement—Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Poor Removal Act,* 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Union Chargeability Act,* 1865 (28 & 29 *Vict. c.* 79), *s.* 8—*Divided Parishes Act,* 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

A married woman who was married to a foreigner with no settlement of his own went to live in the parish of Birmingham. Before a year had elapsed the husband left the parish, intending to return. The woman remained on, and ultimately became chargeable to the parish.

Held, following Reg. *v.* St. George's-in-the-East, *L. R.* 5 *Q. B.* 364, *that she had become irremovable by virtue of the Poor Removal Act,* 1846, *s.* 1, *as amended by section* 8 *of the Union Chargeability Act,* 1865, *by which it is provided that no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant for removal.*

Case stated by the Recorder of Birmingham on an appeal by the Guardians of Tewkesbury to quarter sessions against an order for the removal of one Alice Alinquest and her four children from the parish of Birmingham to the parish of Breden in the Tewkesbury Union.

The recorder allowed the appeal and quashed the order for removal, subject to the stating of this case.

The case set out the following facts: The pauper, Alice Alinquest, is the wife of Charles Alinquest, a foreigner with no settlement of his own. They were married on the 6th of July, 1890, and the children, the lawful issue of the pauper and Charles Alinquest, are all of them under the age of sixteen years. Doris was born in August, 1892, at New York, in America; Rose was born on the 5th of January, 1898, in the West Bromwich Union; Hubert was born on the 17th of October, 1899, in the West Bromwich Union; and Charles was born on the 16th of April, 1902, in the Birmingham Workhouse.

The pauper Alice and her husband came to reside in the parish of Birmingham in January, 1901, and continued to reside there until the 20th of June, 1901, when the husband went to America to work for his brother-in-law, intending to send for his wife and children when he got settled. The pauper Alice heard from him several times, but he said he was not able to get work and had made up his mind to return to England. He had not returned at the date of the order of removal, but the recorder found as a fact that he did not desert his wife and that he had the intention of returning.

From the 20th of June, 1901, the pauper Alice, with her three children, continued to reside in the parish of Birmingham until the 27th of March, 1902, when she removed to the Birmingham Workhouse. She remained there till the 19th of September, 1902, when she went out and has not returned.

The pauper Alice was born in 1869, and is the lawful daughter of Robert Warner, who had obtained at the time that she attained the age of sixteen years, a settlement by residence in the Tewkesbury Union.

On the 3rd of September the Guardians of Birmingham obtained an order for the removal of the pauper Alice and her four children from the parish of Birmingham to the parish of Breden, in the Tewkesbuy Union.

The recorder held that the pauper Alice was irremovable from the parish of Birmingham by reason of her continuous residence there for more than one year prior and up to the date of the order of removal, and he adopted the reasoning of the judgments in the case of *Reg.* v. *St. George's-in-the-East,* 18 W. R. 787, L. R. 5 Q. B. 364, as applicable to the present case. He also held that section 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), was a bar to the setting up of a derivative settlement from her father. He accordingly held that neither the alleged settlement of the mother nor of the children had been made out, and allowed the appeal and quashed the order of removal, subject to the following questions: (1) Was the pauper Alice Alinquest at the time the order of removal was made irremovable from the parish of Birmingham; (2) if not, was the pauper Alice Alinquest, or were any of her children, properly removable to the Tewkesbury Union.

The Guardians of the Birmingham Union appealed.

Macmorran, K.C., and *Pritchett,* for the appellants. — The pauper here was removable. The husband would have become irremovable had he remained at Birmingham for a year, but this break in his residence prevents her from acquiring the status of irremovability. *Reg.* v. *St. George's-in-the-East,* 18 W. R. 787, L. R. 5 Q. B. 364, is against me, but that case must now be considered overruled since *Guardians of Medway Union* v. *Guardians of Bedminster Union,* 38 W. R. 295, 14 App. Cas. 465. She must therefore be removed to her maiden settlement, as here she could not acquire a derivative settlement from her husband, he having none. Three of the children, being within the age of nurture, follow their mother, and the fourth, being under the age of sixteen, is removable or irremovable as the pauper is removable or irremovable. Section 35 of the Divided Parishes Act has not really altered the case: *Guardians of Reigate Union* v. *Guardians of Croydon Union,* 38 W. R. 295.

He also referred to *Reg.* v. *Guardians of Bridgnorth,* 31 W. R. 938, 11 Q. B. D. 314; and *Guardians of Dorchester Union* v. *Guardians of Poplar Union,* 36 W. R. 706, 21 Q. B. D. 88.

R. C. Glen, for the respondents.—It is admitted that *Reg.* v. *St. George's-in-the-East* governs this case. It is said that case has been overruled by *Guardians of Medway Union* v. *Guardians of Bedminster Union,* but there the husband had a settlement. The words of Blackburn, J., in the *St. George's-in-the-East* case cover this case exactly.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Macmorran, K.C., in reply.

Lord ALVERSTONE, L.C.J.—I am of opinion that the decision is right, and substantially for the grounds that the learned recorder has stated. The short ground, if I may so call it, upon which I wish to decide this case, is that in substance I think the learned recorder was right in saying that the principle of the judgment of Blackburn, J., in *Reg.* v. *St. George's-in-the-East* applies. I myself am not able to see that that case is indirectly, certainly no directly, overruled by the House of Lords' judgment in the *Medway case*. It is not referred to in any of the judgments, and I cannot see anything that makes the reasoning upon this part of the case inconsistent with anything which the House of Lords' have said. The reasons which Blackburn, J., gives, and which I will not repeat, I venture respectfully to adopt as being to my mind conclusive in a case in which a husband has left a wife but not deserted her—under circumstances which are found as a matter of fact not to amount to desertion—and when the husband has left the wife under circumstances which are found as a matter of fact to indicate an intention to return, and when the husband could not be removed. I do not like to even venture on the expression, acquiring a status of irremovability, because I am not sure that that might not be used against me hereafter. I think Blackburn, J., points out very good reasons why the wife, who has in fact resided long enough to become irremovable, should not be removed. That seems to me to be part of the reasoning of the *St. George's-in-the-East case*, which I adopt, and which I think is sound. Had the husband been here for twelve months, then Lopes, L.J's, judgment in the *Medway case*, would have applied directly. The wife would then have acquired the status of irremovability by virtue of having resided with her husband for a period of twelve months. But it seems to me that we ought to find clear, plain, and distinct language to hold that a wife who has in fact resided twelve months shall be removable to her maiden settlement in a case in which a husband not having deserted her and meaning to come back, cannot himself be removed. I think it is pretty plain that the wife does not come in within either the original proviso to section 1 of the Poor Removal Act, 1846, or section 1 of the Poor Removal Act, 1848, which replaces that proviso. If it is right that the wife could only be removed when the husband can be removed, then the position is pretty clear. I share the difficulty which Blackburn, J., felt in construing that proviso. All I have to decide in this case is this: Here the woman comes within the enacting part of the first section of the Act of 1846; she does not come within, in my opinion, the terms of the proviso as I understand it. Therefore it seems to me that unless it is necessary to hold that Mr. Pritchett's contention is right—namely, that you cannot consider at all what has been happening to her during the period of coverture when she has been residing with her husband—she cannot be removed. There are no words in the enactment which make it necessary to adopt that contention; and inasmuch as the husband could not be removed, I think that those who claim the wife should be removed, fail on the principle Blackburn, J., has laid down in *Reg.* v. *St. George's-in-the-East*. This woman having resided here, there is no state of things which would have made the husband removable if he had been here, and for the present purposes—whether you call it the status of irremovability or not being able to remove him—it leads to the same result—namely, that the wife cannot be removed. I think this appeal must be dismissed.

WILLS, J.—I have come to the same conclusion. It is admitted by counsel for the appellants that unless the *St. George's-in-the-East case* is overruled it governs this case. Now I understand the reason for supposing it is overruled by the case of *Medway Union* v. *Bedminster Union* is that the reasoning in the former case was partly founded on *Reg.* v. *Glossop*, and the train of reasoning by which *Reg.* v. *Glossop* was arrived at—though not the decision itself—is said to have been overruled by the House of Lords. But the decision in *Reg.* v. *Glossop* has no bearing on the facts of this case, and there is obviously material difference between the case where the wife has a derivative settlement by reason of her husband's settlement, and where she has none by reason of her husband having no settlement at the time when she is residing in the parish. Under those circumstances we are, as it seems to me, driven to look at the very words of the Poor Removal Act, 1846, as amended by the Union Chargeability Act, 1865, and the words are that no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for one year next before the application of the warrant. It is true that in one sense there is a difference between her residence before the husband goes away and after he goes away, because after he goes away he himself has broken his residence, and therefore she cannot tack on simply as a wife, her residence after the break by the husband to that which she had before he went away; and she cannot therefore claim to have acquired the status of irremovability on the ground that her husband had acquired it. There is no decision, and if there is not a decision I do see why we should make one, to prevent her tacking on the residence during the time she had no settlement — when she had no settlement by reason of her husband not having a settlement — with the residence which she had afterwards after her husband had gone away. It is not at all like the case of the wife who becomes a widow, in which case it was held that where the wife had the settlement as long as she was a wife she could not tack on residence afterwards of her widowhood. The two cases are not analogous, and inasmuch as there is no decision which makes it imperative upon us to say that she has not resided for the period of twelve months, it is better to follow the language of the Act and say that she has resided for the necessary period. The late decision in the *West Ham Union* v. *Holbeach Union* is not without bearing upon this matter, because it does show that residence may be completed for the purpose of conferring a status of irremovability where the first portion of it was under a different capacity from the second. As it seems to me, there being no express enactment or decision which militates against this view, the residence may be considered as complete within the terms of the statute, and as conferring the privilege of irremovability. Although I follow what my lord has said about the husband being, I will not say irremovable, but its being impossible to remove the husband on other grounds if he were there, I prefer to put my judgment upon the ground that I have put it—namely, that the two periods may be tacked together, because I do feel that there is a very considerable difference between the position of a person who cannot be removed because there is no place to which he can legally be removed, and the position of a person who otherwise might be removed, and who had a place to which he could otherwise be removed, but who has acquired the protection of irremovability by reason of residence in one place for a sufficient period.

KENNEDY, J.—I am of the same opinion upon the facts, which, I think, are important, and which are found thus: The woman is the wife of a man who has no settlement of his own, the man has left her, not deserting her, and with the intention of returning, and therefore he is in the position really—in a sense—of being treated as still residing in the parish of Birmingham. Under those circumstances, before she became chargeable the position of the pauper is that of a married woman with her children, who has resided for the statutory period, which would confer upon her the status of irremovability, if she could be treated as an independent personality. Is she, when she becomes chargeable, to be taken away to her maiden settlement at Tewkesbury, which is the settlement of her father, which she acquired through him; or is she to be treated as being chargeable to Birmingham, where she is and where she has resided for the statutory time, and where she is the wife of a man who has not deserted her, who intends to come back to her and her children, and who only for the time is absent? As I understand it—if one may venture to hope one understands the principles on which a great deal of complex legislation has taken place—there two important things, not to separate husband and wife and not to separate children from parents. We may assume that as far as possible the Legislature has not consciously enacted legislation which has violated those governing principles. Now what has happened here? The husband has no settlement of his own, therefore the wife cannot take a settlement from her husband. She has resided herself as a married woman, it is true, a sufficient time which would otherwise give her a status of irremovability, and if she is removed to the place of her maiden settlement then there will be a grave question, to say no more, as to whether the children will be able to follow her or will be planted—as I think Mr. Pritchett happily put it—in various spots; and certainly she will be separated from her husband, because her husband has no settlement where she had. He has no settlement anywhere in fact, and the whole family would be, as it were, sent floating about to various points that they might be directed to. Now, if the husband had a settlement there could be no question his settlement would be the wife's also, but where the husband has no settlement what happens? That is answered by Blackburn, J., in the *St. George's-in-the-East case*, and it is admitted that unless that judgment could be treated as overruled the learned recorder was perfectly right in the judgment he came to in this case. But it was said that that case was overruled and should be treated as overruled in a number of cases, finally by the judgment of Lord Watson and the reasoning in the *Medway case*. I confess myself I entirely differ. I see no trace of the *St. George's case* having been overruled directly or indirectly in any of the cases, including the last. On the contrary, I think the point emphasised by Lord Watson in that judgment, where he asserts his affirmance of Lopes, L.J.'s, view in the Court of Appeal, turns on the fact, absent in this case, where the husband had a settlement, and where that is so the wife follows that settlement, and you must obey that. That does not exist here.

Then can it be said that the Act of 1876 has modified either the grounds upon which Blackburn, J., proceeded or has altered any statement of his as to what he finds the law to be? That really is not suggested. It is again practically admitted, and rightly admitted, that the legislation so far as the case of wife and husband is concerned has not affected the statement of law upon which Blackburn, J., based his judgment in that case. If I may add, it seems to me, as I stated in the beginning, it is the only position which can be reasonably consistent—where the husband has no settlement—with the great object of keeping the family together and keeping husband and wife together; subject to this, that if the husband has a settlement of his own the wife must follow his settlement.

Solicitors, *Redfern & Hunt; Sims & Gribble*, for *Brookes & Badham*, Tewkesbury.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — June 14, 15, 16, 17; Aug. 9, 1904.

In re BOWLBY.
BOWLBY *v.* BOWLBY. (*a.*)

Infant—Maintenance—Contingent legacy—Legacy from parent to child—Contingent life interest—Right to surplus income and accumulations—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-sections* 1, 2, *and* 3.

A legacy given by a testator to his infant child, made contingent on the infant attaining twenty-one, bears interest for the maintenance of the infant, if, and for such period as, no maintenance is expressly provided. But all that the infant is entitled to have is maintenance, and he does not take any immediate vested interest in the income, so that should there be a surplus not required for maintenance, the surplus does not become the property of the child or pass to his personal representative if he dies a minor, but is regarded as an accretion to the corpus *of the contingent legacy. Nor does the setting apart of a fund by the testator to answer the contingent legacy alter the character of the child's interest therein, but subject only to the right of maintenance thereout of the child, the income of the fund so set apart ought to be accumulated and added to* corpus.

Consequently where a life interest in a legacy was given to a child, contingently on such child attaining twenty-one, the child was held entitled only to the income of the ultimate fund arising from the original fund and the surplus accumulated fund combined. By sub-section 2, *of section* 43, *of the Conveyancing Act*, 1881, *the persons for whose benefit surplus income, after providing for maintenance is to be accumulated, are the persons who become entitled to the* corpus *of the fund set apart.*

In re Scott, 50 *W. R.* 454, [1902] 1 *Ch.* 918, *overruled.*

This was an appeal from the decision of Joyce, J.

The testator, E. S. Bowlby, by his will, dated the 17th of June, 1898 (*inter alia*), bequeathed to each of his sons (other than his eldest son, A. S. Bowlby) "who should attain the age of twenty-five years" the sum of £50,000.

And he empowered his trustees to apply the whole or such part as they in their discretion should think fit of the legacy of £50,000 so given to each of his younger sons "for or towards his maintenance, education, or benefit" during such time as such son should be under the age of twenty-five years.

During the suspense of vesting of such legacy the income thereof was to be accumulated, so as to follow the destination of the legacy from which the same had proceeded, but with power to apply any such accumulations in any subsequent year for or towards the maintenance, education, or benefit of such son in

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the same manner as such accumulations might have been applied had they been income arising from the original legacy in the then current year. The trust for accumulation was to cease at the end of twenty years from the testator's death in case any such son should not then have attained a vested interest in his legacy.

And the testator bequeathed to each of his daughters who should attain the age of twenty-one years or marry with the consent (if marrying after his death) of her guardian or guardians the sum of £50,000, "provided that the legacy of £50,000 hereinbefore given to each daughter of mine who shall attain the age of twenty-one years or marry with such consent as aforesaid shall not vest absolutely in her, but shall be retained by my trustees and held by them upon the trusts hereinafter declared concerning the same." These trusts were to invest the legacy and to pay the income to the daughter for her life for her separate use without power of anticipation, and after her death upon trust for her children or remoter issue as she should by deed or will appoint, and, in default of and subject to any such appointment in trust for all or any the children or child of such daughter who being sons or a son should attain twenty-one, or being daughters or a daughter should attain that age or marry, if more than one in equal shares.

And the testator authorized his trustees at any time or times and at their discretion to appropriate any part of his personal estate in its then actual condition or state of investment in or towards satisfaction of any legacy given by his will or by any codicil thereto, with power for that purpose conclusively to determine the value of such part of his estate in such manner as they should think fit, and after such part of his estate should have been so appropriated the testator declared that his residuary estate, as well real as personal, should be discharged from the said legacy to the extent of the value as determined by his trustees under this power of the part of his estate so appropriated. And the testator devised and bequeathed the residue of his personal estate and all his real estate not thereby otherwise disposed of unto and to the use of his son A. S. Bowlby. And the testator directed that immediately after his death his trustees should take such steps as should be requisite in order that all children of his who should not have attained the age of twenty-one years on the day of his death might be declared wards of the Chancery Division, and that, "notwithstanding anything hereinbefore contained, all powers, whether statutory or otherwise, as to the education, maintenance, or advancement of such children or any of them while minors shall be exercised by my trustees only under the direction of the said court." The testator appointed his son A. S. Bowlby, T. W. S. Bowlby, and H. R. Wilson executors and trustees of his will.

The testator died on the 4th of November, 1902. There survived him his eldest son, A. S. Bowlby, who had attained twenty-one, and four daughters and three younger sons, all of whom were still infants.

On the 6th of January, 1903, the trustees, under the power contained in the will, appropriated, in satisfaction of each of the legacies of £50,000 to the four daughters and the three younger sons, the sum of £53,547 10*s.* 6d. Consols.

On the 9th of February, 1903, an order was made by Joyce, J., that the sum of £1,000 per annum be allowed out of the income of her legacy to the eldest daughter, Eva Mary Bowlby, for her maintenance from the 4th of February, 1903, and for the time to come during her minority, or until further order, and other sums were allowed for the maintenance of the other infant children respectively.

Eva Mary Bowlby attained twenty-one on the 13th of July, 1903.

The present summons was taken out by the trustees as plaintiffs against Eva Mary Bowlby as defendant to determine whether the unapplied income accrued during the minority of the defendant of her £50,000 legacy and the accumulations thereof should be paid and transferred to her, or whether they should be retained by the trustees upon the trusts declared by the will of the capital of the said legacy.

Joyce, J., contrary to his own view, held that by reason of the decision of Buckley, J., in *In re Scott*, 50 W. R 454, [1902] 1 Ch. 918, he was bound to hold that the unapplied income and the accumulations belonged to the defendant, and made a declaration accordingly.

The plaintiffs appealed.

Vaughan Hawkins, for the appellants.—This appeal is really brought for the purpose of asking this court to review the decision in *In re Scott*, 50 W. R. 454, [1902] 1 Ch. 918. By sub-section 2 of section 43 of the Conveyancing Act, 1881, these accumulations are to be held for the benefit of the person who ultimately becomes entitled to the property from which the same arise. Having regard to the use of the word property in sub-section 1, it is submitted that in sub-section 2 it is confined to *corpus*. The infant tenant for life, therefore, on attaining twenty-one, takes only a life interest in the surplus income accrued during her minority. In both *In re Wells*, 38 W. R. 327, 43 Ch. D. 281, and *In re Humphreys*, 41 W. R. 519, [1893] 3 Ch. 1, the gift to the infant was vested, not contingent on attaining twenty-one. Those cases were decided on the principle that the Conveyancing Act, 1881, did not make any alteration in the rights of infants; but here before the Act the infant would only have taken a life interest in the surplus income: *Hodgson* v. *Earl of Beclive*, 1 H. & M. 376, 11 W. R. Dig. 135. The infant here has no vested interest, but is only entitled to something in the nature of maintenance: Williams on Executors (9th ed.), p. 1285; Roper on Legacies (4th ed.), vol. 2, cap. xx., s. 4, p. 1257. The effect of the appropriation was to make the income accessory to the capital. In such a case the intermediate income goes to the person who becomes entitled to the capital: *In re Medlock*, 55 L. J. Ch. 738; *In re Clement*, 42 W. R. 374, [1894] 1 Ch. 665; and *In re Woodin*, 43 W. R. 615, [1895] 2 Ch. 309.

Wyndham v. *Wyndham*, 3 Bro. C. C. 58; *Shawe* v. *Cunliffe*, 4 Bro. C. C. 144; *Harvey* v. *Harvey*, 2 P. Wms. 21; *Chambers* v. *Goldwin*, 11 Ves. 1; *Brown* v. *Temperley*, 3 Russ. 263; *Martin* v. *Martin*, 14 W. R. 421, 1 Eq. 369; and *Butler* v. *Butler*, 3 Atk. 58, were also referred to.

Rowden, K.C., and *Stokes*, for Eva Mary Bowlby.—We submit that *In re Scott* was rightly decided. "Property" in section 43 is not confined to *corpus*; it can refer equally well to the income fund, and the person "who ultimately becomes entitled" thereto is, as in this case, the infant. But apart from the statute it is an established rule of law that a contingent legacy by a parent or one standing *in loco parentis* to a child carries interest, unless the testator has provided another fund for the maintenance of the infant: Carson's Real Property Statutes, p. 590; Simpson on Infants (2nd ed.), p. 267. In *In re George*, 5 Ch. D. 837, 25 W. R. Dig. 127, James, L.J., speaks of a contingent legacy as carrying interest. If this is so, the infant is entitled to the interest notwithstanding any expressions in the Conveyancing Act, 1881, as it was not intended by that Act to alter the infant's rights: *In re Wells* and *In re Humphreys*.

Heath v. *Perry*, 3 Atk. 101; *Hearle* v. *Greenbank*, 3

Atk. 695; and *In re Moody*, 43 W. R. 462, [1895] 1 Ch. 101, were also referred to.

Vaughan Hawkins, in reply.—Though a legacy given by a father to a child is often said to carry interest, yet the cases show that the courts allowed only maintenance which might or might not amount to the full interest on the legacy.

Pett v. *Fellows*, 1 Swans. 561*n*; *Wynch* v. *Wynch*, 1 Con. 433; *Mole* v. *Mole*, 1 Dick. 310; and *Ellis* v. *Ellis*, 1 Sch. & Lef. 1, were referred to in addition to the cases cited earlier in the argument.

Cur. adv. vult.

Aug. 9.—VAUGHAN WILLIAMS, L.J.—In this case the question is, Who is entitled to the accumulations arising from the excess of interest over the allowance for maintenance pending minority now that the infant, Miss Eva Bowlby, has come of age and become entitled absolutely as tenant for life to the income of a fund, such life estate having been bequeathed to her contingently on her marriage or attaining the age of twenty-one? I do not think it necessary to read the clause in the testator's will under which Miss Eva Bowlby takes. It is sufficient to say that the testator made provision for his sons and for his daughters, and that the clauses under which the sons take and those under under which the daughters take are not the same, the clause in favour of the sons containing an express provision for maintenance, and the clause in favour of the daughters containing no such express provision.

Before dealing with the question, What is the established rule of construction of wills of parents who leave legacies to children, whether vested but payable at a future time, or contingent, but make no provision outside the legacy for the maintenance of the child between the death of the testator and the date when the legacy becomes payable, I will deal with the question whether section 43 of the Conveyancing Act, 1881, is applicable in the facts of this case, and what is its effect if applicable, and in particular with the question whether the decision of Buckley, J., in *In re Scott*, ought to be followed. Joyce, J., followed that decision, but against his own judgment. I do not think that, having regard to the decision in *In re Dickson*, 33 W. R. 511, 29 Ch. D. 331, section 43 of the Conveyancing Act, 1881, applies to the facts of the present case, because the infant, Miss Eva Bowlby, is not under her father's will entitled even contingently to the intermediate income of the £50,000 left to her by her father. Under her father's will she may, at the age of twenty-one, become entitled in possession to a life estate in the £50,000, with its accretion by the addition to the capital of the accumulations arising from the surplus income after providing maintenance; but she can never take the intermediate income as her property, or, if she can so take, the application of section 43 is excluded by the will expressing a contrary intention within the meaning of sub-section 3 of that section; for if by the will the intermediate income is her property, held for her by the trustees, it cannot be that it is to accumulate for the benefit of the person who ultimately becomes entitled to the property—that is, the capital—from which the accumulations arise. The only way in which the section can apply is, if it is construed as Buckley, J., construed it in *In re Scott*, *Scott* v. *Scott*, and read, as that learned judge did, the word "property" in sub-section 2 of section 43 as meaning either *corpus* or income, as the nature of the gift may require. If this construction is adopted, the application of the section will not be excluded by a contrary intention within the meaning of sub-section 3 of section 43. I have, however, great difficulty in adopting Buckley, J.'s, construction of section 43, because, as pointed out in Hood and Challis's Conveyancing and Settled Land Acts (6th ed.), p. 123, to hold "that 'property' might not mean 'capital' exclusively, attributes to the Act an intolerable degree of looseness in the use of language." Secondly, because of the cases relied on as supporting this view, *In re Wells* is a case where the child took a vested interest, and *In re Humphreys* is a case in which the court held that by implication there was a gift of an immediate life interest. It is, however, to be observed that Lindley L.J., at the end of his judgment in *In re Humphreys*, does give some countenance to the suggested construction of the word "property" in sub-section 2, for he says: "With respect to the case of *In re Wells*, which we were asked to overrule, I am of opinion that the decision was correct, having regard to the terms of the will and to sub-section 3 of section 43 of the Conveyancing Act, 1881, which in that case, as well as this, excluded sub-section 2. It may be that that result, which I think it safer to arrive at by the aid of sub-section 3, can be reached without the aid of that sub-section by construing sub-section 2 as suggested by North, J., when that sub-section has to be applied to the case of a tenant for life becoming absolutely entitled to the income in possession. I have some doubt about this, but I desire to leave the point open until the necessity for deciding it arises." As to the suggestion that, assuming section 43 not to apply, the clause of the will requiring "all powers whether statutory or otherwise as to the maintenance, education, or advancement of such children while minors to be exercised by the trustees only under the direction of the court" amounts to a testamentary direction that section 43 shall apply, I cannot agree. It seems to me that, if section 43 applies by force of the statute, there is no need for words to that effect in the will; and if, on the other hand, section 43 does not apply, the clause above cited will not make it do so, because, *ex hypothesi*, there is no statutory power.

I propose now to deal with the question of the general law, under which the will of a father giving a legacy to a child either not payable till a future date, or contingent on the happening of a future event, is so construed as to make a provision for the child's maintenance, by making the child's legacy carry interest. There can, to my mind, be no doubt but that the language in the cases in which this canon of construction was first established is language apt for the gift to the child-legatee of interest on the legacy payable *in futuro* or contingently during the interval between the parent's death and the arrival of the time or the happening of the event on which the legacy is made payable. Thus, in *Green* v. *Belcher*, 1 Atk. 505, Lord Hardwicke says: "In such a case interest by way of maintenance would certainly be allowable in the meantime; it being a constant rule in equity, that wherever a legacy is given by a father to a child, as a provision for such child, though the legacy be payable at a future day, yet the child has an immediate right to the interest on the money; if the legatee was a stranger to the testator, it would be otherwise." The words in *Beckford* v. *Tobin*, 1 Ves. sen. 308, and *Crickett* v. *Dolby*, 3 Ves. 10, are all of a similar character. The child's legacy is said to "bear interest" or "carry interest." It will be found that this sort of phraseology is used equally in modern cases. Take, for example, *In re George*, in which James, L.J., says: "But the rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take

effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose." It will be observed that in none of these cases is the statement made that the presence in the will of a gift *in futuro* by a parent to a child gives the child during infancy a right to an allowance for maintenance out of the testator's estate. On the contrary, the statement invariably is that the legacy in such a case should "bear interest" during a period before it becomes payable. I think that it can hardly be doubted but that the reason why the courts of equity, deeming it impossible that a father who made a future provision for a child should intend the child to starve until the legacy fell in, gave effect to the father's presumed intention to provide for the maintenance of his child, by construing the will as directing that the future legacy should bear interest before it became payable rather than by finding in the will an implied direction that the child should receive reasonable maintenance out of the residue of the testator's estate, was that the courts wished to avoid the appearance of affirming a common law right in children to maintenance during infancy independently of the father's intentions as expressed in his will, and also desired, by making the maintenance payable out of interest on a legacy contingently coming to the child, to provide for the child out of the fruit of a fund which contingently was to come to the child, because to do this seemed to be to do less violence to the provisions of the will than simply to order maintenance to be paid out of the residue of the parent's estate. *Primâ facie*, maintenance ought only to be ordered out of the property of the child. To construe the will as giving the child at once, not contingently, interest for maintenance, complies with this *primâ facie* rule.

Now the logical consequence of this view would be that so long as the child lived, pending the interval between the father's death and the child attaining twenty-one, the child would be entitled to the whole of such interest, although it was for the court to determine whether the whole or what lesser sum should be allowed for maintenance. It does not seem to me that the practice of the court in fixing the amount to be allowed for maintenance negatives the right of the child to the whole interest, because the order of the court fixing the amount to be paid from time to time for maintenance was necessary not from anything to be implied on a proper construction of the father's will, but from the inability of the child or its guardian to give to the executors or trustees a valid receipt or discharge. It is said that the *dictum* of Sir W. Grant in *Hanson* v. *Graham*, 6 Ves. 239, is an authority for the proposition "that what is not taken out of the fund for maintenance must follow the fate of the principal"; and it is said that *Leake* v. *Robinson*, 2 Mer. 363, a decision by the same judge, leads to the same conclusion. These cases, however, are both cases in which there was an express direction for maintenance. In *Hanson* v. *Graham* the legacy to grandchildren of the testator was a legacy of £500 apiece 4 per cent. Consolidated Bank Annuities when they should respectively attain their ages of twenty-one years or day or days of marriage, and the direction was to lay out for the benefit of the grandchildren the interest, the whole of which was given till they should respectively attain twenty-one or marry. The legacy was accompanied by an absolute gift of the interest; whereas in *Leake* v. *Robinson* there was only a direction for maintenance out of the interest, and no gift of interest. These cases in which there is an express direction for interest, and in which the interest will or will not follow the fate of the principal according as the interest is or is not given to the child-legatee, do not seem to govern cases in which the interest is given in accordance with the rule of construction laid down by Lord Hardwicke in *Green* v. *Belcher*. Mr. Simpson in his book on the Law of Infants (2nd ed.), pp. 317 and 318, states generally that where an infant is entitled to the whole income of a fund given for his maintenance, whether absolutely or till the happening of a certain event, such part of the income as is not applied to his maintenance belongs to him absolutely or to his personal representative, as the case may be, and cites *Webb* v. *Kelly*, 9 Sim. 469, as an authority for the proposition. That case, like *Hanson* v. *Graham*, was a case in which there was an express direction as to maintenance, and the court held, as it did in *Hanson* v. *Graham*, that the gift was so worded as to constitute a gift of the income. Mr. Simpson says: "On the other hand, where the legatee is entitled not to the whole income, but to maintenance out of it, the surplus, after providing a proper maintenance, follows the fate of the principal whatever that may be, and does not pass to the personal representative of the legatee," and cites *Hanson* v. *Graham* and a number of other cases. But neither the proposition in the text nor any of the cases cited conclude the question as to what is the true construction of the father's will in cases where the father makes a gift *in futuro* or a contingent gift to a child for whose maintenance no provision is made outside the gift, nor the consequential question who will be entitled to the accumulations of interest not required for maintenance; and I can find no case anywhere which concludes these questions. It appears, however, that there is a strong opinion amongst equity lawyers that the accumulations in such a case follow the fate of the principal; but it has never been so decided, and this view certainly seems difficult to reconcile logically with the statements of those judges who laid down the canon of construction.

So far as the practice is concerned, it seems that the interest as it accrues is never carried to the account of the infant, and that there is no case, or at all events no reported case, in which the personal representatives of a child dying under twenty-one, or before the happening of the contingency upon which the legacy was payable, have obtained payment of the surplus interest accruing during the child's life beyond what was required for maintenance. This, of course, goes strongly to negative the child's right to such accumulations; but we did not have any case cited to us in which the accumulations of interest were ordered to be paid to a residuary legatee or the next-of-kin or the remainderman. I am only speaking, of course, of cases in which the interest became payable only by virtue of the rule of construction to which I am referring applied in cases of a legacy *in futuro* or a contingent legacy given by a parent to a child for whose maintenance there is no provision. I am not speaking of cases in which interest is expressly given and constitutes a part of the gift *in futuro* or the contingent gift. On the other hand, I find in the case of *Wynch* v. *Wynch*, that the Master of the Rolls seems to have been of opinion that if the father had not directed maintenance to be paid out of his personal estate his children would have been entitled to interest on their legacies *eo nomine*. Again, in *Chambers* v. *Goldwin* there was an express direction for maintenance of a daughter till twenty-one or marriage and a contingent legacy in case she should attain twenty-one, payable at and to carry interest from that time. The daughter married at eighteen, and her husband claimed and the court allowed maintenance between the marriage and the majority of the daughter at the rate of £350 a year. I do not know if the court expressly fixed the rate of interest or whether the £350 was the whole of it; but as the application was not made until after the main-

tenance had been given I suppose the case was dealt with as if the allowance had been made pending infancy. It is difficult, however, to justify the order except upon the ground that the court thought fit to treat the will as authorizing interest to be allowed on the legacy from the end of the period during which the testator expressly directed maintenance to be provided for the child until the child attained the age of twenty-one. It is difficult to suppose that the court intended to prolong the period during which maintenance should be allowed as such beyond the period defined by the testator. *Martin* v. *Martin* runs on the same lines, the maintenance given by the will being maintenance out of the testator's residuary estate until the son should attain the age of fifteen. There was also a legacy to the son of £6,000, contingent on his attaining the age of twenty-one. The son also took a share of the residuary estate. Wood, V.C., says: "I think, on the whole, the proper construction is, that maintenance should be allowed by payment of interest on the legacy"; and then, after saying that it must be implied, although the legacy itself is contingent that interest is to be given in the meantime, Wood, V.C., concludes: "Lord Eldon having thus decided (*Chambers* v. *Goldwin*), I am bound to give the plaintiff interest on one or other of his legacies, and he being entitled to both contingently, I must select that which will be most for the benefit of the infant; and declare that interest at £4 per cent. is payable upon the £6,000 legacy."

I confess that I have considerable difficulty in coming to the conclusion that this interest allowed by the court as a matter of construction on a child's legacy from its parent for the purpose of maintenance, ought to follow the fate of the principal. If the interest itself is contingent on the legatee attaining the specified age, of course the interest will follow the fate of the principal; but it is impossible to suggest that interest, which is to provide maintenance for the child, can possibly be contingent in this sense. The interest must be something which immediately and absolutely to the extent required can be applied to the use and benefit of the child. Now let me assume that such interest can only be called for to the extent required, and the child dies an infant. Why should the accumulations of this interest, as to which the testator has given no express direction whatever, be allowed on the legacy for the benefit of the remaindermen or other person taking by a gift over, who may be a middle-aged man or woman? But if the accumulations of interest are to go to the remaindermen this is the result. I could understand a construction of the testator's will under which the court simply held that the goodwill of the testator, evinced by his gift of a legacy payable *in futuro* or contingently, necessarily imported an intention by the testator to provide for the maintenance of that child out of the residue of his estate in order to give the child a chance of living till the contingency might occur. In such a case there would be no surplus; but unfortunately this is not the construction which the courts adopted; for again and again one finds expressions like that used by the Master of the Rolls in *Harvey* v. *Harvey*: "Yet the infant legatee ought to have interest allowed him during his infancy in order for his maintenance." The intention of the testator is to give interest on the legacy and to give it to the child himself. It seems to me that to give the accumulations to the remaindermen is altogether outside the intention imputed to the testator.

I wish now to say a few words as to the effect of a direction in the will to segregate a contingent legacy from the rest of the estate. I have not read the clause, but I may mention here that there is a direction in this will. It is a general direction applying to all the legacies. Now the case of *In re Cotton*, 24 W. R. 243, 1 Ch. D. 232, decided under Lord Cranworth's Act, shows that under that Act, where a legacy is of capital *plus* income, maintenance might be ordered out of income to which the child is contingently entitled as an accretion to capital. *In re George* shows that where there is a gift of the *corpus*, but not of the income, Lord Cranworth's Act does not apply. It seems to follow that if the case is one in which the income is applicable for maintenance it can only come within section 43 if the construction of the will is such that the intermediate income, as distinguished from maintenance out of it, belongs to the child. The direction to segregate a fund to provide for the gift is the equivalent of a contingent legacy of the fund *plus* its income. If you have a contingent gift of the fund *plus* its income, maintenance may be given, not because the infant is entitled to the income immediately on the testator's death, but because he is entitled to it on the happening of the contingency. But in the present case the daughter is not entitled to the intermediate income on attaining the age of twenty-one. She is only entitled to the income of the capital fund increased by the accretion of the accumulations. If section 43 does not apply, the result is that she is only entitled to that which she gets by the true construction of the will in which a father gives a gift *in futuro*, or a contingent gift to a child, without providing for its maintenance in the period intervening before the attainment of the age or the occurrence of the contingency. If that to which she is so entitled is the interest, she is entitled to that, not contingently, but immediately on her father's death. But if that is a true description of what she is entitled to, then in respect of that interest she is brought within the scope of section 43, because that property is property held by trustees in trust for the infant for life, subject to a defeasance, as the words import, on her death, or by necessary merger on her acquiring the fund. The only effect of a direction for segregation and investment outside section 43 of the Conveyancing Act is to convert the contingent gift of the capital sum into a contingent gift of the capital sum *plus* the income, so that on the happening of the contingency the capital sum will be thus enhanced. Such a case is merely *Hanson* v. *Graham*. The enhanced capital will all go the legatee on the happening of the contingency; and if there is a mere direction for maintenance this will, of course, leave the income to follow the fate of the capital, except so far as it is applied for maintenance. I agree that a direction for segregation will have this effect in the present case so far as the legacy is concerned. It makes the legacy, upon a true construction, a contingent gift of the capital *plus* the income, but then it is not followed by a direction for maintenance. The fact is that, having regard to the legacy being a contingent legacy to a child for whose maintenance no provision is made in the interval between the death of the father and the happening of the contingency, the legacy must be read as though it contained these additional words: "And I direct that my daughter shall be allowed interest on the legacy during her infancy." The result is that the case is exactly on all-fours with what Sir W. Grant held to be the true construction of the express words in *Hanson* v. *Graham*—that is, that, inasmuch as the direction for maintenance in that case was coupled with an express gift of the whole of the income to the children, in such a case the income, though given for maintenance, did not follow the fate of the principal. Sir W. Grant expressly declares that the form of the legacy was such as, apart from the direction for maintenance, would have constituted a contingent gift of the capital *plus* the income—that is,

this was a gift which could have equally been effected by a gift of the capital *plus* a direction for segregation; but, notwithstanding this, he held that as the direction for maintenance, properly construed, constituted a gift to the children of the interest, the interest did not follow the fate of the principal. So that, here I say that, if the construction put by Lord Hardwicke, Lord Eldon, and others on the will of a parent amounts to a gift of the interest to the children, that interest will not follow the fate of the principal. If my view of this construction put by Lord Hardwicke is right, a direction to segregate not affect the general law on this point; and then, so far as section 43 is concerned, if the case does fall within the section, either Buckley, J.'s, view in *In re Scott* is right, or if it is not, the gift of the interest to the child is a contrary intention within sub-section 3 of that section. The whole question really is, What was the construction put by Lord Hardwicke, and other judges following him, on the will of a father in such a case? So far as their words are concerned, I think that they construed the will of the father as giving the interest to the child independently of the happening of the contingency. I am told that the practice of the court has been to take a different view of what these judges meant, notwithstanding the fact that down to the present day the language of every judgment which I have seen speaks of the legacy to the child "bearing" or "carrying" interest. But I feel that, sitting as I do here, I am bound to follow the practice of the court. The result will be that the decision of Joyce, J., which he gave against his own judgment will be reversed, and this appeal will be allowed.

ROMER, L.J.—Before dealing with section 43 of the Conveyancing Act, 1881, I desire to make some remarks on the law (apart from that section) concerning a legacy given by a testator to his infant child made contingent on the child attaining twenty-one years of age. It is of course well settled that if and for such period as no maintenance is expressly provided for the infant by the testator, the legacy will bear interest for the maintenance. But the fact that the legacy is to bear interest for such a purpose, though it may be and often is shortly referred to by saying that the legacy "bears interest," does not make the legacy the less a contingent one or put the infant into the position of having an immediate vested life interest in the income of the legacy. All that the infant is entitled to is to have the maintenance. And the authorities show that the court is not bound to order that the legacy shall bear a greater rate of interest than is necessary for that maintenance. In Roper on Legacies (4th ed.), vol. 2, p. 1257, it is stated: "The court determines the *quantum* of the allowance, either the whole of the usual interest allowed by the court, or less, according to circumstances"; and at p. 1290, "maintenance being in fact another name for the whole, or a proportion of the interest on the legacy"; and in *Chambers* v. *Goldwin* the court in fact made such a legacy, during a period when the infant daughter was under the rule entitled to interest for maintenance, bear interest at a rate less than 4 per cent. per annum; and it does not appear that during the period any further interest was allowed by the court in favour of the legatee, though she attained twenty-one and became absolutely entitled to the legacy. It is possible that other like cases may be found. But the court has undoubtedly a jurisdiction to provide for the legacy carrying the full 4 per cent. interest, even though at the commencement of the infancy the child may not require the whole; and I think this is the course often adopted of late years, probably because the child as it becomes older may, for its maintenance, want the full interest, and even to have recourse to the surplus of past years. But, notwithstanding this practice and whatever may be the reasons for it, I see no sufficient ground for holding that the court has lost its right not to order payment of the full 4 per cent. in a case where there is no need for the full interest for the purposes of the maintenance. In cases where the full 4 per cent. interest is called for, the court may order it or parts of it from time to time to be applied in or towards the maintenance of the child; but, except so far as the orders of the court are concerned, or the interest may have been applied or may be required for maintenance, the child has acquired no vested interest in the interest; and should there be a surplus during the infancy not covered by any order of court, and not required for maintenance, that surplus does not in my opinion become the property of the child, but is regarded as an accretion to the *corpus* of the contingent legacy, and the child cannot obtain it unless he attains twenty-one years of age, and so becomes absolutely entitled to the legacy. Accordingly, so far as I can find, there is no case reported, and certainly no case is known to me, where the legal personal representatives of a child dying during infancy have obtained payment of the surplus accruing during the child's life. Nor is it the practice of the court to carry over the surplus to the separate account of the child. The practice is to treat the surplus as appertaining to the *corpus* of the legacy, so that the child on attaining twenty-one may apply for the legacy and accumulated surplus together. The views above expressed are clearly set forth in the judgment of Sir William Grant, M.R., in *Hanson* v. *Graham*, where he was pointing out the difference between a direct gift of interest on a contingent legacy and the right to maintenance, and, referring to the argument before him that what he ultimately held to be a true gift of the interest was more like a gift for maintenance, he says: "On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the same effect as giving interest; upon this principle, that nothing more than a maintenance can be called for, what can be shown to be necessary for maintenance however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal; whatever that may be." This principle has, so far as I am aware, always been acted on by the court in cases like those I have been considering; and in the case of a child dying under twenty-one the surplus ought to go to those whose funds have provided it, seeing that the interest was only payable for maintenance.

I will now consider the case where a testator for the purpose of providing a fund for a contingent legacy sets apart and creates a trust of certain personal property. In that case, apart from any special provisions to the contrary by the testator, and apart from any question as to maintenance, the income would be added to the *corpus*, and the legatee could only claim it if and when he became entitled to the *corpus*. See, for example, the cases referred to in the judgment of Chitty, J., in *In re Clements*. If, then, in the case where a fund is so set apart the legatee becomes entitled to maintenance, it follows that, subject only to the right of maintenance thereout of the child, the income ought to be and will be accumulated and added to *corpus*. And if the child dies during the infancy the surplus of the income up to the time of the death remaining after complying with the order of the court, and after providing for any sums still required for past maintenance, will not

belong to the child's legal personal representative, but will pass to those entitled to the *corpus* of the fund. For the setting apart of the fund and the right of the child to maintenance out of the income did not change the contingent nature of the child's legacy. The child did not acquire a vested life interest during minority in the income. Accordingly, after providing for maintenance, the court does not order the surplus income during infancy to be carried to the separate account of the infant. Nor has it ever, so far as I am aware, ordered any surplus accruing during infancy to be paid to the child's legal personal representatives on the child dying while still a minor.

I now come to the circumstances of the present case. The testator has authorized his trustees to set apart out of his personal estate a sufficient fund to answer (*inter alia*) the legacies given by him to each of his daughters on her attaining twenty-one years of age or marrying with the consent (if marrying after his death) of her guardians. But those legacies are settled by the will upon trust for the daughter for life, and after her death upon trust for other persons whom I will call the remaindermen. The authority to the trustees to set apart has been acted upon by them in the case of the respondent Eva Bowlby. Now, apart from any question as to the right of that daughter to maintenance, and apart from the question as to the true construction of section 43 of the Act of 1881, this setting apart did not alter the contingent nature of the legacy. It did not make the life interest of the daughter begin before she attained twenty-one or married. The daughter, apart from her right to maintenance, acquired no vested interest in the income, and, so far as the income is not applied for her maintenance, it must in my opinion be held upon trust to accumulate as part of the contingent legacy, and this whether the daughter, though only tenant for life of the fund and notwithstanding the special provisions of the testator's will, is entitled to maintenance because she was the child of the testator (a point I need not decide) or because of the provisions for maintenance in section 43. This being so, unless there be something to the contrary in section 43, on the daughter attaining twenty-one, so far as the income set apart was not required or applied for her maintenance, it became part of the *corpus* of the legacy, and the daughter only became entitled to the life interest of the fund regarded as a whole.

This brings me to a consideration of the special provisions of section 43. Now on the construction of that section I cannot say that I feel any doubt. It appears to me that under sub-section 2 the surplus income after providing for maintenance is to be accumulated for the benefit of the persons who become entitled to the "property" from which the income has arisen—that is to say, in this case the persons who become entitled to the *corpus* of the fund set apart; and those persons are not the daughter alone, but the daughter for life and the remaindermen after her death. So that the daughter becomes entitled only to the income of the ultimate fund arising from the original *corpus* of the fund and the surplus accumulated income combined. In my opinion, *In re Scott* was wrongly decided. I think that the grounds on which Buckley, J., based his judgment in that case—namely, that the tenant for life of the contingent legacy was entitled to the income during minority apart from the Act of 1881—was wrong, and led him to an erroneous way of construing section 43.

COZENS-HARDY, L.J.—This is an appeal from an order of Joyce, J., who has declared that the unapplied income and accumulations of a settled legacy of £50,000 belong to the defendant Eva Bowlby, who has attained twenty-one. The order was made by the learned judge contrary to his own view, on the ground that the case was covered by Buckley, J.'s, decision in *In re Scott*; and this appeal is in truth brought to review that decision. Buckley, J., held that, according to the true construction of section 43, sub-section 2, of the Conveyancing Act, 1881, which directs trustees to accumulate the residue of income not applied for maintenance, and to hold accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arises, a tenant for life of a contingent share of residue who had attained twenty-one was entitled to the accumulations. I am unable to adopt this view. Subject to any "contrary intention" expressed in the instrument (sub-section 3), it seems to me that the words "property from which the same arises" mean the property the income arising from which has been accumulated. This involves, not that the persons interested in the capital will alone take, but that the accumulations become an accretion to the capital, with the result that all persons interested therein, whether as tenant for life or otherwise, will in due course and order take precisely the same interests as they take in the original capital. I cannot adopt the view that the accumulations of income arising before the contingency happens, belong to the person whose life interest does not commence until the contingency happens. I think, therefore, that the decision in *In re Scott* ought not to be followed.

It was assumed in *In re Scott* that section 43 authorized the trustees to allow maintenance and to accumulate the residue of the income; but I think this was not so. It is settled that section 43 has no application unless, apart from the Act, the infant would, under the terms of the will, be entitled to the arrears of income on attaining twenty-one: *In re Dickson*. This must mean either as tenant for life or absolutely. If a share of residue is given absolutely to an infant contingently on attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and section 43 will apply. But if the infant only becomes tenant for life of the share of residue with its accretion on attaining twenty-one, the case does not fall within the language of section 43 as interpreted by the Court of Appeal.

The main stress of the argument before us was, however, based upon a ground which was not suggested in *In re Scott*. Put shortly, it may be stated as follows: A contingent legacy by a father to an infant child is an exception to the rule that interest is not payable until the contingency happens, and in such a case interest is payable from the testator's death until the happening of the contingency, and the child is entitled to have maintenance provided out of such interest, and the child has a vested interest in the whole of the income, or so much of the income as may not be applied for maintenance; and inasmuch as the object of section 43 was not to alter the rights of parties, the accumulations arising from the vested interest of the infant legatee must belong to the infant, there being an expression of a "contrary intention" within sub-section 3 of section 43 sufficient to negative the direction in sub-section 2: *In re Humphreys*. It is not easy to understand precisely on what principle the courts have for centuries proceeded in this matter. The words used by a testator have a different operation and effect according as the legatee is or is not an infant child of the testator. It appears to be a matter of construction, a presumption being raised that a father making a future vested or contingent provision for an infant child did not

intend the infant to be deprived of maintenance in the meantime. It is, however, certainly not an absolute rule that in all cases a legacy by a father to an infant child carries interest from the death, for the presumption does not arise if a provision for maintenance out of other property is contained in the same will: *Wynch* v. *Wynch*, *Ellis* v. *Ellis*, and *Donovan* v. *Needham*, 9 Beav. 164. There are, moreover, authorities which show that interest allowed on such a legacy is not always allowed at the ordinary rate. On the other hand, there is no doubt that, whether we regard the language used by the text-writers or the form of order usually adopted by the court, the common means of providing maintenance has been to declare that the legacy carries interest from the death.

Upon the whole, however, I think that the true view is that the infant is entitled not to interest on the legacy as such, but only to maintenance, although for the purpose of creating a fund, and as a matter of convenience, the court has been in the habit of allowing an annual sum at the rate of 4 per cent. upon the amount of the legacy: *Mole* v. *Mole*. The case of *Chambers* v. *Goldwin*, where a provision for maintenance in the will ceased on the daughter's marriage at the age of eighteen, and she did not attain a vested interest in her legacy of £15,000 until twenty-one, is important. The legacy was expressly stated to carry interest at the rate of 6 per cent. from her attaining twenty-one. Lord Eldon there allowed maintenance for the interval between the marriage and the attainment of twenty-one, but not in the shape of interest on the legacy nor at the same rate at which it had been allowed up to marriage. On examining the record, it appears that the husband applied for and was allowed arrears of maintenance at the rate of £350 a year, and there is no trace of further payment having been made. *Martin* v. *Martin* is also important. There was a similar contingent legacy to the plaintiff, and a provision for maintenance up to the age of fifteen. Wood, V.C., gave maintenance not by giving interest on the legacy from the testator's death, but simply from the date when the provision in the will for maintenance ceased. Upon the whole, I think it is not correct to say that an infant child is entitled as of right to interest, as such, from the father's death until the contingency happens; and that being so, the contention on the part of the respondent fails. No authority has been produced in which this doctrine has ever been applied to a case in which the infant child is only tenant for life of the contingent legacy, and, if I had taken a different view on the main point, I am not prepared to say that I should have extended the doctrine to such a case.

I have thought it desirable to deal with the general principles raised before considering the particular language of this will, upon which, as it seems to me, the case might well be decided. The testator's eldest son had attained twenty-one, and was named executor and made a residuary legatee. A legacy of £50,000 is given to each of his younger sons who should attain twenty-five, and there is an express maintenance clause which provides that the accumulation should go in augmentation and so as to follow the destination of the legacy. The follows a legacy of £50,000 to each daughter who should attain twenty-one or marry with consent, with a declaration that the legacy should not vest absolutely in her, but should be retained by the trustees of the will and held by them upon trust to pay the income of such legacy to her for life, with various trusts over. The will subsequently authorized the trustees at their discretion to appropriate any part of his personal estate in or towards satisfaction of any legacy given by the will; and in the last clause but one of the will the testator directed that all his children should be made wards of court, and that "notwithstanding anything hereinbefore contained, all powers, whether statutory or otherwise, as to education, maintenance, or advancement of such children or any of them, while minors, shall be exercised by my trustees only under the direction of the said court." Now it seems to me clear that section 43 has no application unless and until an appropriation was made, for until that date it was impossible to say that any property was held by the trustees in trust for the infant. But an appropriation has been made by the trustees with the concurrence of the residuary legatee, who was in fact a party to the appropriation. This appropriation was in satisfaction of the contingent legacy. The testator has by this final clause manifested an intention that with reference to this appropriated fund section 43 shall apply in like manner as the express power of maintenance has to apply to the legacies to younger sons. In other words, he has said that section 43 shall be treated as applicable to the funds appropriated for the daughters' contingent legacies, even though, apart from that, section 43 would not be strictly applicable to the case. What, then, is the provision he has made? That the court shall say what allowance is to be made by the trustees for maintenance. This, and only this, is to be given. This is what has been done in fact. In the language of Sir William Grant in *Hanson* v. *Graham*, "whatever is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be." The daughter's life interest in the contingent legacy only arose on the happening of the contingency—that is, on her attaining twenty-one. Prior to that date she took no interest in the legacy as such, although she was entitled to a provision for maintenance out of the antecedent income arising from the appropriated fund. I do not think it can reasonably be held that she had a vested interest in the income of the appropriated fund for the period before the contingency itself happened. The result is that, in my opinion, the appeal must be allowed.

Appeal allowed.

Solicitors, *Farrer & Co.; Kennedy, Ponsonby, & Ryde.*

From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) — Nov. 15.

POWELL AND THOMAS *v.* EVAN JONES & CO. (*a.*)

Principal and agent — Secret commission — Right of principal to recover from sub-agent—Fiduciary relation—Declaration with respect to commission payable in the future.

The defendants, being desirous of raising money by the issue of debentures in a company which they were promoting, applied to the plaintiffs for that purpose, offering them commission on the amount of the debentures issued. The plaintiffs arranged with C. that he should endeavour to obtain the required sum for the defendants from a certain society, and that he should receive a share of the commission. C. accordingly introduced the defendants to the society, and the society found the required sum and the debentures were issued through their instrumentality. C. received a secret commission from the society, and by an agreement between him and them certain further sums were to be payable by them to him in the way of commis-

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

sion on the transaction. The plaintiffs having brought an action against the defendants to recover the commission agreed between them, the defendants counterclaimed against the plaintiffs and C. to recover the amount of the secret commission.

Held, that the defendants were entitled to recover from C. the amount of the secret commission which he had received, and also to a declaration that, if C. should at any time receive further sums as commission from the society, he should become indebted to the defendants for such sums as he should receive them; but that they were not entitled to a declaration that C. was a trustee for them in respect of money which he might thereafter receive from the society.

Appeal from the judgment of Kennedy, J., at the trial of an action without a jury.

The action was brought by the plaintiffs, Percy Powell and H. J. Thomas, of Cardiff, against the defendants, Evan Jones & Co., of Cardiff, to recover £1,400, the amount of agreed commission at the rate of 2 per cent. on debentures to the amount of £70,000 issued by a company called the Field Line (Cardiff) (Limited). The plaintiffs alleged that the sum claimed was payable under the following agreement or commission note, which was dated the 7th of August, 1902, addressed to the plaintiffs, and signed by the defendants: "In consideration of your introducing to us the Law Guarantee and Trust Society for the purpose of negotiating a debenture issue in connection with a fleet of steamships, and of such negotiations resulting in business, we undertake to pay you a commission of 2 per cent. on the amount that may be mutually agreed between us and the said society to be advanced."

The defendants pleaded by way of defence (1) that no commission was earned, as no advance had been obtained for them through the instrumentality of the Law Guarantee and Trust Society; (2) that one Cowperthwaite, who had acted in the matter as the sub-agent of the plaintiffs, had improperly stipulated for and had received secret commission from the Law Guarantee and Trust Society, contrary to his duties, and that the plaintiffs were so far responsible for his acts that they were not entitled to recover their commission from the defendants. The defendants further counterclaimed against the plaintiffs and Cowperthwaite to recover the amount of the commission received by him from the Law Guarantee and Trust Society.

The material facts were as follows: In the spring of 1902 the defendants Evans Jones & Co., who were a firm of shipowners, formed the plan of creating a steamship company, to be called the Field Line (Cardiff) (Limited), and to be incorporated under the Companies Acts, and they were desirous of obtaining £70,000 by an issue of debentures, which were to be raised on the security of certain ships to be transferred to the company. With that purpose in view they entered into communication with the plaintiffs Powell and Thomas, offering them a commission on the amount of the debentures issued. The plaintiffs thereupon approached one Akenhead, who introduced Cowperthwaite to them. The plaintiffs arranged with Akenhead and Cowperthwaite that Cowperthwaite should endeavour to obtain for the defendants the required amount from the Law Guarantee and Trust Society, and that Akenhead and Cowperthwaite should receive certain shares of the commission. Cowperthwaite had previously had various business transactions with the Law Guarantee and Trust Society, and was stated to be an agent of theirs, though this was not known to the plaintiffs or to the defendants. On the 16th of July an interview took place between the plaintiffs, the defendants, and Cowperthwaite, when it was arranged that Cowperthwaite should introduce the defendants to the Law Guarantee and Trust Society, which was done. On the 7th of August the agreement or commission note above set out was signed. The Law Guarantee and Trust Society found the required sum, and the debentures were issued through their instrumentality. Without the knowledge of the plaintiffs or of the defendants it was arranged between Cowperthwaite and the Law Guarantee and Trust Society that he should receive the usual commission payable to their agents. He had already received £145 in respect of that commission, and it appeared that by his agreement with the society he was to be entitled to receive by way of further commission a certain percentage on the annual premiums payable on a sinking fund policy of insurance which was to be effected by the company with the society to ensure the ultimate payment of the amount of the debentures.

Kennedy, J., gave judgment for the plaintiffs on the claim, and the appeal from this part of the judgment was settled. As to the counterclaim, the learned judge came to the conclusion that either the defendants had adopted Cowperthwaite as their agent to negotiate the loan, or, at any rate, there was a fiduciary relation between them, and, upon the authority of *De Bussche* v. *Alt*, 8 Ch. D. 286, 26 W. R. Dig. 192, in either view of the case, he held that the defendants were entitled to recover from him the secret commission which he received. He accordingly gave judgment for the defendants as against Cowperthwaite for the amount of the secret commission received by him; and he further made a declaration that, if Cowperthwaite should at any time receive further sums as commission from the Law Guarantee and Trust Society, he should become indebted to the defendants for such sum or sums as and when he should receive the same.

Cowperthwaite appealed from the judgment on the counterclaim, and the defendants gave cross-notice of appeal.

Buckmaster, K.C., and *H. M. Sturges*, for Cowperthwaite.—Cowperthwaite acted solely for the plaintiffs, and there was no evidence of any privity of contract between him and the defendants. Whatever right the plaintiffs may have to recover the secret commission from him, the defendants have no such right. In this case there was no necessary implication of authority to employ a sub-agent, as there was in *De Bussche* v. *Alt*.

J. Eldon Bankes, K.C., and *Holman Gregory*, for the defendants, in support of the cross-appeal.—The declaration made by the learned judge is insufficient. The defendants ask for a declaration that they are entitled to any benefit which Cowperthwaite may have under his agreement with the Law Guarantee and Trust Society for secret commission. If by reason of the decision in *Lister & Co.* v. *Stubbs*, 38 W. R. 548, 45 Ch. D. 1, they are not entitled to a declaration of trust, they are at least entitled to declaration of agency—that is, that Cowperthwaite was acting as their agent when he made his agreement for commission with the Law Guarantee and Trust Society.

COLLINS, M.R.:—The question is whether or not, in the circumstances of this case, the borrowers, Evan Jones & Co., are entitled to recover from Cowperthwaite the amount of commission which he has received from the lenders, the Law Guarantee and Trust Society. It is argued on the part of Cowperthwaite that they are not, because there was no privity of contract between them and him. The argument is that Cowperthwaite was introduced into the transaction merely as a sub-agent, that he acted

in the matter for Powell and Thomas, and not as agent for Evan Jones & Co., and that there was no privity between him and Evan Jones & Co. The learned judge at the trial seems to have come to the conclusion that in fact there was privity of contract between Evan Jones & Co. and Cowperthwaite. But he was clearly also of opinion that, whether there was such privity or not, there was a fiduciary relationship between them which debarred Cowperthwaite from making a secret profit out of the transaction without the consent of Evan Jones & Co. I am of opinion that the learned judge was right in law and fact. If it were necessary to establish privity of contract, which, in my judgment, it is not, I think there was abundant evidence that, with the assent of all parties, Evan Jones & Co. did make Cowperthwaite their agent for reward. But beyond that, as the learned judge also held, inasmuch as Cowperthwaite knew that Powell and Thomas, in employing him, were acting as agents for Evan Jones & Co., for the purpose of procuring a loan for them, he stood in such a fiduciary position towards Evan Jones & Co. as debarred him from acting in a manner contrary to their interests. He was under a personal incapacity to receive a private reward from the lenders without the knowledge of Evan Jones & Co. The judgment of the learned judge was clearly right so far as regards the money already received by Cowperthwaite from the Law Guarantee and Trust Society.

I think it is equally clear, after considering the case of *Lister & Co.* v. *Stubbs*, that the declaration made by the learned judge was also right, and that though Cowperthwaite is a debtor to Evan Jones & Co. in respect of all sums actually received by him under the contract for commission made by him with the Law Guarantee and Trust Society, yet Evan Jones & Co. are not entitled to a declaration that Cowperthwaite is a trustee for them in respect of money which he may hereafter receive. He cannot be compelled to enforce the contract so far as it has not been enforced for their benefit. In the case cited Lindley, L.J., said as follows: "The real state of the case as between Lister & Co. and Varley & Co. and Stubbs in this. Lister & Co., through their agent Stubbs, buy goods of Messrs. Varley at certain prices and pay for them. The ownership of the goods, of course, is in Lister & Co.; the ownership of the money is in Messrs. Varley. Then Messrs. Varley have entered into an arrangement with Stubbs, who ordered the goods of them, to give Stubbs a commission. That is what it comes to. What is the legal position between Messrs. Varley and Stubbs? They owe him the money. He can recover it from them by an action, unless the illegality of the transaction afford them a defence; but the appellants have asked us to go further and to say that Messrs. Varley were Stubbs's agents in getting his commission from Lister & Co. That appears to me to be an entire mistake. The relation between Messrs. Varley and Stubbs is that of debtor and creditor—they pay him. Then comes the question as between Lister & Co. and Stubbs, whether Stubbs can keep the money he has received without accounting for it? Obviously not. I apprehend that he is liable to account for it the moment that he gets it. It is an obligation to pay and account to Messrs. Lister & Co., with or without interest, as the case may be. I say nothing at all about that. But the relation between them is that of debtor and creditor; it is not that of trustee and *cestui que trust*. We are asked to hold that it is—which would involve consequences which, I confess, startle me." These observations seem to me to apply to the present case, and they show that Evan Jones & Co. are not entitled to any declaration larger than the one which they have got. They have the right to receive any money which may be paid to Cowperthwaite by way of commisson under his agreement with the Law Guarantee and Trust Society, and to that extent they are entitled to a declaration of title. But, unless and until any money payable under the agreement comes into the hands of Cowperthwaite, Evan Jones & Co. have no right in respect of it. I think, therefore, that both the appeal and the cross-appeal must be dismissed.

STIRLING and MATHEW, L.JJ., concurred.

Appeals dismissed.

Solicitor for Cowperthwaite, *C. F. Ingram.*

Solicitors for the defendants, *Williamson, Hill, & Co.*, for *Ingledew & Sons*, Cardiff.

High Court of Justice.

Chan. Div. }
Buckley, J. } Dec. 16, 21.

GREAT WESTERN RAILWAY CO. *v.* FISHER. (*a.*)

Vendor and purchaser—Covenants for title—Defect in title—Right of way—Railway company—Compensation—Breach of covenants—Measure of damages—Solicitor and client costs—Conveyancing Act, 1881, *s.* 7.

F. sold land to a railway company, conveying it as beneficial owner. He had previously granted a right of way over part of it, which had become vested in J. The company knew at the time of the conveyance that other persons probably had rights over the land. The intention of the parties was, however, that, as between themselves, the land should be conveyed freed from any rights of way over it. The company blocked the land over which J.'s right of way existed. J. claimed and was awarded in arbitration a certain sum as compensation for loss of his way. The company, contesting his right of way, defended an action brought against them by J. to establish it and enforce the award, and had judgment given against them with costs. They then sued F. for damages for breach of his covenants for title.

Held, that the action lay; that the damages were (1) *the sum awarded to J. as compensation;* (2) *the costs of J. in the arbitration paid by the company; and* (3) *their own costs therein, and that these latter were the costs taxed as between solicitor and client.*

But held, that the damages did not include the costs of the action brought by J. against the company, who should not have defended it.

Turner *v.* Moon, 50 *W. R.* 237, [1901] 2 *Ch.* 825, *followed.*

Barnett *v.* Corporation of Eccles, [1900] 2 *Q. B.* 423, 48 W. R. Dig. 101. *distinguished.*

This was an action for breach of the covenant for quiet enjoyment and freedom from incumbrances implied by the Conveyancing and Law of Property Act, 1881, upon a sale for value by the beneficial owner.

Before the year 1899, the defendant, as owner in fee simple of the Drayton Park estate, in the parish of Hanwell, had deposited with the Hanwell District Council plans showing the laying out of the estate in plots abutting upon certain roads, one of which was Tennyson-road.

By indentures of the 7th of February, 1899, and the 23rd of October, 1899, the defendant conveyed certain

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

plots lying upon that estate, and abutting on the western end of Tennyson-road, with the result that they became vested in J. C. Johnstone, and by the conveyance there was granted by the defendant a right of way over Tennyson-road. On the 14th of June, 1900, an agreement was executed for the sale by the defendant to the plaintiffs, for £11,000, of 8 acres 22 perches of land, being a number of plots on the Drayton Park estate abutting on both sides of Tennyson-road itself. That agreement was carried into effect by a conveyance of the 13th of August, 1900. That conveyance referred to the plans deposited with the district council, and the conveyance granted to the plaintiffs a certain right of way over so much of Tennyson-road as was shown on the plan upon the conveyance, "in common with all other persons entitled to use the same." The same plan was on the agreement.

The Tennyson-road shown upon the plan was only the western end of the road, and a piece adjoining on the east to that western end, upon which piece the road was indicated as constructed as to half its width on the land sold to the plaintiffs. Except to this extent the road was not in that plan shown as continuing eastward over the land which the plaintiffs bought. The agreement and conveyance both provided that the plaintiffs should erect and for ever maintain a certain fence five feet high in certain places where its erection would stop and close the road at its eastern end, as shown on that plan. The land conveyed to the plaintiffs was coloured red on the plan on the conveyance. In the conveyance the defendant was expressed to convey to the plaintiffs "as beneficial owner in fee simple." The agreement for sale contained recitals, which are referred to in the judgment, suggesting that the plaintiffs were going to erect a railway upon the land.

At the time when the plaintiffs acquired the land they knew that the estate had been plotted out, and that intended roads had been shown, as above mentioned; that Tennyson-road had been pegged out throughout its entire length, although not constructed; that plots had previously been sold on the estate; and that some of these plots were at the western end of Tennyson-road.

The plaintiffs, having acquired the land, constructed railway sidings upon it, and thus blocked and destroyed the road.

In July, 1902, Johnstone claimed £5,000 compensation for the loss of his way over that part of the road so blocked up and destroyed. The matter went to arbitration, the company appointing an arbitrator under protest, with the result that in June, 1903, the arbitrator awarded a sum of £510 as compensation. After the award was made the plaintiffs did not—as his lordship said it seemed to him they ought to have done—pay the amount awarded, and seek to recover against the defendant their damages up to that time, but they allowed an action to be brought upon the award, and defended the action with a view to raising the question whether Johnstone was entitled to any right of way over so much of Tennyson-road as the plaintiffs had blocked. In the result a special case was stated upon which Bigham, J., found against the company, deciding in fact that Johnstone had a right of way over the whole of the road.

The plaintiffs thereupon brought this action against their vendor, Fisher, claiming as damages, first, £510, the amount they had paid as compensation to Johnstone; secondly, the costs they had had to pay on the arbitration and in the action; and thirdly, their own costs as between solicitor and client in the arbitration and in the action.

Cripps, K.C., and *Howard Wright*, for the plaintiff company.—The defendant, having conveyed to the company as beneficial owner, is liable under the covenants for title implied by the Conveyancing and Law of Property Act, 1881, s. 7, to indemnify the company against the loss which has been occasioned to them in consequence of the right of way existing over part of the land conveyed, a right of way created by the defendant himself: *Turner* v. *Moon*, 50 W. R. 237, [1901] 2 Ch. 825. And it makes no difference that the purchasers knew of the defect of title, or even that it was disclosed on the conveyance: *Page* v. *Midland Railway Co.*, 42 W. R. 116, [1894] 1 Ch. 11. In addition to other damages the plaintiffs are entitled to have repaid to them all their own costs in the arbitration proceedings (*Sutton* v. *Baillie*, 40 W. R. 28; *Rolph* v. *Crouch*, 16 W. R. 252, L. R. 3 Ex. 44) taxed as between solicitor and client: *Smith* v. *Compton*, 3 B. & Ad. 407.

Buckmaster, K.C., and *W. Mackenzie*, for the defendant.—The plaintiffs were put upon their inquiry, and if they had inquired they would have discovered the existence of the right of way. It was in fact disclosed on the conveyance. They cannot therefore sue on the covenants for title in respect of it: *Oldfield* v. *Pound*, 5 Ves. 508. They could not have resisted an action for specific performance at the suit of their vendor, and still less can they sue him on his covenants for title. The costs connected with the arbitration were unnecessarily incurred. The company should have paid the money due for compensation at once without going to arbitration. They cannot therefore be recovered as damages: *Baxendale* v. *London, Chatham, and Dover Railway Co.*, 23 W. R. 167, L. R. 10 Exch. 35. It is no answer to say that they could not tell the amount of the compensation; that observation would apply to every defendant against whom an action is brought for unliquidated damages. In any case the costs must be those taxed as between party and party, and not as between solicitor and client: *Barnett* v. *Corporation of Eccles*, [1900] 2 Q. B. 423.

Cur. adv. vult.

Dec. 21.—BUCKLEY, J., after stating the facts: At the time when the plaintiffs acquired the land they knew, as it seems to me, that such a state of things existed as that possibly or probably previous purchasers of land upon the estate had so taken their conveyances as that they would be entitled to rights over Tennyson-road, including so much of it as was included in the estate within the land coloured red on the plaintiffs' conveyance. I am satisfied, however, that as between the plaintiffs and defendant the bargain was made upon the footing that such rights of way, if any, over the land sold to the plaintiffs, as previous purchasers possessed should be abrogated, and that the plaintiffs should take the land discharged from those rights if they existed. [His lordship referred to a letter of the 6th of April, 1900, and to certain negotiations which took place before the purchase by the plaintiffs.] When I come to look at the conveyance and the plan upon it, the same thing is, to my mind, clear. The recital of the agreement of sale is that the price shall include compensation for various things which never could come into contemplation unless the railway company were going to use the land for the purpose of laying a line of railway upon it. These, it is said, are common form words in the cases of purchases by railway companies. This is true, but I cannot on that account disregard them. The conveyance further contains a provision that the plaintiffs are to erect and for ever maintain the fence which I have mentioned, and which, if constructed, will necessarily prevent the user of the road beyond the place where

the purchased land first attains its greater width from north to south. Having regard to these facts it is, in my opinion, plain that as between the defendant as vendor and the plaintiffs as purchasers the bargain was that so much of Tennyson-road as lay upon the plaintiffs' land should be abandoned, and if any rights of third parties were interfered with, it would result that it was for the defendant to make good to the plaintiffs any diminution in value of the property which as between them was the subject of the agreement and conveyance. The plaintiffs say that they are entitled to damages against the defendant, and that the damages are first, £510; secondly, the costs they have to pay on the arbitration and in the action; and thirdly, their own costs as between solicitor and client in the arbitration and action. I have to decide whether in this they are right.

It was decided by Joyce, J., in *Turner* v. *Moon*, that in an action for damages for breach of the covenant for title implied by section 7 of the Conveyancing and Law on Property Act, 1881 (which is this case), damages may be recovered for defect of title by reason of the existence of an undisclosed right of way. Upon the point there decided I simply follow, without expressing any opinion of my own, the decision of my brother Joyce. The defendant argues, however, that the plaintiffs here are not entitled to damages because they knew of the rights subsisting between Johnstone and Fisher (the defendant). I think they did know, but I also think that, for the reasons which I have stated, Fisher's conveyance was as between himself and the plaintiffs a conveyance intended to be a conveyance of the land discharged from those rights. It was decided in *Levett* v. *Witherington*, 1 Lutw. 317, that mere notice to a purchaser of a defect of title does not bar his right to recover; and in *Page* v. *Midland Railway Co.* it was further decided that no difference is to be made by reason of the fact that the defect of title appears upon the face of the conveyance. "There is no warrant" said Lindley, L.J., "for qualifying the Acts covenanted against by inserting 'save as herein appears,' or 'save as shown by the abstract,' or 'save as explained before the execution of this deed,' or any words to any such effect. If a vendor does not intend that his covenant for title shall extend to defects disclosed to the purcaser, whether on the face of the deed, or *aliunde*, the vendor must take care not to word his covenant so as in terms to cover such defects, or he must insert some clause in the deed clearly explaining and controlling his covenant." The knowledge which the purchasers here obtained by seeing the estate plan and knowing of the previous sales of plots upon the footing of that plan, was notice outside the conveyance. The fact that the plan had been deposited with the Hanwell District Council, and that other persons were entitled to use some portion at least of Tennyson-road, was notice on the face of the conveyance, but neither the one nor the other justifies the insertion into the conveyance of words qualifying the covenant in respect of the acts covenanted against. There was in this conveyance no express covenant which required qualification, but there was an implied covenant and, having regard to the decision in *Turner* v. *Moon* this implied covenant, unless qualified, gives rise to a right to damages. I have no doubt myself but that the defendant knew that the company contemplated the use, and intended that the company should use the purchased land in such a manner as that Tennyson-road, so far as it lay on that land, should never be constructed. I think that the defendant is liable in damages.

Then what is the measure of damages? It is, first, the £510 which the plaintiffs have been compelled to pay in order to enjoy the land in the actual state in which by the contract they were to enjoy it. To this is to be added, I think, the costs to which they were necessarily put in determining in the arbitration that £510 was the proper figure. Johnstone had claimed £5,000. Under section 68 of the Act of 1845, the company were bound either to admit that to be the figure or to proceed to arbitration. They did the latter, with the result that £510 was the amount awarded, and they had to pay the costs of Johnstone taxed as between party and party, and their own costs of the arbitration proceedings. They are, I think, entitled to recover all those as damages: *Rolph* v. *Crouch*. Then subsequently the company defended the action on the award. They cannot, in my opinion, claim as damages any of the costs which they either had to pay or which they incurred in that proceeding. They knew the facts from which they ought to have been aware that the rights were such as Bigham, J., subsequently decided them to be; and they ought not to have put Johnstone to bring the action. Those costs are not legal damages as between them and Fisher. I think, however, that the plaintiffs are entitled to recover the £510 and the taxed costs which they had to pay in the arbitration proceedings, and their own costs in the arbitration, and I give judgment for the damages thus ascertained, and the costs of the action. The costs of the plaintiffs in the arbitration must be their costs as between solicitor and client. This case is not the same as *Barnett* v. *Corporation of Eccles*. There is a distinction between cases where a person is entitled to an indemnity and where a person is simply recovering damages. In the one case he gets solicitor and client costs, in the other case not. The costs of the company are those they incurred. The matter must be treated as if Fisher, and not the railway company, had been the party opposing Johnstone, in which case, of course, they must have paid the costs of their own solicitor.

Judgment for the plaintiffs.

Jan. 18.—The matter was mentioned again on this date.

H. E. Wright, for the plaintiffs, said that a question had arisen as to whether the damages ought to include interest upon the £510 which the plaintiffs had had to pay. This interest was claimed in the statement of claim, and he submitted that the plaintiffs were entitled to it.

W. Mackenzie, for the defendant, submitted that such interest was not payable. The claim in the statement of claim was not a demand within the statute 3 & 4 Will. 4, c. 42, s. 28: *Rhymney Railway Co.* v. *Rhymney Iron Co.*, 38 W. R. 764, 25 Q. B. D. 146.

His lordship said that he had not intended the £510 to exclude interest upon it, which he thought that the plaintiffs were entitled to have.

Solicitors, *R. R. Nelson; Mills, Currie, & Gaskell.*

Chan. Div. } Jan. 12, 13.
Joyce, J. }

AINSWORTH v. WILDING. (a.)

Mortgage—Mortgagee in possession—Sale of part of mortgaged estate—Redemption—Account—Rests.

A mortgagee in possession from time to time sold

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

portions of the mortgaged property. He had in his hands at the dates of such sales a balance of rents and profits over disbursements.

Held, that the accounts were properly taken without making rests in the account of rents and profits at the date of each sale.

Thompson *v.* Hudson, 18 *W. R.* 1081, *L. R.* 10 *Eq.* 497, *considered and explained.*

Wrigley *v.* Gill, [1905] 1 *Ch.* 241, *followed.*

Held, also, that the expenses of a sale of mortgaged property are correctly deducted from the gross proceeds of the sale, and only the net proceeds must be brought into the account, although the mortgagee has in his hands a balance of rents and profits sufficient to pay such expenses.

Adjourned summons.

For some years previous to 1877 Richard and John Wilding acted as solicitors for one John Smith, who was a builder and quarry-owner, and they made large advances to him from time to time; they also acted as his agents, and received rents and other moneys on his account.

On the 7th of October, 1877, Smith gave the Wildings a mortgage on certain freehold and leasehold property to secure the sum of £12,500 with interest at 5 per cent. This sum was the amount which, according to the Wildings, was then due to them from Smith. But Smith was not satisfied that he owed them so much. In January, 1878, the Wildings gave Smith twenty-four hours' notice of their intention to sell the mortgaged property unless he paid off the amount. Smith at once brought an action against them for an account of what was due on their mortgage and for redemption.

Thomas Ainsworth was Smith's solicitor in this action until the summer of 1879, when a change of solicitors took place.

On the 28th of March, 1878, Malins, V.C., made a decree in Smith's action declaring that the mortgage of the 7th of October, 1877, ought to stand as a security for what was due at that date from Smith to the Wildings on the balance of account of the dealings and transactions between them with interest at 5 per cent. from the 7th of October, 1877. The decree went on to direct an account of what was due to the Wildings for principal and interest on their security, having regard to the declaration, and the judgment then proceeded to decree redemption in the ordinary way. The costs were reserved, but the Vice-Chancellor intimated his intention of making the Wildings pay all the costs if less than £12,500 was found on taking the accounts to be due from Smith to the Wildings on the 7th of October, 1877.

Under this decree accounts were carried in in the nature of an ordinary current account between the parties in which interest was calculated not only on what Smith owed the Wildings, but also on what the Wildings owed Smith for moneys received by them for him as his agents. There was much disputing over the accounts as to the true balance, but ultimately on the 4th of August, 1879, after Ainsworth had ceased to act for Smith, the accounts were agreed to and Smith signed a memorandum stating that on the 7th of October, 1877, he owed the Wildings on their security £11,805 3s. 1d., and he agreed to settle the action on those terms, and to pay his own costs and £100 towards the defendants' costs. This ended the disputes between Smith and the Wildings, and an order staying the proceedings on these terms was drawn up on the 9th of August, 1879, the £100 to be paid within two months. Previously, on the 8th of February, 1879, Smith had mortgaged the same property as that comprised in the mortgage of October, 1877, but subject to it, to Ainsworth.

In October, 1879, the Wildings entered into possession of the mortgaged property and from time to time sold portions of it. Smith never paid off any part of the principal money secured by the mortgage of October, 1877, and was adjudicated a bankrupt on the 21st of January, 1884, and died in 1892.

Richard Wilding died in 1884, leaving John Wilding solely entitled to the mortgage.

On the 22nd of August, 1890, Ainsworth, who was not a party to the former action, brought an action against John Wilding, Smith, and a third mortgagee for an account of what was due on the security of the 7th of October, 1877, for redemption, for foreclosure against the third mortgagees, and for damages against J. Wilding for alleged sales at an undervalue.

Ainsworth died in December, 1890, and the action was continued by his executors, the present plaintiffs.

After much intervening litigation as to an alleged consent judgment (see *Ainsworth* v. *Wilding*, 44 W. R. 540, [1896] 1 Ch. 673, and *Wilding* v. *Sanderson*, 45 W. R. 462. 675, [1897] 2 Ch. 534), this action was continued and the statement of claim as finally amended, in addition to what was asked in the original claim, asked to have an account of all the dealings and transactions between John Smith and the Wildings taken upon the principle of a current account, and, if necessary, that the alleged settled account might be re-opened.

The action came before Joyce. J., who made an order on the 3rd of August, 1901, declaring that the deed of the 7th of October, 1877, should stand as security for what was due at that date from Smith to the Wildings on the balance of account between them, together with interest at 5 per cent. from the 7th of October, 1877, and directing that the following accounts should be taken:

1. An account of what, having regard to the above declaration, was due to John Wilding under his security, such account to be taken as an ordinary mortgagee's account and to commence with the balance of £11,799 15s. 1d., being the sum of £11,805 3s. 1d. appearing in the account filed in the action of *Smith* v. *Wilding*, less £5 8s., the amount of one bill of costs, which account was to be treated as a settled account up to the 7th of October, 1877.

2. An account of the rents and profits of the property comprised in the mortgage of the 7th of October, 1877, received by the defendant or on his behalf.

3. An inquiry as to what parts of the property comprised in the said mortgage had been sold, and for what sums of money and by whom they had been received.

4. An account of the proceeds of any sale received by the defendant on his behalf.

The accounts had since been carried into chambers. They were in three parts. The first part was an account of the principal and interest due on the security, in which rests had been taken on the sale of any property by bringing in the net proceeds of such sale according to *Thompson* v. *Hudson*, 18 W. R. 1081, L. R. 10 Eq. 497. The second part was an account of the rents and profits and disbursements taken without any rests, and the third part was an account of the proceeds of sale of the property in which the expenses of sale had been deducted from the gross proceeds and only the net proceeds carried into the principal and interest account.

There had been a balance of rents and profits over disbursements since January, 1885. Rests had been taken in the principal and interest account on the 29th of November, 1886, the 2nd of December, 1890, and the 18th of November, 1891, when portions of the property had been sold.

The surplus of rents and profits in the hands of the mortgagee on the 29th of November, 1886, was £233,

on the 2nd of December, 1890, £1,118, and on the 18th of November, 1891, £1.166.

No rests had been taken since 1891 of the principal and interest account as there had been no sales subsequent to that date. The surplus rents and profits were not sufficient to pay the interest.

Objection was taken to certain items in the defendant's account which were adjourned to be dealt with by the judge.

The question for decision was whether the true effect of *Thompson* v. *Hudson* was that a general rest should be made in the principal and interest account by bringing in not only the proceeds of the sale, the occasion for the rest, but also any balance of rents and profits in the hands of the mortgagee at the date of such sale.

Younger, K.C., and *Leigh Clare*, for the plaintiffs, the representatives of Thomas Ainsworth.—These accounts are supposed to be prepared according to the decision in *Thompson* v. *Hudson*, rests being made whenever any of the mortgaged property was sold, the net proceeds of the sale being brought in and deducted from the principal debt and interest then due, but according to a true view of *Thompson* v. *Hudson* whenever a sale takes place a general rest ought to be made of all moneys in the mortgagee's hands, irrespective of where it was derived from. In *Thompson* v. *Hudson* the sale was only the occasion for the rest. What was brought into account was much more than the proceeds of the sale of the house at Albert-gate. Rests are not decreed as a matter of course, a case for them has to be made out—viz., if a mortgagee enters into possession when no interest is in arrear. In the present case annual rests would not be decreed because the interest was in arrear. The reasoning of Turner, L.J., in *Nelson* v. *Booth*, 6 W. R. 845, 3 De Gex & J. 119, that a mortgagee is not bound to receive his money by driblets, does not apply to a sale of part of the property, because by the sale the mortgagee shows his willingness to receive so much of his debt; and as surplus rents and profits are applicable in discharge of principal and interest as well as proceeds of sale, there is no reason why, the occasion for the rest having arisen by the action of the mortgagee—viz., by the sale—there should not be a general rest not only of the proceeds of such sale, but also of the balance of rents and profits in the mortgagee's hands at the date of such sale. As the mortgagee had in his hands rents and profits sufficient to pay the expenses of each sale, the amount brought into the principal and interest account ought to be the gross proceeds of such sale, and the expenses ought not to be deducted, but paid for out of the rents and profits.

Hughes, K.C., and *Austen Cartmell*, for John Wilding, the mortgagee.—The decision in *Thompson* v. *Hudson* only went to this point, that a mortgagee must bring into account the proceeds of sale and set them off against the principal and interest due at the date of the sale. The Master of the Rolls did not consider the question of rents and profits. The point was considered in the recent case of *Wrigley* v. *Gill*, [1905] 1 Ch. 241, by Warrington, J., who held it was not the usual practice in taking accounts against a mortgagee in possession to make rests in the account of rents and profits, at the date of the sale of the mortgaged property merely on the ground of such sale, and that *Thompson* v. *Hudson* was an exceptional case. In *Nelson* v. *Booth* Turner, L.J., pointed out that a mortgagee was not bound to receive his money by driblets, but different considerations arise if he sells part of the property; it was only equitable that he should bring in the proceeds of the sale, as he was realizing part of the *corpus*, and there was no rest, only a discharge of security *pro tanto*; but it was impossible to invest driblets. The reasoning that applied to *corpus* was quite different to that which applied to rents and profits which were only fruit. [JOYCE, J.—I cannot find a word in the reports of *Thompson* v. *Hudson* that rents and profits were taken into account; from the report in the Law Journal it is clear that only the proceeds of sale were taken into account; nothing is said in the order as to rents and profits.] The reasoning of the Master of the Rolls refers solely to the proceeds of sale, and looking at all the materials it is now clear that *Thompson* v. *Hudson* did not decide anything as to bringing in rents and profits in making a rest on the occasion of a sale, and further, it is against the ordinary practice.

Younger, K.C., replied.

JOYCE, J.—This action of *Ainsworth* v. *Wilding*, as I understand it, is practically an action for redemption by a second mortgagee against the first mortgagee, and a decree was made by me on the 3rd of August, 1901, directing (with some directions immaterial for the present purpose) common accounts. That decree contains no direction for making rests, and I see no reason for adding such a direction now, even if it would be allowable for me to do so. The accounts have been brought in, and what has been done as to sales of property has been this: The receipts from the sales have been brought in as debits against the mortgagee and credits to the mortgagor in the first account—namely, the account which is practically an account of what is due on the security, and brought in at the date of receipt.

Now what has been contended for by the plaintiffs has been this: They have started what, to my mind, is a new and ingenious theory, that whenever a mortgagee brings in an account of what he has received from a sale a rest is to be made at that date in the account of rents and profits, so as to bring in any balance which would be in the hands of the mortgagee from the rents and profits. No authority for this proposition has been or, I believe, could be cited, but this was said to have been done in the well-known case of *Thompson* v. *Hudson*, 18 W. R. 1081, L. R. 10 Eq. 497, and to be really involved in the decision in that case. Now the law or practice, whichever you call it, on this subject has recently been stated, and, I think, correctly stated by Warrington, J., in the case of *Wrigley* v. *Gill*, where he says that the practice is this: "The first account—that is, the account of what is due—is treated as separate from the account of rents and profits. If money is received from an exercise of the power of sale the money is credited to the mortgagor under the first account—that is, the account of what is due—at the date at which it is received, but unless rests have been directed in the judgment the accounts of rents and profits, following the usual rule, goes on without rests." And later on he says: "The ordinary rule is admitted that in the absence of special circumstances the account against a mortgagee in possession is not directed with rests—that is to say, the account of rents and profits runs on from beginning to end without reference to the question whether he has at any particular time had in his hands more than sufficient to pay the interest or not, the reason being that a mortgagee is not bound to accept payment by driblets, but is entitled to have the account taken as a whole, and not to be treated as repaid until that account has been so taken." Now, on further investigation it turns out that *Thompson* v. *Hudson* is no authority against what Warrington, J., has stated. Certainly the question as to making the rest in the account of rents and profits

does not appear in any of the reports to have been argued or even referred to. No doubt the Master of the Rolls does mention a very large sum as having been received, a sum so large that, I suppose, it was thought by some of the counsel, and by myself too, that it must have consisted in great part of receipts in respect of rents and profits. But, on looking into the contemporaneous reports of the case, it appears in the report in the Law Journal, 40 L. J. Ch., there having been two mortgages in the case of *Thompson* v. *Hudson* (which is quite an immaterial circumstance), and the interest on both mortgages being in arrear, the plaintiffs entered into possession of all the mortgaged property. The date of the entry into possession is given in the report in the WEEKLY REPORTER as 1861. The report in the Law Journal, at p. 28, reads: "And from time to time, previous to May, 1861, sold portions of the Whitby estate, and applied the proceeds in reduction of interest on both mortgages, so as to leave in that month only about £1,000 due in respect of such interest." It appears that the plaintiffs had been in possession but a very short time. I conclude from these reports that the sums received consisted of receipts in respect of purchase-money of various lots of the Whitby estate, the aggregate of which sums so received as purchase-money, until the £21,600 was received from the Albert-gate house, was less than the interest due by £1,000. If possibly it could be ascertained that any part of the amount received in that case was received in respect of rents, there was no order that it was to be applied in reduction of interest, but the mortgagee himself gave credit for the amount. On the whole I see no reason whatever to suspect that there could have been anything of the kind, or that there had been any receipt of rents at all. Taking that report alone there is certainly no decision, express or implied, that what, had been received in respect of rents must be given credit for against interest due at the date of the sale, and when we look at the order itself it is perfectly plain that no such order was made, because the only order made was as follows: "His lordship being of opinion that the sale moneys received by the plaintiffs from the sale of the mortgage properties are to be applied first in payment of interest, costs, and expenses due to them at the dates when such sale moneys were respectively received, and then in reduction of principal due at these dates respectively, refers the certificate back to chambers to vary."

It appears to me to be an entirely new theory that a rest is to be made in the account of rents and profits whenever—because it must go to that length—any sale of any kind took place of any part of the mortgage property. In my opinion the objection raised to the account on this ground fails, and the account must be taken in the way I have stated without making rests, and no rest is to be made in the account of rents and profits.

The costs of any sale of the mortgage property are always deducted from the gross amount of the proceeds of the sale, and only the net proceeds of the sale are brought into the account of what is due notwithstanding there may be a balance of rents and profits in the hands of the mortgagee sufficient to pay the expenses of the sale.

Solicitors for the plaintiffs, *Bower, Cotton, & Bower.*

Solicitors for the defendants, *Robbins, Billing, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Phillimore and Kennedy, JJ.) July 12, 1904.

SCOTT v. PILLINER. (a.)

Local government—Bye-law—Sale of paper devoted wholly to giving probable result of races and other competitions—Validity of bye-law—Local Government Act, 1888 (51 & 52 *Vict. c.* 4), *s.* 16.

A county council purporting to act under the powers granted to them by section 16 *of the Local Government Act,* 1888, *made a bye-law imposing a penalty on any person frequenting and using any street or other public place "for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions."*

Held (*by* Lord Alverstone L.C.J., *and* Kennedy, J., Phillimore, J., *dissenting*), *that the bye-law was invalid, as it was in its terms unreasonable.*

Case stated.

An information was preferred against the appellant by the respondent, a superintendent of police, charging him with frequenting and using on the 19th of April, 1904, a certain street or public place situate in the parish of Handsworth, and called Soho-street, and then and there selling or distributing a certain paper devoted mainly to giving information as to the probable result of races, steeplechases, and other competitions contrary to a bye-law made by the Staffordshire County Council under section 16 of the Local Government Act, 1888.

The bye-law was the following: "No persons shall frequent and use any street or other public place either on behalf of himself or any other person for the purpose of selling or distributing any paper or matter or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, and other competitions. Every person contravening any of the foregoing provisions shall be liable to a penalty not exceeding £5."

The justices convicted the appellant and fined him £5, but stated this case for the opinion of the court as to the validity or otherwise of the bye-law.

Danckwerts, K.C. (*Pritchett* with him).—This bye-law is invalid, firstly, because it is too wide. It goes far beyond *Thomas* v. *Sutters,* 48 W. R. 133 [1900] 1 Ch. 10. Secondly, because it is unreasonable, as it punishes acts which are quite innocent in themselves.

Avory, K.C. (*Shakespeare* with him).—This bye-law is aimed at putting down street betting, and it is recognized that the sale of tips on races does lead to betting. The bye-law is nearly covered by *Thomas* v. *Sutters.*

Danckwerts, K.C., in reply.

PHILLIMORE, J.—I regret to have to disagree with the other members of the court, but I think that at times the courts have been too astute in finding grounds for holding bye-laws invalid. Parliament has given these powers for the good government of their respective districts to county councils and other bodies, and though Parliament itself legislates for the good government of the United Kingdom, I think the local authorities can exercise the powers given them within their particular areas, and if additional provision for the good government of those areas are found to be necessary I think we ought not to interfere.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

It may very well be that these papers do facilitate street betting, as their only reason for existence is that they appear to give information as to the probable result of races and other competitions. I think that this bye-law is reasonable, or at any rate not unreasonable, and that it is within the power of the county council to make it, and that it ought to be supported.

KENNEDY, J.—I feel obliged to come to a different conclusion. This bye-law is framed for the purpose of subjecting to penalties persons who "frequent and use any street or other public place . . . for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, and other competitions." It seems to me that we must endeavour to construe such a bye-law entirely on legal principles, and apart from any consideration of what might be desirable as new legislation. That which renders a person liable to a penalty under this bye-law is the selling or distributing of written or printed matter "devoted" wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions. Now it cannot be disputed that such information may be given without any breach of the law at all. It is not in itself immoral. It is not necessarily information as to bets, or as to where they may be made. It is harmless to most people. The words are wide enough to include information as to the probable result of any athletic contest. I should be slow to think that it was reasonable to penalize the sale or distribution of papers giving information as to these things merely because those who buy such a paper will have an additional opportunity of getting knowledge or suggestions which may lead them to make bets. One may have a strong view as to the mischief of betting, but one's objection to it ought not to govern the decision of this case. The question for us is whether it is reasonable for the county council to penalize the sale or distribution of such newspapers or other documents as may be held to come within the very wide description given in the bye-law. The question must be dealt with on broad grounds, and I think it would be going too far to say that this bye-law is reasonable merely because most of the information contained may help people to make bets.

Lord ALVERSTONE, L.C.J.—I also think the bye-law cannot be supported. I quite agree with the principles laid down by my brother Phillimore, but I also think bye-laws laid down by the local authority should be free from ambiguity and should not make things unlawful which are otherwise perfectly lawful. I think this bye-law is open to the objection that it may bring within its purview papers which are mainly devoted to giving results of competitions on which there might be no betting at all. I do not wish to say that a bye-law could not be framed so as to suppress street betting by means of tipsters. I think a bye-law might be passed so as to hit the real mischief and to be confined to it. Both on the ground of uncertainty, and on the ground that it may strike at perfectly innocent sales of newspapers I think that this bye-law is bad and cannot be supported.

Appeal allowed.

Solicitors for appellant, *Judge & Priestley*, for *Philip Baker*, Birmingham.

Solicitor for respondent, *H. M. Davis*, for *Hand & Co.*, Stafford.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) } April 13; May 3, 1904.

In re ALLISON, JOHNSON, & FOSTER (LIMITED). *Ex parte* BIRKENSHAW. (a.)

Company—Winding up—Invalid appointment of liquidator—Claim for remuneration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 67.

A limited company, resolved on a voluntary winding up, and appointed the appellant, liquidator. This resolution was subsequently set aside as invalid by an order of the court. On a compulsory winding up of the company the appellant claimed to prove as a creditor for work done by him while purporting to act as liquidator prior to the order of the court.

Held, that section 67 of the Companies Act, 1862, *could not be used to justify the appellant's claim against the company for services as liquidator, as he had never had valid authority from the company to act as liquidator, nor was the appellant entitled at common law to be paid on a* quantum meruit *for such services; but that the appellant was entitled to claim reasonable remuneration for such work as he had done for the company for business purposes unconnected with the voluntary winding up, or which had been used by the official receiver and liquidator in the compulsory winding up with full knowledge of the facts.*

This was an appeal by Birkenshaw from the decision of his Honour Judge Raikes, K.C., sitting at Kingston-upon-Hull County Court, who upheld the decision of the official receiver and liquidator in the winding up of Allison, Johnson, & Foster (Limited), rejecting the claim of the appellant to prove as a creditor in the winding up.

The facts of the case as stated in the written judgment of the court are as follows: The company, in January, 1903, was embarrassed by such financial difficulties that at a directors' meeting, on the 16th of that month, which seems to have been attended only by the chairman and one other director, it was resolved that it was advisable to wind up the company voluntarily, and that the appellant, William Parker Birkenshaw, who is a chartered accountant, should be appointed liquidator.

On the following 28th of January a meeting which is described in the company's minute book as an extraordinary general meeting of shareholders was held, at which resolutions to the same effect are recorded as having been passed, but only Mr. Hushwood Irving Foster (the chairman) and a Mr. F. E. Johnson were present, of whom the last-named took no part in the voting; and the proceedings were set aside as invalid *ab initio* by the order of Farwell, J., in the following July.

On the same day—the 28th of January—the company's solicitors, Messrs. Shackles & Dunkerley, wrote to Mr. Birkenshaw and informed him of his appointment, under the resolutions, as liquidator, which he accepted, and he continued to act until the 25th of July, when he was served with a writ and notice of an *interim* injunction.

The company had since been in course of winding up under the order of the court.

The work in respect of which the claim was made was work done by Birkenshaw, as liquidator under the resolutions of the 28th of January, employing in portions of it, as a liquidator who is an accountant commonly does, both his partner Young and the clerks in the firm's office. Particulars of the work

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

appear in a statement which he sent in with the claim to the official receiver and liquidator.

Adams, for the appellant.—The decision of the learned county court judge was wrong. The appellant is entitled to claim in respect of the work he did for the company as liquidator. Section 67 of the Companies Act, 1862, provides, *inter alia*, that "all appointments of . . . liquidators, shall be deemed to be valid, and all acts done by such . . . liquidators shall be valid, notwithstanding any defect that may be discovered in their appointments or qualifications." The company benefited by the work he did as liquidator, and he is entitled to be paid for such work at any rate on a *quantum meruit*.

He cited *In re Bridport Old Brewery Co.*, 15 W. R. 291, L. R. 2 Ch. 191; *Dawson* v. *African Consolidated Land and Trading Co.*, 46 W. R. 132 [1898] 1 Ch. 6; and *British Asbestos Co.* v. *Boyd*, 51 W. R. 667, [1903] 2 Ch. 439.

Tindal Atkinson, K.C. (*H. S. Cautley* with him), for the respondents.—The appellant is not entitled to be paid for his services as a liquidator either under section 67 of the Companies Act, 1862, or on a *quantum meruit*. The object of section 67 is to protect outside persons who deal with a company; it was not intended to apply to the case of a liquidator in regard to the company itself.

He referred to the judgment of Chitty, J., in *Harben* v. *Phillips*, 31 W. R. 173, 23 Ch. D. 14, at pp. 27, 28.

Adams replied.

Cur. adv. vult.

May 3.—KENNEDY, J., read the following judgment of the court: In this case the judgment of the learned county court judge at Kingston-upon-Hull has upheld the rejection by the official receiver and liquidator of the claim of Messrs. Birkenshaw & Young, trading as Carill, Birkenshaw, & Ferguson, to prove as creditors in the winding up of the above-named company for £165 0*s*. 3d. The appellants ask us to reverse that judgment. The material facts are few and simple, but they raise a point of some difficulty upon which there appears to be no express or direct authority in the reports. [The learned judge then stated the facts as above set out, and continued:] It appears to us that the judgment of the county court judge in so far as it upholds the rejection *in toto* of the appellants' claim ought not to be upheld, but should be varied in the way and to the extent which I will mention later on. It was sought by the appellants' counsel to justify the claim on, substantially, two alternative grounds: first, as valid under the 67th section of the Companies Act, 1862; secondly, as a good claim at common law for remuneration upon the basis of *quantum meruit* in respect of work and labour done for the company at its request. In regard to the first and main contention of the appellants, I am of opinion that the learned county court judge was right. The 67th section validates acts done by *de facto* directors, managers, and liquidators, notwithstanding any defect that may be afterwards discovered in their appointments or qualifications. It has been held that the provision covers not merely acts which affect the relations between the company and persons outside the company who have no notice of the defect, but also acts affecting members in their relation to the company and the relations of members *inter se*: *Dawson* v. *African Consolidated Co.*, and *British Asbestos Co.* v. *Boyd*, But I do not see on principle (and no authority for the contention was cited to us on the argument) how how this provision can be used to justify the claim of a person against the company for services as liquidator when he never had authority from the company to act as liquidator. The remuneration of a liquidator in a voluntary winding up may be fixed by a resolution of the company (the Companies Act, 1862, s. 133 (3)); if not so fixed, it has to be settled by the court, as the court thinks just: see *In re The Amalgamated Syndicates* (*Limited*), [1901] 2 Ch. 181, 49 W. R. Dig. 35. In this case there was no resolution of the company at the so-called meeting of the 28th of January for fixing Mr. Birkenshaw's remuneration as liquidator, and if there had been it would have been invalid; and I am at a loss to see how the court can be asked to award him remuneration out of the funds of the company in liquidation for work done, whether done by himself personally, or under his direction by his clerks or partners, in a capacity in which he was never validly authorized by the company to act. Nor does the appellant, in our judgment, make out a good common law claim to reward for the work he did, merely because he did it. There can be no implied contract for payment arising out of acceptance of the work done, where the work was done upon an express request which turns out to be no request at all, but which down to the time when the whole of the work had been done was supposed by both parties to be valid and operative.

But we think that, if and so far as the appellant can prove that his labours have been beneficial to the company and have been accepted by the company for business purposes of the company unconnected with liquidation, or have been utilized, with full knowledge of the facts, by the official receiver and liquidator of the company in the winding up, which has been carried on under the court's order, it is consistent alike with law and equity for us to hold that there has been such an acceptance of them upon an implied promise of reward, a promise of reward to be implied from the making use of materials prepared by him and for which they must have paid someone else if they did not use what he had done, as entitled Mr. Birkenshaw to this extent to claim to be remunerated on the basis of a *quantum meruit*. So holding, we think that the proper direction to give on the appellants' application would be that the items of the appellants' claim should be investigated by the registrar, and that the claim should be admitted by the official receiver and liquidator for such a sum, if any, as should upon such investigation be found to be just and proper remuneration for the work, if any, done by Mr. Birkenshaw (whether personally or under his direction, by his partner or the firm's clerks) since the 28th of January, 1903, of which the company had the benefit of for business purposes unconnected with the liquidation, or of which the official receiver and liquidator has availed himself in the winding up.

Order varied accordingly.

Solicitors for the appellant, *Woodhouse & Davidson*, for *J. T. Woodhouse, Aske, & Ferens*, Hull.

Solicitors for the respondents, *Maples, Teesdale, & Co.*, for *Davis*, Hull.

Prob. Div. & Adm. Div. Admiralty. } Aug. 1, 8, 1904.

"THE ELMVILLE." (a.)

Ship—Necessaries—Disbursements by master—Bill of Exchange—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 167-742.

A master defended, and lost, an action on a bill of exchange given by him for necessaries supplied to his ship, which bill was dishonoured by his owners.

The Court held that in the circumstances of the case the costs of the action incurred by the master were not liabilities properly incurred on account of the ship within the meaning of section 167 *of the Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *inasmuch as the defence did not appear to be reasonably necessary in the interest of the ship.*

Motion.

On the 8th of December, 1903, the master of the steamship *Elmville* drew a bill of exchange upon his owners for a sum of £300 odd for the supply of bunker coal and certain disbursements for pilotage and harbour dues. The bill was dishonoured and an action was commenced against the master by the holders. *The Elmville* had been mortgaged and the mortgagees commenced an action shortly after the action on the bill was instituted, and the master also instituted an action against his owners on the bill of exchange and for other disbursements and for his own wages, and judgment went by default, a reference and the question of priorities being agreed to. The mortgagees' action also went by default, the vessel being ordered to be sold. The holders of the bill of exchange also obtained judgment against the master on the bill of exchange, in an action which the master defended. The registrar at the reference in the master's action disallowed the master's own taxed costs in the unsuccessful action on the bill of exchange, and also the plaintiffs' costs in that action, which the master had become liable to pay.

The master moved to vary the report of the registrar in respect of the disallowance of his costs incurred in unsuccessfully defending the action on the bill, and further moved for a declaration that he was entitled to claim a bonus of £50 awarded in respect of wages in priority to the claims of the mortgagees of the vessel.

Balloch, for the appellant.

Stephens, for the respondents, the owners of the vessel.

JEUNE, P., in giving judgment, said: It appears to me that this case is substantially covered by authority. The question is whether the master is entitled to claim not only the actual disbursements which he has made in the ordinary sense of the word, but the costs which he has incurred in an action on a bill of exchange to which he was a party. I do not think any question arises about this being a disbursement within the meaning of the Admiralty Court Act of 1861, s. 10, because although the money has not been actually spent, still I think if it was all proper expenditure made by the master of the ship it would fall within that definition. I think the authority of *The Feronia,* 2 L. R. 2 Ad. & Ecc. 65, which to my mind covers the principle upon which this case is to be decided, would cover the costs for which the master was liable, although he has not actually paid them, if they were, when paid, within the terms which were considered in *The Feronia* to be disbursements. *The Feronia* laid it down in broad terms that all proper expenditure made by the master were to be considered as disbursements within the meaning of the Act, and the emphasis in that view appears to me to be that the payment must be made by the master of the ship as such master. Upon that matter very much, indeed, turns, because in the subsequent case of *The Orienta,* [1895] P. 49, 43 W. R. Dig. 170, in which I had occasion to consider the matter fully—perhaps needlessly fully, because the Court of Appeal thought it a more simple matter than it appeared to me, though they came to the same decision as that which I had arrived at—the question was, I think, really whether the liability was a liability incurred in terms by the master in his office as master, or merely by his being the drawer of a bill at the request of his owners, irrespective of his being master. That was the view taken in a simple and decisive way by the Court of Appeal in *The Orienta.* The judgment given by Lord Esher, of course the very highest possible authority on a question of this kind, puts the matter very simply as follows: "For a century or more it has been common knowledge that the master is only authorized to pledge his owner's credit for what may be called 'things necessary' for the ship; that is to say, he can pledge his owner's credit if he is in a position where it is necessary, for the purposes of his duty, that these things should be supplied, and he cannot have recourse to his owners before ordering them, just as he can give a bottomry bond on the ship where the necessity arises in the sense which I have just stated. But then there come these Acts of Parliament, which say he should have a lien for disbursements. Now, if he should have a lien upon the ship, then the ship is bound to him; but the master cannot bind the ship to himself by ordering goods which he was not authorized to order at all, so as to pledge his owner's credit for them. The real meaning of the word 'disbursements' in Admiralty practice is disbursements by the master, which he makes himself liable for in respect of necessary things for the ship, for the purposes of navigation, which he, as master of the ship, is there to carry out—necessary in the sense that they must be had immediately—and when the owner is not there, able to give the order, and he is not so near to the master that the master can ask for his authority, and the master is therefore obliged, necessarily, to render himself liable in order to carry out his duty as master. Here no disbursements were made by the master; no goods were ordered by the master at all; no liability was incurred by the master in respect of these goods. He is not liable for the price of the coals, though it may be that the bill is drawn for the exact price. What he has done is, at the request of his owners, to make himself drawer of the bill of exchange which the owners were to accept; but it does not make the the master liable to anybody unless the owners dishonour the bill when it becomes due and the proper notices have been given. That is not a liability in respect of the coals—that is a liability is respect of the bill of exchange. It is not a liability incurred by him in his office as master, but by his being the drawer of the bill at the request of his owners irrespective of his being master." That appears to me to govern the principle in this case. Being the master he no doubt drew the bill, but when we come to the question whether he was justified in defending the action or making the ship liable for the costs of that defence, then I have to consider whether it was necessary in the interests of the ship to have defended that action. There my difficulty arises, because I confess I do not see why it was. He might perfectly well have allowed judgment to go by default. I do not think there was any real defence.

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

He acted as an individual and not as master of the vessel, and even if there was some sort of request to him by the owners to defend, I do not think that was addressed to him as master of the vessel for the purposes of the vessel, but addressed to him on account of the accident of his being a party to the bill of exchange, in which the owners were interested. To use the words of Lord Esher, the liability incurred by him in respect of costs was not a liability incurred by him in his office as master, but by his being the drawer of the bill at the request of his owners, irrespective of his being master. I think, therefore, that the captain cannot have the costs of this action against the ship.

Solicitors for the appellant, *Stokes & Stokes.*

Solicitors for the owners and mortgagees, *Williamson, Hill, & Co.*, for *Ingledew & Co.*, Cardiff.

K. B. Div. (Channell, J.) April 18, 19, 1904.

SMYTH (*Appellant*) *v.* STRETTON (*Respondent*). (*a.*)

Inland Revenue—Income tax—Assistant master at schools—Liability to income tax on increase of salary—Scheme for provident fund—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Schedule E.*

Under a provident fund scheme for the year 1900 *at Dulwich College it was provided that with respect to assistant masters that the following increase of salaries should be granted from the date on which the scheme came into operation, subject to certain conditions:* "(a) *Assistant masters having not less than five years' but less than fifteen years' service an increase of* 5 *per cent.;* (b) *assistant masters having not less than fifteen years' service and over an increase of* 7½ *per cent.;* (c) *a further addition, equal in amount to the above sums, to be granted from the same date to the assistant masters alluded to in* (a) *and* (b) *subject to certain conditions.*" *All assistant masters were required to become members of the fund at the expiration of five years from their respective appointments. The whole of the above increases of salary were not to be paid to the masters, but to be retained by the governors and accumulated at compound interest for the purpose of forming the said provident fund.*

Among the conditions to which the above increases of salary were subject were that assistant masters having less than ten years' service who might resign their appointments, or from any other cause than ill-health cease to belong to the college, should be entitled to receive the total increase sanctioned by (a) *and the accumulations thereof, but should not receive the additional increase sanctioned by* (c) *or the accumulations thereof. In the event of any such assistant master retiring from ill-health the governors, in addition to the increase sanctioned by* (a), *might grant him the further* 5 *per cent. sanctioned by* (c) *and the accumulations thereof. Masters of over ten years' service were to receive on retirement before the age of sixty the total sum due under* (a) *or* (b) *and* (c) *with accumulations. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to receive the increase sanctioned by* (c) *or accumulations thereof. Any additional increase under* (c) *remaining unissued was to be credited to the fund for exceptional cases.*

Held, that the true effect of the scheme was to add the sums specified in both (a) *and* (c) *to the salary of assistant master; and that the respondent, an assistant master, was liable under section* 146, *Schedule E, of the Income Tax Act,* 1842, *to pay income tax on that addition to his salary.*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Case stated by the Income Tax Commissioners for the Division of East Brixton.

The respondent, one of the assistant masters of Dulwich College, appealed against an assessment made upon him under Schedule E of the Income Tax Acts in the sum of £385 in respect of his emoluments as assistant master received from the governors of Dulwich College for the year ended the 5th of April, 1901, on the ground that the assessment included £35 not liable to taxation, being the amount placed to his credit by the governors under the provident fund scheme for the year 1900.

The material parts of the scheme in question were as follows:

As to the present assistant masters:

(1) That the following increase of salaries shall be granted from the date on which the scheme comes into operation, subject to the conditions hereinafter mentioned: (*a*) Assistant masters having not less than five years' but less than fifteen years' service, an increase of 5 per cent.; (*b*) assistant masters having not less than fifteen years' service and over, an increase of 7½ per cent.; (*c*) a further addition, equal in amount to the above sums, shall be granted from the same date to the assistant masters alluded to in (*a*) and (*b*), such addition being, however, subject to the conditions provided by paragraph 5; (*d*) assistant masters not having fifteen years' service shall, on reaching that period, be eligible for the increase sanctioned by (*b*) and (*c*); (*e*) in the case of the few present assistant masters of advanced age, it shall be open to the governors to grant the maximum increase alluded to in (*b*) and (*c*).

As to future assistant masters:

(2) That future assistant masters shall in like manner, on attaining five years' service from the date of their appointment, be entitled to the increase of 5 per cent. as in clause 1 (*a*), and to the additional increase of 5 per cent. as in clause 1 (*c*), but shall not be entitled to any further increase.

As to all assistant masters:

(3) That all assistant masters shall be required to become members of the fund at the expiration of five years from the date of their respective appointments.

(4) That the whole of the above increases of salary shall not be paid to the masters, but shall be retained by the governors and accumulated at compound interest for the purpose of forming the said provident fund, but subject to the provisions hereinafter contained.

(5) That assistant masters having less than ten years' service who may resign their appointments, or from any other cause than ill-health cease to belong to the college, shall be entitled to receive the total increase sanctioned by (*a*) and the accumulations thereof, but shall not receive the additional increase sanctioned by (*c*) or the accumulations thereof. In the event of any such assistant master retiring from ill-health, the governors, in addition to the increase sanctioned by (*a*), may grant him the further 5 per cent. sanctioned by (*c*), and the accumulations thereof. In the event of death of any such assistant master whilst in the service of the college, the 5 per cent. due by (*c*) as well as under (*a*), with the accumulations thereof, shall be paid to his legal representative.

(6) That assistant masters who shall have served ten years or upwards, and who may retire before the age of sixty from any other cause than misconduct, shall receive the total sum due to them respectively under (*a*) or (*b*) and (*c*), and the accumulations thereof. In the event of death before the age of sixty whilst in the

service of the college, the full amount credited the assistant master in the fund books shall be paid to his legal representative.

(7) That assistant masters who shall at any time be removed for misconduct, or having been guilty of misconduct may be allowed to resign—such misconduct being certified to by the master of the college—shall not receive the additional increase sanctioned by (c) or the accumulations thereof.

There were further provisions in the scheme, but these are not material to the point in issue.

The appellant contended (1) that he had no actual enjoyment of the sum of £35, it being in the nature of a bonus at the end of his career as a master at the college, and that he could not raise any money on the sum; (2) that with respect to a moiety of the sum it was uncertain whether it would ever be received, as under paragraph (c) of the scheme power was reserved by the governors to refuse such part of the grant—in other words, that the moiety was contingent, not vested in character, and therefore could not be described as income in any way.

It was also argued that the sums credited under the scheme did not form the subject of agreement when the appellant entered the employ of the governors, or of any subsequent agreement, and that it was open to question whether they were legally recoverable.

In support of the assessment the Crown surveyor quoted the charging words under Schedule E of the Income Tax Act, 1842, s. 146, whereby all emoluments "accruing by reason of such offices" are made liable to assessment, and contended that the whole amount credited was practically an addition to the annual income, performing the function of a payment to a superannuation fund, and thus relieving the appellant from the necessity of making similar provision out of the salary actually paid to him during the year in question; that the possibility of forfeiture was too remote to affect the question, and that the scheme did not comply with the conditions laid down for deduction in the way of life insurance premiums by section 54 of 16 & 17 Vict. c. 34, as amended.

The commissioners were of opinion that the sum of £35 was not liable to taxation, and reduced the assessment accordingly from £385 to £350.

Sir E. Carson, S.G. (*S. A. T. Rowlatt* with him), for the appellant.

Danckwerts, K.C. (*Ellis J. Griffith* with him), for the respondent.

April 19.—CHANNELL, J.—This case was argued before me yesterday, and I think it better for me to give judgment in it whilst the matter is fresh in my mind, though I cannot say that I am altogether satisfied with the decision that I am about to come to. It seems to me to depend upon this: There is a scheme established by the governors of Dulwich College, and the question is whether the true effect of that scheme is to increase the salaries of the assistant masters, imposing at the same time an obligation upon them to deal with a portion of the increased salaries in a certain way; or whether the trueeffect of the scheme, when you look at the substance of it, is not really to increase the salaries, but to give to the masters upon their ceasing to hold the position of assistant masters gratuities or allowances. I do not use the word "gratuities" in the sense that there is no consideration for it, because the services of the masters during the time that they serve, after the arrangement is made, are no doubt consideration for it, but retiring bonuses, or something of that kind, when they cease. If that is the true effect of the scheme then I do not think it becomes salary for the purposes of taxation, and, on the whole, I agree with what counsel for the respondent says, that you must look at the substance of it and not the words. But, at the same time, I do not say that you must disregard the words, because the fact is, as I think it is in this case, that the objects of the scheme could have been carried out in two different ways. It could have been done either by increasing the salaries and saying: "If we increase your salaries you must devote a certain portion of them to certain purposes," or it could have been carried out by giving them retiring bonuses. Then, if you are left in doubt as to which of those two ways the governing body have in fact carried it out, I do not think you can do otherwise than look at the words they use. Now, in this case this scheme deals with two different percentages of 5 per cent. each; there is another of 7½ per cent., which does not apply to this particular master, but stands on precisely the same footing as the first 5 per cent. that we have to deal with, and we may leave that out. There are two percentages of 5 per cent. under clause (a) and clause (c) in the first section of the scheme. They are substantially different in my opinion. They both come under the same words as to the increase of salary, and each party is entitled to draw an argument, and each party has drawn an argument from the fact that they are lumped together. Counsel for the appellant say that (a) is quite clearly in their favour and therefore that I must come to the conclusion that the entirety is an increase of salary. On the other hand, counsel for the respondent says that (c) is quite clearly in his favour, and it is not a sum which the assistant masters ever get at all except as a matter of discretion and bounty, and that therefore I must take it, as (c) is heaped together with (a), neither (a) nor (c) are increases of salary. That prevents me from getting much benefit from either argument; they must be set off against one another, and one has to look at what the real substance of the thing is. In this case I have to deal with a decision which certainly is very much in point, and that is the decision of *Bell* v. *Gribble* and *Hudson* v. *Gribble*, 51 W. R. 457, [1903] 1 K. B. 517. That establishes, if authority were wanted (I think for the main proposition authority clearly existed before), that a sum recoverable by way of salary or wages is not the less salary or wages taxable, because for some reason or other the person who receives it has not got the full right to apply it just as he likes. The fact that income which is income, but which has even by operation of some statute to be devoted compulsorily to some purpose or another, does not prevent it being income. That is decided, of course, by one of the various Mersey Docks cases—namely, *Mersey Docks* v. *Lucas*, 32 W. R. 34, 8 App. Cas. 891. But this case of *Bell* v. *Gribble* goes a little further. There is the case dealt with by Mathew, L.J.: "Suppose in the case of a marriage settlement a man agrees to set apart out of his salary at his office so much every year by way of investment. According to Mr. Asquith's argument that would not be income, but really it is clear in each of the cases I have mentioned the payment is purely voluntary, and is of the same character as a payment made by a thrifty man who out of his salary reserves so much every year for old age or for contingencies." Now, the case is quite clear where a man has a salary from his office, which is what the Lord Justice puts, and by agreement with somebody else, I presume his father-in-law, has bound himself to set apart a certain portion of that salary year by year, and save it and invest it for the benefit of his wife and children; it still is income, although he has contracted with somebody else to employ it in a particular way, and to save it; but the decision in *Bell* v. *Gribble* and *Hudson* v. *Gribble* goes beyond that,

because it applies the same rule to a case where the money comes from the person with whom the contract is made to apply it in a particular way. In *Bell* v. *Gribble* it was a case of an Act of Parliament of the city of Manchester enabling them to establish a provident fund for their servants, but it was dealt with as a case of contract, and was a case of contract, of course; the statute was merely the authority of the corporation to contract, and the servants who became servants, and who need not have become servants, were dealt with as contracting with the corporation upon those terms. It is an extension of the illustration Mathew, L.J., was giving, because there is a substantial difference between a sum placed out of the disposal of the person who is being dealt with as having got the enjoyment of it, if it is placed out of his disposal by a contract with the person from whom he gets it. There is a distinction between that and his getting it from one source and contracting with another person to deal with it in a certain manner. I think it is a substantial difference. I may illustrate it by what I think is a pretty well known illustration relating to a technical subject, though not of use beyond an illustration, and that is the law in reference to bills of sale. If a borrower is getting from a lender an advance on a bill of sale it is legitimate to treat the entire sum purporting to be advanced as now advanced notwithstanding that there are some deductions made from that sum for the purpose of paying sums which the borrower is by some other existing independent obligation liable to pay, such as to deduct sums payable for rent, and so on. Those may be properly treated, as I understand the law, as part of the advance, and the advance may be stated as an advance of the entire sum, notwithstanding a portion of it is detained by the lender for the purpose of paying the sum due on an existing obligation of the borrower for his rent or for other matters. But if a sum is detained by the lender from the borrower for some agreed bonus or for something that there is no obligation of the borrower to pay other than the obligation created by the contract that is being made between the parties at the time, then you may not state the entire amount to be an advance made at the time. That illustrates what I mean—that there is a substantial difference between a sum being detained by the person who would otherwise pay it, by reason of a right to detain it that is created as part of the same contract which he is carrying out, and to that extent, therefore, it seems to me that the decision in *Bell* v. *Gribble* and *Hudson* v. *Gribble* goes beyond what the previous cases and the illustration of Mathew, L.J., has established. But it is binding, and it seems to me that it creates a difficulty in my saying that the governing body here did not mean as to both of these sums really to increase the salary, and to increase the salary with a view of enabling the assistant masters, without losing money, to take part in this provident fund, and not only enabling them to do it, but binding them to do it. In *Bell* v. *Gribble* the servants were bound to make those payments or to allow those deductions as part of the terms of their service, just as here this becomes part of the engagement of these assistant masters from the time that it came into operation, and whether they are previous masters or newly-appointed masters really makes no difference for the purpose.

I think, under the circumstances, that I am bound to hold that this scheme really meant what it said; that it did mean to increase the salaries, and to provide that as to one portion of the increase the assistant master should have it in any event. All the clauses show that as to the first 5 per cent. the masters were to have it, or their representatives were to have it if they died, and they were even to have it if they left by reason of some misconduct, and they were to have it not year by year, but when they left, and with compound interest. The scheme has been criticized by somebody in refurence to the grammar of clause 4, and, I think, criticized with some grounds; it also may be criticized on the ground that it does not state at what rate of interest this compound interest was to be, nor does it state for anybody who had to assess the compound interest what he would want to know, what was done as to rests, whether it was to be annual or half-yearly, or how the compound interest was to be calculated. It is not absolutely complete if it is to be criticized, but that does not make any difference for the purpose that I have to consider. In reference to the first 5 per cent., it seems to me that it must have been meant to be that which it is said to be—viz., an increase of salary payable at a future date, and when payable, payable with compound interest; and therefore I do not think the case would have been arguable if that provision stood alone. It does not stand alone. The next one, if it stood alone, would certainly be very arguable. I am not quite clear about it now, but it seems to me that, being put as it is with the other sum which is clearly salary, and being in express and clear words, used, not by ignorant people, notwithstanding what I have said as to their grammar and other things, but by people — namely, the governors and masters of this college — who must be considered to understand quite well what they say, stated distinctly to be salary; and it seems to me not by any means necessary to prevent it being salary, because there is a binding obligation. As to this sum (*c*), it is to be left in the hands of the governors of the college upon certain specific terms which are that the masters are not to have it in every possible event, for they are not to have it if they do not serve for ten years unless their non-service for as much as ten years depends on the case of ill-health; and then in the case of ill-health it is discretionary with governors to give it. So in that case, if they have served for less than ten years, they do not get this sum (*c*) as of right, and also if they are removed for misconduct or having resigned to avoid being removed for misconduct, they do not receive that sum, but that sum in those cases, if it is not given to them, goes into a general fund which the governors are to distribute to exceptional and special cases requiring and deserving assistance. Therefore each man when he pays down, if you may call it paying down, or when he has deducted from what otherwise would be his salary the sum (*c*), when he is paying over or submitting to the deduction of that sum, he is paying it in the nature of a premium in respect of advantages which he is probably to get, advantages secured to him for certain in certain events, which he may not get in certain other events, but he is also purchasing the right to have or to ask for and possibly to get it if he happens to be specially unfortunate, and therefore in that sense, "specially deserving" an additional allowance out of the sums which other gentlemen have contributed. Gentlemen who have served for five years and therefore come into this charge, but have not served for ten, and have gone out perhaps to some better appointment elsewhere, will have paid certain sums which they will not get back, and those go to increase the fund, and each person who subscribes to the fund has a chance of getting a portion of those funds. The result is it is like a premium paid down for an insurance in certain events, a sum paid for advantages which you may or may not get, or get to a greater or a lesser extent. It is exactly like the case of a person being

obliged to insure his life; that would not prevent the sum being salary. In one sense it is a hard case on these assistant masters. It is a ground of complaint (it is not for me to say if it is legitimate or not) against the income tax that it charges in the same way income arising from a man's own work and exertions, out of which there is a moral obligation at any rate to put something by for his family and those dependent upon him, and for his old age and chance of illness. It treats that, for the purpose of taxation, on exactly the same footing as income arising from capital, which capital remains intact and is there for the man in his old age or his children. It is an objection to be made to the tax; but there is the tax —it exists—and considerations of that sort, it seems to me, cannot be taken into account in considering whether a particular case comes within the principles of the taxation. Of course the Legislature has done something for persons in that position—it is very little —but something in the way of the provision that exists as to deducting the premiums on life assurances. That is done to meet the grievance. This case, though it may possibly come within the mischief which that particular provision is meant to meet, does not come, as it seems to me, within any of the statutory relief that has been given. Of course it is not a life assurance within the meaning of that provision, nor can it possibly be said, and it is not argued by counsel for the respondent in an argument which has assisted me very much, that it comes within the express words set out in this case about certain deductions allowed by Act of Parliament, which was one of the things considered in *Bell* v. *Gribble*. But this case could not be said to come within that, and does not. The result seems to me to be that I must take this sum as a sum which really has been added to the salary and is taxable, and it is not the less added to the salary because there has been a b'nding obligation created between the assistant masters and the governors of the schools that they should apply it in a particular way.

Judgment for the Crown.

Solicitor for appellant, *Solicitor of Inland Revenue.*

Solicitors for respondent, *Druces & Attlee.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Cozens-Hardy, L.J.) — Feb. 13.

HARBOTTLE *v.* ROBERTS.
PEEL, *Claimant.* (*a.*)

Practice—Interpleader—Summary decision—Value of subject-matter in dispute over £50—Jurisdiction—Right of appeal—Ord. 57, rr. 8, 11.

The jurisdiction of a master on the hearing of an interpleader summons to order that the dispute between the claimants shall be decided in a summary manner under ord. 57, r. 8, is not limited to cases in which the value of the subject-matter in dispute does not exceed £50.

No appeal lies, even with leave, to the Court of Appeal, in such a case.

Appeal from an order made by Bray, J., at chambers.

The plaintiff, having obtained judgment in the action, proceeded by writ of *fi. fa.* to levy execution on the defendant's goods. A claim to the goods was thereupon made by the holder of a bill of sale, and the sheriff took out an interpleader summons. The value of the goods in dispute was more than £50. On the hearing of the summons, the master decided to dispose of the matter in a summary manner under ord. 57, r. 8, and adjourned the summons for the production of evidence.

From this decision the execution creditor appealed to the judge at chambers. Bray, J., affirmed the decision of the master, and ordered that the matter in dispute should be summarily decided by the master, but he gave leave to appeal from his order to the Court of Appeal.

The execution creditor accordingly appealed.

Rowlatt, for the claimant, took the preliminary objection that no appeal lay. It was held in *Bryant* v. *Reading*, 34 W. R. 496, 17 Q. B. D. 128, that a decision of a master on an interpleader summons to dispose of the claims in a summary manner was in itself a summary decision under ord. 57, r. 8, and was therefore, by virtue of *Waterhouse* v. *Gilbert*, 15 Q. B. D., 569, 33 W. R. Dig. 158, not appealable to the Court of Appeal.

Edward Clayton, for the execution creditor.—The value of the goods in dispute being over £50, the master had no power to order that the matter should be decided in a summary manner. A rule of practice has always prevailed restricting the exercise of the summary jurisdiction under ord. 57, r. 8, in the absence of consent, to cases where the amount in dispute does not exceed £50: see Annual Practice, 1905, vol. 1, p. 833. The existence of this rule was recognized in *Van Laun & Co.* v. *Baring Brothers & Co.* (*Limited*), 52 W. R. 59, [1903] 2 K. B. 277.

COLLINS, M.R.—In my opinion the preliminary objection is a good one. The case of *Bryant* v. *Reading* shows that a decision to dispose of a claim in a summary manner is, so far as regards the right to appeal, the same thing as a summary decision itself. But it is said that, as the value of the subject-matter here was more than £50, a rule of practice governs the case, and by that rule the judge had no jurisdiction to order the matter to be decided summarily. To my mind it is clear that such a rule of practice, if it exists, has never been anything more than a mere rule of practice. It does not fetter in any way the provisions of the statutory rules; and, although in this case the value of the subject-matter in dispute is more than £50, it is clear that the rule (ord. 57, r. 8) does not exclude the jurisdiction of the master to deal with the case in a summary manner. Nothing that I said in *Van Laun & Co.* v. *Baring Brothers & Co.* is contrary to this; in fact that case is confirmatory of what I am now saying. A mere rule of practice cannot restrain the application of substantive provisions of statutory rules. The authority of *Bryant* v. *Reading* is therefore in point, and shows that no appeal lies to this court. The fact that the learned judge has given leave to appeal cannot make any difference. The preliminary objection, therefore, succeeds, and the appeal must be dismissed.

COZENS-HARDY, L.J., concurred.

Objection upheld.

Solicitors for the claimant, *Freshfields.*

Solicitors for the execution creditor, *Cohen & Cohen.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Jan. 18.

AYLWARD v. MATTHEWS. (a.)

Master and servant—Employers' liability—Accident—Compensation—"Building"—Steam crane platform—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.

The applicant's employer entered into a contract to erect a steam crane platform for the purpose of carrying a crane wherewith to raise building materials for the construction of a permanent building by another contractor. The platform was constructed of timber supported by three long wooden legs, each leg consisting of four uprights connected together by cross-pieces of wood. Each leg was let into the ground, and where so let in it was surrounded by loose bricks to keep it firm. In order to construct the platform planks were placed resting on the cross-pieces, and ladders were placed on the planks to enable the workmen to go up and down. The ladders and planks were the scaffolding by means of which the crane platform was being erected, and when it was completed they would be removed. While the applicant was working at the erection of the crane platform he fell and was injured. At the time of the accident the structure was sixty-two feet high, but the permanent building was less than thirty feet high. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, *the county court judge found that the crane platform was a "building" within section* 7, *sub-section* 1, *of the Act, and that it was being constructed by means of a scaffolding, and he made an award of compensation.*

Held, that, though the structure was a temporary wooden structure, the county court judge was entitled to find that it was a "building" within the Act.

Appeal from an award of Judge Emden, at the Lambeth County Court, under the Workmen's Compensation Act, 1897.

The applicant for compensation was a labourer employed by Matthews in the construction of a steam crane platform. Matthews was a crane erector, and had entered into a contract to erect a steam crane platform to be used for the purpose of hoisting up materials in connection with building operations at a school. When Matthews had completed the erection of a crane platform he and his men would leave, and they would have no more to do with the work of building. The crane platform in the present case was constructed of timber supported by three long wooden legs, each leg consisting of four uprights connected together by cross-pieces of wood so as to form a hollow square 4½ feet each way. Each leg was let into the ground, and where so let in it was surrounded by loose bricks to keep it firm. In order to construct the platform planks were placed resting on the cross-pieces and ladders were placed on the planks to enable the workmen to go up and down. The ladders and planks were the scaffolding by means of which the platform was being erected, and they would be removed when the platform was completed. The crane platform would be removed when the permanent building was finished. The applicant was working on one of the legs, and as he was descending a ladder inside the leg, the plank on which the ladder was resting broke, and he fell and was injured. At the time of the accident the crane structure was sixty-two feet in height, but the permanent building was not thirty feet high, only the foundations having been laid. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that the steam crane platform was a "building" within section 7, sub-section 1, of the Act, exceeding thirty feet in height, and that it was being constructed by means of a scaffolding, and that Matthews was the undertaker in respect thereof. He accordingly made an award in favour of the applicant of 15s. a week during incapacity.

Matthews appealed.

Minton-Senhouse, for the employer.—A temporary wooden structure such as this crane platform cannot be a "building" within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, 1897. Building there means a permanent building. This structure was only put up for the purpose of erecting a permanent building. The county court judge was therefore wrong.

He referred to *McNicholas* v. *Dawson*, 47 W. R. 500, [1899] 1 Q. B. 773; *McCabe* v. *Jopling*, 52 W. R. 358, [1904] 1 K. B. 222.

John O'Connor, for the applicant.—The county court judge was entitled to find that this crane platform was a "building" within section 7 of the Act. It was a separate building sixty-two feet high, and it was being erected by means of a separate scaffolding. It is a question of fact whether a particular structure is a "building" within the Act. The decision was therefore right.

Minton-Senhouse replied.

COLLINS, M.R.—The ground of this appeal is that the county court judge has wrongly found as a fact that a certain wooden structure, which was itself being constructed by means of a scaffolding, was a "building" within section 7, sub-section 1, of the Workmen's Compensation Act, 1897. The object of the structure when completed was to form the platform on which a steam crane should be placed, the steam crane to be used in connection with the erection of a permanent building. The evidence showed that the temporary scaffolding by means of which the structure was being constructed would be removed when the structure was completed. The finding of the judge on a question of fact is conclusive, unless we can say as a matter of law that a wooden structure sixty-two feet in height such as the present one cannot be a "building" within the Act. At first it required some reflection before I could accept the proposition that a temporary wooden platform such as the present one, to be erected as a platform for a crane which was to be used for raising materials for the erection of a permanent building, was itself a "building." But we are dealing with an Act in which we cannot find any principles upon which its provisions are to be interpreted, and we have to ascertain the interpretation of the Act as best we can from the language used and from the objects aimed at in the Act. The Act deals (*inter alia*) with accidents to workmen when they are employed on or in or about a building which exceeds thirty feet in height, and which is being constructed by means of a scaffolding. The elements of an accident which exist in such a case are the dropping of tools or other articles upon the head of a workman below, or a workman falling off the scaffolding. Those elements exist quite as much in the case of a wooden structure like the present one as in the case of a permanent brick structure of the same height. So far as any incident can be contemplated as likely to arise from the use of a scaffolding, that incident can be contemplated as likely to arise in the present case. It is a question of fact whether the structure is a "building," and we are not in a position to say that the county court judge was bound to hold as a matter of law that this structure could not be a "building" within the meaning of the Act. Numerous

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

cases of wooden structures which are buildings might be put. For instance, in Norway churches are frequently built of wood. How can we say as a matter of law that a temporary wooden structure erected for the purpose of carrying a crane is not a "building"? Suppose that a structure was built of brick or stone for the purpose of carrying a crane, it could not be said that such a structure was not a "building" within the Act. The only difference between the two structures is that one is constructed of wood and the other of brick or stone. In my opinion it cannot be said as a matter of law that because the structure is made of wood it is not a building. The structure here was capable of being a "building," and the appeal accordingly fails.

MATHEW, L.J.—I am of the same opinion. The argument on behalf of the appellant points to this, that a structure, to come within the word "building" in the Act, must be made of brick or stone. The Act does not, in my opinion, contemplate any such limitation upon the meaning of the word. The structure here was built up very carefully in order to carry a steam crane to be used in the erection of the permanent building. It is said that such a structure ceases to be a "building" if made of wood. It seems to me to be the same whether it is constructed of wood or of brick or stone, and that the structure may be a "building" within the Act though it is only a temporary wooden structure.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the applicant, *S. A. Clench & Co.*

Solicitor for the employers, *H. B. Sewell.*

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Nov. 28, 29.

In re WHITING'S SETTLEMENT. WHITING *v.* DE RUTZEN. (*a.*)

Settlement — Condition — Marriage with consent — No limitation as to time — Gift over — Forfeiture — Validity of condition.

A condition imposing a partial restraint on marriage, by requiring the marriage to be with consent, with a gift over in the event of marriage without the required consent, is valid and enforceable, notwithstanding that it is not limited as to time but operates during the whole life of the beneficiary, provided that any of the persons whose consent is required survives.

Dashwood *v.* Lord Bulkeley, 10 *Ves.* 230, *and* Lloyd *v.* Branton, 3 *Mer.* 108, *followed.*

This was an appeal from a decision of Warrington, J.

By a voluntary settlement dated the 22nd of January, 1886, Henry Whiting declared that securities of the value of about £30,000 should be held by the trustees thereof upon trust to pay the income thereof to himself for his life and then upon trust (subject to the proviso as to marriage thereinafter contained) to pay the income to his daughter, Juliette Whiting for her life after she should have attained the age of twenty-six years, or been married under that age with such consent as thereinafter was required, for her sole and separate use without power of anticipation, and after her death to hold the funds in trust for her issue, if any, as she should appoint, and in default of appointment for her children. If she had no children £5,000 was to be paid out of the trust funds to the magistrates or magistrate for the time being of the police-court at Bow-street, to be invested by them, with power to them to distribute the income in the same manner as that of the Police Relief Fund, which had been established by the settlor, was distributed. The residue of the trust fund was to be held in trust for the testator's sons, H. P. Whiting and M. N. Whiting in equal shares. Clause 9 provided that if Juliette Whiting should marry under the age of twenty-six years without the consent of the settlor during his life and after his death of his wife during her widowhood, and after her second marriage or death without the consent of the trustees, or if his daughter should either before or after the age of twenty-six marry a person other than a person born of English, Welsh, or Scotch, or of Greek parents, then or in either of these events the trusts declared of the trust fund and the income thereof after the death of the settlor should, subject as next thereinafter mentioned, cease and determine as from the date of such marriage. (Clause 10.) "And then, subject to the life interest of the said Henry Whiting in the said trust fund, and to any interest therein or in the income thereof that may then by virtue of these presents have been acquired by any previous issue of the said Juliette Whiting, the trustees shall stand possessed of the sum of £5,000 sterling to be raised out of such portion of the trust fund as shall consist of pure personal estate in trust to pay the same to the said magistrates or magistrate" upon the trust mentioned above. And (by clause 11) the residue was to go to the settlor's said two sons in equal shares.

By clause 12 the daughter was, until she should attain twenty-six or should marry with such consent such a person as before mentioned, to receive out of the income after the death of the settlor £100 a year for pocket-money.

The deed contained a proviso that it should be lawful for the settlor at any time or times by deed or will wholly or partially to revoke or to alter or to vary the settlement.

By a deed-poll dated the 29th of March, 1887, the settlor made some alterations in the settlement, the only one which it is material to mention being the striking out of the words "or of Greek" from clauses 9 and 12. In other respects the settlor confirmed the settlement. A similar power of revocation and alteration was reserved, applying to both the deed-poll and the original settlement.

By another deed-poll dated the 22nd of May, 1891, the settlor altered the original settlement by revoking clause 9 and substituting the following clause for it: "That if the said Juliette Whiting shall marry without the consent in writing of the said Henry Whiting during his life, or shall after his death and during the lives of Juliette Antoinette Whiting (the wife of the said Henry Whiting) and the said Henry Paul Whiting and Matthew Noel Whiting, marry without the united consent of all three while living, or without the joint consent of the two survivors, or without the consent of the last survivor of them, marry without their or her or his consent in writing [*sic*], then and in either of these cases the trusts of the principal indenture declared of the trust fund and the income thereof after the death of the said Henry Whiting shall, subject as next hereinafter (meaning thereby clause 10 of the principal indenture) mentioned, cease and determine as from the date of such marriage." By this deed-poll the following declaration was introduced into the original settlement: "That the consents or consent by the principal indenture as varied by these presents

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

required to the marriage of the said Juliette Whiting shall apply to every marriage contracted by her during the life of the said Henry Whiting, and after his death during the lives of the said Juliette Antoinette Whiting, Henry Paul Whiting, and Matthew Noel Whiting, and the lives of the survivors and the life of the survivor of them. And, in so far the principal indenture and the said deed-poll are not revoked, altered, or varied by these presents, the said Henry Whiting doth hereby confirm the same."

By this deed-poll power to revoke or vary was again reserved.

By a deed-poll dated the 29th of December, 1893, the trust of the residue for the settlor's two sons was revoked, and there was substituted for it a gift of the residue to the magistrates at Bow-street upon the same trusts as had been declared of the £5,000 given to them by the settlement.

In August, 1893, the settlor made a will by which he made no provision for his daughter, but he confirmed the settlement of 1886 as varied by the deeds-poll and subject to his power of thereafter revoking the same. He died on the 8th of December, 1894, without again having exercised his power of revocation.

On the 18th of September, 1897, Matthew Noel Whiting died.

In March, 1902, the daughter, who was then more than twenty-six years of age, became engaged to be married to General Sir Alfred Turner, K.C.B. Her mother approved of and consented to the marriage, but the brother, Henry Paul Whiting, refused to give his consent.

The mother died on the 16th of June, 1902, and on the 23rd of August, 1902, the daughter, being then of the age of thirty-four, was married to Sir A. Turner without the consent of her brother, Henry Paul Whiting.

The trustees of the settlement and deeds-poll took out a summons to determine the question whether the condition as to the daughter's marriage was valid, and whether by her marriage without her brother's consent her interest and that of any issue which she might have, had been forfeited, and whether the trust funds ought to be transferred to the magistrates of the Bow-street police-court.

Warrington, J., held that the condition was valid, and that, Lady Turner having married without her brother's consent, the gift over took effect.

Lady Turner appealed.

Sir E. Clarke, K.C., and *Manby*, for the appellant.—If this condition is a condition imposing a restraint upon marriage at any time during the daughter's life, we submit that it is an unreasonable condition. It is the policy of the law to discourage restraints on marriage. Warrington, J., held that he was bound by *Lloyd* v. *Branton*, 3 Mer. 108. But this point was not really discussed in that case. *Lloyd* v. *Branton* really decided that, having regard to *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230, it was too late to discuss the question, and in *Dashwood* v. *Lord Bulkeley* Lord Eldon does not specifically deal with this question at all. We also submit that, if the condition is valid, on the construction of these documents it is imposed only in the case of the daughter's marriage under twenty-six. She did not marry till after that age, and so no forfeiture has taken place. Further, there is no effectual gift over here, the fund not being required for the purpose mentioned by the settlor.

They cited *Scott* v. *Tyler*, 2 Dick. 712, W. & T. (7th ed.) vol. 1, p. 535; *Allen* v. *Jackson*, 24 W. R. 306, 1 Ch. D. 399; *Stackpoole* v. *Beaumont*, 3 Ves. 89; *Garrett* v. *Pritty*, 2 Vern. 293; *Stratton* v. *Grymes*, 2 Vern. 357; *Underwood* v. *Morris*, 2 Atk. 184; *Morley* v. *Richardson*, 2 Hare 570; *Chauncey* v. *Graydon*, 2 Atk. 616; *Crommelin* v. *Crommelin*, 3 Ves. 227; *Marples* v. *Bainbridge*, 1 Madd. 590; *Bellairs* v. *Bellairs*, 22 W. R. 942, 18 Eq. 510; *Knapp* v. *Noyes*, Amb. 662; *Desbody* v. *Boyville*, 2 P. Wms. 547; *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 473.

Mulligan, K.C., and *Vaughan Hawkins*, for the trustees of the settlement, representing possible unborn issue of Lady Turner.—*Lloyd* v. *Branton* seems to be the first case in which it was held that the forfeiture of a mother's interest involved the forfeiture of the children's interest in remainder. It does not appear whether the children were represented in that case, and the judgment only deals with the mother's rights. This is a clause in restraint of marriage, and as such will be discouraged: *Cooke* v. *Turner*, 15 M. & W. 727.

Rowden, K.C., and *Marsham*, for the magistrates.—The restraint on marriage is only partial and, there being a gift over, the condition is valid: Theobald on Wills (5th ed.), p. 544. *Lloyd* v. *Branton* exactly applies to the present case. That decision was founded on earlier decisions, and it has stood so long that it will not now be overruled.

They cited *Daley* v. *Desbouverie*, 3 Mer. 108; *Aston* v. *Aston*, 2 Vern. 452; *Cleaver* v. *Spurling*, 2 P. Wms. 526.

R. J. Parker, for the Attorney-General.

Sir E. Clarke, K.C., in reply, cited *Reynish* v. *Martin*, 3 Atk. 330.

VAUGHAN WILLIAMS, L.J.—This branch of the law is one with which it is not very satisfactory to deal, and I cannot say that I think the mode in which it has been dealt with is very easy to weld into one consistent whole. We are told that the law on this point has been partially imported into our system of law from the Roman law, and that this was done through the ecclesiastical courts. And then we are told that the Court of Chancery did not entirely adopt the view of the law adopted by the ecclesiastical courts, just as the ecclesiastical courts did not adopt in its entirety the Roman law. And eventually, as a matter of history, we find ourselves face to face with this state of things—that the Court of Chancery had to administer rules of law which they did not think very fair or very just, and that they were constantly straining the rules by which they yet declared that they were bound in order to escape from them. By the time at which Lord Eldon was Lord Chancellor the rules of law which had to be applied when the question was raised whether a particular disposition, in either a will or a deed *inter vivos*, was such as would be enforced by the law, as not being inconsistent with the interests of the public or the policy of the law, or the rules which had been laid down with regard to the policy of the law, had come to be tolerably well ascertained. Under the circumstances I think that, if we find decisions of that date based upon the assumption that the law had been settled up to that time, we ought not to depart from them, unless there is reason to suppose either that they have been questioned in subsequent cases, or that they have not been accepted by conveyancers and by the profession generally as being sound decisions which could be safely acted upon. Speaking for myself, I cannot regard the present state of the law as very satisfactory. I do not suppose any one would say that it is desirable in the interests of the community that gifts should be treated as valid which distinctly encourage celibacy and discourage marriage. On the other hand, I do not suppose that any one would say that every partial restraint of marriage is an injury to society and ought to be

treated as null and void. Possibly, some middle line should be drawn, and it might be said that in each case we have to consider whether the particular condition in partial restraint of marriage is a reasonable one looking at matters from the point of view of the community. But, in my opinion, we are not really in a position to deal with such matters according to our own view of what might or might not be desirable for the community. I think we are bound to follow the decisions of Lord Eldon in *Dashwood* v. *Lord Bulkeley*, and Sir William Grant in *Lloyd* v. *Branton*. If I had to consider the question whether it is in the interest of the community to allow a restraint upon a woman's freedom of marriage to be continued during the whole of her life, unless her marriage were with the consent of a named person, I might perhaps come to the conclusion that this would not be to the interest of the public. But, as I have said, I think I am not entitled to consider any such question, and the only matter which I have to consider is whether the cases which I have mentioned do lay down the law in such a way that the condition in the present settlement is valid according to law, and can be enforced. I have come to the conclusion that those decisions do show that this condition is valid, and can be enforced, and that we are bound to give our decision accordingly.

I will deal first with *Lloyd* v. *Branton*. There can be no doubt that in the result it was held in that case that, there being a condition under which the marriage of a lady without consent was to operate as a forfeiture of her interest, there being also a gift over in the event of forfeiture, it was a valid condition, and that the forfeiture must take effect, although the consent would have to be obtained after she had attained the age of twenty-one. That being the result of *Lloyd* v. *Branton*, let us see what is the real ground upon which we are asked to reverse the decision of Warrington, J. As it seems to me, the outcome of it is this: It is said that if we construe the clause as meaning that the consent required is to be necessary during the whole life of the daughter, now Lady Turner, the condition would be an unreasonable one, and although the restraint on marriage is partial, not general, and there is a gift over, yet the court ought to say that this provision for forfeiture is inconsistent with the freedom of marriage and must be treated as null and void. It seems to me that that contention is rendered impossible by the decisions in *Lloyd* v. *Branton* and *Dashwood* v. *Lord Bulkeley*. I will not deal at length with the other points which have been made. It is said that we ought not to construe the deeds as showing that the settlor intended that the conditions of obtaining the required consents to the marriage of the daughter should extend beyond her age of twenty-six. We have heard the arguments upon that point, and I think we have all come clearly to the conclusion that we cannot put such a construction upon the deeds. It may be quite true, and I think it is true, that in several of the cases which have been cited there was a great straining by the court of the words of the instrument then in question in order to avoid a forfeiture. But we have come to the conclusion that there is nothing in the words of these successive deeds which would justify us in saying that the necessity for consent was to come to an end as soon as the daughter had arrived at the age of twenty-six. Then it was said that in this case there is no gift over. If there was no gift over I agree that there would be great difficulty in supporting this condition, and the forfeiture which is based upon the breach of it. But to my mind it is perfectly clear that there is a gift over, and, as was pointed out in the course of the argument, it is to take effect not only in the case of the breach of the condition with respect to marriage with consent, but also in the event of Lady Turner dying without issue. Under these circumstances it seems to me plainly impossible to say that there is no gift over.

That leads us to the result, first, that there is a condition necessitating the consent of the settlor's widow and the two brothers or the survivors or survivor of them to any marriage of the daughter, and that this condition remains in force during the whole life of the daughter provided that the persons who are to give the consent or any of them are living; and secondly, that there is a plain gift over. That being so, the question arises whether the law had been so definitely settled by *Lloyd* v. *Branton* and *Dashwood* v. *Lord Bulkeley* that we are bound by those decisions. In my opinion the law has been thus definitely settled. As regards *Lloyd* v. *Branton* it was not suggested that the facts were not such that the decision by implication involved a decision of this point adverse to the appellants. Neither was it said that the question was not raised in argument. But it was said, and was accurately said, that Sir William Grant, M.R., did not in terms deal with this question. Let us see how that really stands. The question had been raised, and the Master of the Rolls was obviously extremely anxious if he could to support the settlement so as to prevent the forfeiture taking effect. The Master of the Rolls said: "It is now too late to raise a doubt on the legality of the condition on which Mrs. Barnard's right to the bequests given her by the will is made to cease." Now the condition to which the Master of the Rolls was referring was that if Mrs. Barnard should marry without the consent of specified persons her interest under the will should be forfeited, and the condition was not limited to her infancy or any specific time. Then the Master of the Rolls continued: "In the modern case of *Dashwood* v. *Lord Bulkeley*, the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under twenty-one." The latter words show that the question whether it was essential to the validity of the condition that it should be confined to marriage under twenty-one was distinctly before the Master of the Rolls. The only objection that counsel for the appellant was able to take to *Lloyd* v. *Branton* was that the decision was not justified by *Dashwood* v. *Lord Bulkeley*. I think I may say that it was admitted that *Lloyd* v. *Branton* was conclusive unless we accepted the appellant's view of the construction of the successive deeds, and that the only way to get rid of *Lloyd* v. *Branton* was by saying that it was based upon *Dashwood* v. *Lord Bulkeley*, and that *Dashwood* v. *Lord Bulkeley* did not really determine the point which Sir William Grant assumed that it did.

I will now say a few words about *Dashwood* v. *Lord Bulkeley*. The report shows that in the first instance there was a decree of Lord Rosslyn which is set out on p. 236. By the decree pronounced by Lord Rosslyn on the 25th of April, 1796, it was declared that the plaintiff, Elizabeth Dashwood, was entitled to a sum of £400 a year under the will. That is, she was entitled to the reduced sum only which was to come to her in the event of her marrying without the required consent. Then, the report goes on, after the death of Mr. Dashwood, a petition of re-hearing was presented by his widow, insisting that she did not by her marriage under the circumstances forfeit any of the bequests under the will. Then there is the argument of the case. It is quite true that the point as to the validity of the conditions was not the only point made. There was also an argument whether there had been any breach of the condition. When the Lord

Chancellor gave his judgment it is quite true, as was pointed out, that he did not actually deal with the point whether a condition requiring consent to marriage during the whole life was valid or not, but at the same time it is plain from the account of the argument that the point was raised before him, and raised in the most specific way. Then the Lord Chancellor at the end of his judgment: "Upon the whole, I cannot reverse this decree without some principle that will stand the test of general application, and though I seriously wish I could I dare not say I have found such a principle." It is impossible to read that report without seeing that the very question whether a condition requiring consent to marriage, not only up to the age of twenty-one, but during the whole life of the lady, was a valid condition which could be enforced in law was present to Lord Eldon, that point having been brought prominently before him by the fact and by the argument. When, then, we find Lord Eldon anxious if he can to avoid a forfeiture, and winding up his judgment with the words which I have just read, is it possible to avoid the conclusion that he deliberately meant to say that he could not accept the principle that a condition providing for a forfeiture upon marriage without consent was void unless the necessity for that consent was limited to the infancy of the man or the woman, as the case might be? Under these circumstances I have no hesitation in saying that those two cases are directly in point and that they are binding on us. Both Lord Eldon and Sir William Grant treated the point, not as a new one, but as one which had been settled before, and our attention was called to a decision of Lord Hardwicke, which it was said was probably the case to which Lord Eldon referred when he treated the law on this point as being already settled. That may be quite right, but it was not necessary to refer to that particular case as being the only one in which the point had been decided, for it was decided by Lord Keeper Wright in *Aston* v. *Aston*, 2 Vern. 452, in 1703. The third proposition stated by the Lord Keeper was this, "that in case of marriage without consent, although but a condition subsequent, the court cannot relieve against the forfeiture by reason of the devise over, although it be a hard condition, no time being limited, but goes to a marriage at any time, even after the age of twenty-one." This being so, I think it is not easy for us to quarrel with the historical accuracy of this view of Lord Eldon and Sir William Grant, that in their days it was too late to say that the extension of the necessity of the consent to a period after infancy had come to an end renders the condition for the forfeiture of the property void in a case in which there is a gift over.

I think, therefore, there is really nothing more for us to decide in the present case than, first, that, according to the true construction of these successive deeds, there is a condition which operates, not only until the age of twenty-six by the daughter, but extends to the whole of her life, provided that any of the persons whose consent is required survives, and that there is a gift over. And inasmuch as Lady Turner has married without the consent of the survivor of those persons, I think we are bound by the decisions in *Lloyd* v. *Branton* and *Dashwood* v. *Lord Bulkeley* to hold that her interest and the interests of her possible children under the settlement have been forfeited. I should have been very glad if we could have decided otherwise.

ROMER, L.J.—I am of the same opinion. First, on the question of the construction of the deed of settlement as varied by the deeds-poll, I can only say that I agree with the view which was taken by the learned judge in the court below. I cannot see my way to limit clause 9 as altered by the deed-poll of the 22nd of May, 1891, so as to confine the gift over to a marriage under the age of twenty-six years. Moreover there is to my mind a clear gift over, and there is therefore no ground for the argument that the condition was imposed merely *in terrorem*. That being so, the only remaining question is whether the gift over, on the marriage of this lady without the consent of her mother and the two brothers, or of the survivors or survivor of them, can be held to be void as being in restraint of marriage. It is to be observed that it is not in general restraint of marriage, it is in partial restraint only, and there are many cases in which conditions subsequent imposing partial restraints of marriage have been held good. As regards the form of condition which we have here, a limited restraint of marriage with a gift over in the event of marriage without the required consent, there are, as my lord has pointed out, two clear decisions of Lord Eldon and Sir William Grant, which show that such a condition is valid. My lord has so fully dealt with those cases that I need not refer to them at any length. It is to be noticed that in *Dashwood* v. *Lord Bulkeley*, Lord Eldon was anxious if he could to find any principle upon which he could hold that the gift over did not take effect. He commenced his judgment by saying: "I have looked through all the cases upon this subject with a very anxious wish to find a principle for reversing this decree which I dare trust as a principle to govern future cases; and though a review of the authorities has brought back to my mind many considerations that formerly affected it in this case, I dare not say this case will come within any such principle as the court has acted upon hitherto." It is impossible to suppose that Lord Eldon in considering the case did not consider the more general question whether such a condition as that which he had before him was void. He did not specifically deal with that question in his judgment, obviously because he thought that at this time it could not be satisfactorily raised. And it is equally clear when you read Sir William Grant's judgment on the similar point which he had before him, that he regarded it as too late in the day to raise the question of the invalidity of such a condition. That being so, how much more impossible is it for this court, after a lapse of nearly a century since the decision in *Lloyd* v. *Branton*, to take upon itself to reverse in principle those two decisions, not to mention the earlier decision, *Aston* v. *Aston*. And that difficulty is increased by this fact, that, though the counsel for the appellant have obviously exercised great care in searching for authorities, there is apparently not a single case to be found in the books which militates against the principle of those two decisions of Lord Eldon and Sir William Grant. Not a single recorded case which would justify the contention for the appellant. Moreover, I cannot help thinking that after this long lapse of time those decisions must have been acted upon in many settlements and wills; and it would, in my opinion, be lamentable, after such judgments as those having been for so long acquiesced in and acted upon, if dealings on the footing of their being good law should now be upset by us. Under these circumstances it seems to me impossible for us sitting here to accede to the views of the appellant's counsel, and I think the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. I will not add anything on the question of the construction of these deeds which seems to me reasonably plain. I think it is also reasonably clear that there is a perfectly good gift over. Suppose that Lady Turner had died a spinster or had, after marrying with consent, died

without issue, would there in that event have been a good gift over, or would the legacy have fallen into the residue? It seems to me perfectly plain that there would have been a good gift over for a charitable purpose and that is the very same gift over which, assuming the condition to be valid, is to operate on breach of the condition. The real point of substance is that of the validity of this condition. Now, in my view this point was settled 200 years ago, in 1703, in *Aston* v. *Aston*. The Lord Keeper, Sir Nathan Wright treated it as clear that a condition in partial restraint of marriage, providing for a forfeit upon marriage without consent either before or after twenty-one, was a valid condition. In 1738 in *Daley* v. *Desbouverie* Lord Hardwicke assumed that proposition because he went into a very elaborate discussion as to whether a condition requiring consent to marriage not limited to the age of twenty-one had been got rid of on the ground that the evidence proved that the consent had in fact been given. That discussion would have been needless had he not adopted the view expressed by Sir Nathan Wright in 1703. Again, in 1768 Lord Camden in *Knapp* v. *Noyes* does not seem to have felt any doubt that such a condition not limited to minority, but extending over a daughter's whole life, might be valid, although he said it was not a condition likely to be found in a will, and on the construction of the will then before him he held that that was not the true effect of it. Then we come in 1788 to the great case of *Scott* v. *Tyler*, and as I read Lord Thurlow's judgment, he again treated this proposition as settled. He said: "Therefore an injunction to ask the consent, as I have said before, is a lawful condition as not restraining marriage generally." No trace is to be found there of any limitation to marriage under twenty-one. I may remark in passing that Lord Eldon was one of the counsel who argued *Scott* v. *Tyler*. Then we come to 1804, just 100 years ago, to *Dashwood* v. *Lord Bulkeley*, a case which was argued by Sir Samuel Romilly and decided by Lord Eldon, and neither counsel in arguing the case nor the Lord Chancellor in deciding it, although he was most anxious to help the lady, treated the question as an open one. Then we come to 1817, to *Lloyd* v. *Branton*, in which Sir William Grant in express terms said that it was too late to raise a doubt as to the legality of such a condition. Under these circumstances I think it is impossible for us to differ from the decision of Warrington, J., unless we are prepared (which I certainly am not) to overrule this long series of decisions extending over two centuries. I will only add that, although our attention has not been called to any case in which the rule has been applied to a deed as distinct from a will I can see no ground for drawing any distinction between the two.

Solicitors, *Boxall & Boxall; Frere, Cholmeley, & Co.; Solicitor to the Treasury.*

High Court of Justice.

Chan. Div. } Farwell, J. } Jan. 31; Feb. 1, 8.

In re NESBITT AND POTTS' CONTRACT AND *In re* THE VENDOR AND PURCHASER ACT, 1874. (*a.*)

Vendor and purchaser—Specific performance—Title—Possessory title — Restrictive covenant — Notice — Purchaser for value—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34.

Freehold land held by virtue of a statutory title based on adverse possession for twelve years is not thereby freed from restrictive negative covenants. Such covenants are analogous to an equitable charge, and the land can only be freed from them (1) *by showing abandonment, or* (2) *by the plea of purchaser of the legal estate for value without notice, the person advancing such plea being bound to show that he accepted nothing less than a full title of forty years, and that this title did not disclose the restrictions in question.*

Summons.

By a contract in writing dated the 1st of January, 1903, a vendor, F. V. Nesbitt, agreed to sell to a purchaser, S. L. Potts, a piece of land at Leytonstone for £3,200.

The contract provided that the title should begin with a conveyance of the 11th of August, 1890, "in which indenture it is stated that Thomas Headde and his father had at that date been in possession of the said property for thirteen years and upwards."

It was admitted for the purpose of getting a decision on the point at issue—namely, whether the vendor could give a good title to the land freed from certain restrictive covenants: (1) That T. Headde had acquired a possessory title in 1890. (2) That there was in existence a deed dated in 1872 containing restrictive negative covenants affecting the land to be sold or a material part of it. (3) That neither the present vendor, when he bought in 1901, nor the purchaser under the conveyance made in 1890, had made any inquiry as to the title prior to 1878, the date when adverse possession began.

Jenkins, K.C., and *Romer Macklin*, for the vendor, contended that the land was not subject to restrictive covenants in his hands, on the ground that neither Headde nor the purchaser from him in 1890 nor the present vendor had any notice of the existence of the covenants, and that there was nothing which would enable the court to bind their consciences to give effect to them. Headde was not bound (1) because he acquired title by possession under the statute and had nothing to do with the title of anyone prior to him, and (2) because section 34 of the Real Property Limitation Act protected him whether he had notice or not; and if this were so, it was immaterial whether subsequent purchasers from him had notice or not. Failing that, it was argued (3) that the two subsequent purchasers from him were not bound unless they were affected with notice.

Jessel, for the purchaser.

FARWELL, J., in a considered judgment, after stating the facts, said: Covenants restricting the enjoyment of land, except, of course, as between the contracting parties and those privy to the contract, are not enforceable by anything in the nature of action or suit founded on contract. Such actions and suits alike depend on privity of contract (*Cox* v. *Bishop*, 8 D. M. & G. 815), and no possession of the land coupled with notice of the covenants can avail to create such privity (*ibid.*). But if the covenant be negative so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property of such a nature that it is annexed to and runs with it in equity: *Tulk* v. *Moxhay*, 2 Ph. 774. This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing and is completely analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged. Such a charge was created in its inception by contract

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

between A. and B., the lender and the borrower, but when B. has sold the land charged to C., A. cannot sue C. on the contract to repay, but can only enforce the charge upon the land. This is the basis of the decision of the Court of Appeal in *Haywood* v. *Brunswick Building Society*, 30 W. R. 299, 8 Q. B. D. 403, where it was held that, where land had been granted in fee in consideration of a rent-charge and a covenant to lay out money in building and repairing, the assignee of the grantee of the land was not liable on the covenant to repair, because, as Cotton, L.J., put it, "the covenant to repair can only be enforced by making the owner put his hand in his pocket, and there is nothing which would justify us in going that length." In other words, effect is given to the negative covenant by means of the land itself. But the land cannot spend money on improving itself, and there is no personal liability on the owner of the land for the time being, because there is no privity of contract on which he can be sued in contract. So in *Mander* v. *Falcke*, 40 W. R. 31, [1891] 2 Ch. 554, a mere occupation of land was held to be within that principle. In *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 583, Sir George Jessel states that in his view the doctrine is either an extension in equity of *Spencer's case* to another line of cases or of the doctrine of negative easements, but that, whatever it was, "the purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden. The notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate, he took subject to the burden whether he had notice or not." He says also, at p. 580, "If it binds the land, it creates an equitable interest in the land." These passages are cited as correct in the considered judgment of the Court of Appeal in *Rogers* v. *Hosegood*, 48 W. R. 659, [1900] 2 Ch. 405. It is clear therefore that the person entitled to the benefit of a restrictive negative covenant over Blackacre has an equitable interest in Blackacre, and that such interest has the same nature and qualities as any other equitable interest in land in respect of priority, notice, and the like; but that notice forms no part of the cause of action in respect of such equitable interest. The plaintiff's claim depends on the validity and priority of his own charge, not on any notice, unless and until the owner of the land sets up as a defence the plea of purchaser for value without notice and with the legal estate. The fact that the usual contest in such cases is whether the landowner had notice or not, has doubtless made it usual to speak of notice as an essential part of the plaintiff's case in order to enable the court to bind the defendant's conscience; but it is quite clear that the equitable charge is created and exists independently of notice, and that no question of binding the defendant's conscience arises until he sets up the legal estate. It was suggested that the Privy Council in *Maclean* v. *Mackay*, 29 W. R. 798, took the view that the person to be bound by the covenant must derive title from the covenantor; but the passage merely purports to state the effect of *Tulk* v. *Moxhay*, and cannot fairly be read as deciding anything on the point.

It has not been, and could not, of course, be, contended that Headde, who was a trespasser until he acquired a title under the Statute of Limitations, was a purchaser for value. He could not, therefore, have set up any want of notice as an effectual defence to an action to enforce the restrictive covenants against him, and I am of opinion, therefore, that the land in his hands was bound by these covenants.

The next point is the plea of the Statute of Limitations. Section 34 is as follows: "That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished." It is now settled that the effect of this section is to extinguish the title of the dispossessed owner, not to transfer it to the statutory owner (see *Tichborne* v. *Weir*, 67 L. T. Rep. 735, where it was accordingly held that the statutory owner who had ousted a lessee did not become liable to the payment of rent and performance of covenants to which such lessee was liable), and it is argued from this, that Headde acquired a title free from all burdens attaching to the former owner's estate. But that decision is no authority for such a contention. The lessee's covenants and liabilities were incident to and part of the lessee's estate, and that estate was extinguished. The burden of these restrictive covenants is not incident but paramount to the estate of the dispossessed owner, and all that the Act extinguishes is the right and title of the person who fails to make an entry or bring an action for the recovery of the land in question. The right to enforce these covenants was no part of his title, nor is such right within the Act at all, for it is obvious that the person entitled to enforce them cannot do so by making any entry or distress or bringing any action to recover land. On the contrary, his action proceeds on the assumption that the land is and will remain in the possession of the defendant. The real analogy is not to a lessee's covenants, but to rights of way and similar easements. If a trespasser acquires a statutory title to land over which such easements exist he cannot plead the Statute of Limitations to persons seeking to enforce them, but must show abandonment like any other landowner. The Statute of Limitations therefore is no answer.

The third point is this. The vendor says that both he and the purchaser in 1890 were purchasers for value without notice. The present purchaser says that they had constructive notice. It is assumed that there was no actual notice, nor that form of constructive notice which arises from wilful abstention to inquire. Now it is well settled that a purchaser is bound to inquire into the title to the land offered to him by his vendor, and will be affected with notice of all that he would have ascertained if he had made proper inquiries, whether his abstention from inquiry is due to voluntary waiver or waiver under contract: *Wilson* v. *Hart*, 14 W. R. 748, 1 Ch. App. 467, and *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353. The law is now declared by section 3 of the Conveyancing Act, 1882: "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (1) it . . . would have come to his own knowledge if such inquiries and inspection had been made as ought reasonably to have been made by him." Sir George Jessel answers the question, "What is reasonable inquiry?" thus (29 W. R. 708): "It has been held that he is to require the usual title whatever the usual title may be." Now the usual title is forty years: *In re Cox and Neve*, 39 W. R. 412, [1891] 2 Ch. 109. In an ordinary case it is generally easy to show what would have been discovered if the full title had been shown, by producing that title. But here it is said that the paper title, prior to the twelve years' possession was not the title that the vendor should produce. But however plausible this reason for not producing more than twenty years' title may have seemed, the purchaser was not bound

to accept it. If authority is needed for this, the recent case of *Jacobs* v. *Revell*, 49 W. R. 109, [1900] 2 Ch. 859, affords it. But it is obvious that such a title as the vendor in 1890 or 1901 had to offer was open to serious objections and risks, and that no court would have compelled specific performance of an open contract to purchase land held under such a title. It is true that there are cases in which a title depending on the Statute of Limitations has been forced on a purchaser, but they are cases in which a particular objection, apparent on the face of the title as shown, has been held to be covered by possession for the statutory period. But the court in these cases adjudicated upon the existence of the suggested title; it did not compel the purchaser to take a leap in the dark. It follows, therefore, that inasmuch as the present vendor and the purchaser in 1890 accepted a title that they could not have been compelled to take, they waived their right to the production of the full title on which they might have insisted, and must be liable for the consequences.

Then it is said that there is nothing to show that such title would have disclosed the deed of 1872. But the plea of purchaser for value without notice is one single plea, to be proved by the person pleading it; it is not to be regarded as a plea of purchaser for value, to be met by a reply of notice. The plea of a purchase without notice is one which ought to be specifically alleged, as well as proved, by those who rely on it. It is therefore for the vendor to prove that he had no notice from the prior deeds, and he can only do this by producing such deeds. I see no hardship in this, but it would indeed be strange if the vendor, whose title is deficient in that it lacks the proper evidences for forty years, could give a better title than the man whose muniment room is filled with the proper equipment of deeds, and not the less strange because the deficiency of title results from the fact that part of the title results from a successful trespass. The statutory title is due to the demerits of the owner, who was careless enough to allow himself to be dispossessed for twelve years, not to any merits of the trespasser, who was a mere wrongdoer up to the last day of the twelve years. The latter is entitled to what the statute gives him, but no more, and those who purchase from him must take the risk of suffering for the infirmity of his title. The result is that a title is not shown at present.

Solicitors for the vendor, *Harris, Chetham, & Cohen.*

Solicitors for the purchaser, *Granville Smith, Coleman, Betts, & Co.*

Chan. Div. } Jan. 17.
Buckley, J. }

In re DUNCAN & CO. (LIMITED). (*a.*)

Gaming and wagering contract — Money deposited as security — Stockbroking transactions — Interest upon deposits—Company in liquidation—Surplus assets—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

A claim to the return of moneys deposited as security for the observance of a contract void under the Gaming Act, 1845, *is a claim under contract, and therefore, if there is a contract express or implied between the parties that interest shall be paid upon this money, such interest is recoverable by the depositor.*

A company carried on stock and share transactions, which were illegal as wagering transactions, for customers who deposited money as "cover" for these transactions. The company was wound up, but proved solvent, its creditors being paid 20s. in the £ upon their admitted proofs, and there were surplus assets. The course of dealing between the parties was for the company to pay interest to the customer upon the amount of "cover" in the company's hands.

Held, that the customers were entitled to interest as from the date of the winding up, in addition to the sums proved for.

Dictum *of* Rigby, L.J., *in* Strachan *v.* Universal Stock Exchange Co. (Limited), 43 *W. R.* 611, [1895] 2 *Q. B., at p.* 335, *followed.*

Summons.

In this case a question arose whether interest could be claimed upon sums deposited with stockbrokers as cover for transactions which were illegal under the Gaming Act, 1845.

The above company carried on business as stockbrokers, although not members of the Stock Exchange, and their course of business was to receive from their customers on deposit sums of money as "cover" for the transactions which was intended. They then entered into transactions of buying and selling stocks and shares for or with their customers which were admitted to be illegal, as being gaming and wagering contracts.

In May, 1901, the company was ordered to be wound up. Notice was given by the liquidator in September, 1903, of a first, and in June, 1904, of a final, dividend of 10s. in the pound (payable on the 4th of July, 1904), making up the whole 20s. in the pound.

There would still be a surplus of assets in the hands of the liquidator after payment of the final dividend, and certain of the creditors thereupon claimed interest on their admitted debts at 4 per cent. per annum, in addition to the final dividend, as from the commencement of the winding up of the company.

The liquidator divided the creditors of the company into six classes, but no question arose as to the three first classes. The three last classes were as follows: Class D were creditors who had claimed no interest on their principal; class E were creditors, whose claims as customers had been admitted in part, and several of whom had claimed interest up to the date of the liquidation; class F were creditors whose claims had been compromised under an order of the court and as such admitted. All these claims were in respect of unexhausted "cover" in the hands of the company. These creditors claimed interest upon their admitted proofs upon the ground that interest had been paid upon sums deposited by them with the company in the course of their dealings with the company.

The liquidator took out the summons for the directions of the court upon the claims for interest.

J. R. Atkin, for the liquidator.—The general rule is that interest is not payable, but where the debt is an interest-bearing debt, and the company is solvent, interest after the date of the winding up is payable: *Warrant Finance Co.'s case*, 17 W. R. 780, L. R. 4 Ch. App. 643. The question is whether these admitted claims for the "cover" are claims for interest-bearing debts.

Hon. Frank Russell, for creditors D. and E.—Interest upon these deposits has been paid in the course of dealing between the company and its customers. Their claims are therefore for interest-bearing debts: see the cases mentioned in Seton, vol. 2, p. 1386. The customers are therefore entitled to interest upon their claims since the date of the winding up in addition to the sums they have proved for. The arrangement as to these deposits was not part of the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

wagering contract (*Universal Stock Exchange Co.* v. *Strachan*, 44 W. R. 497, [1896] A. C. 166), and the implied contract as to payment of interest is binding and legal.

C. L. Attenborough, for creditor F.

Sargant, for the contributories.—The whole contract is illegal and void. The customers get back their deposits as money had and received to their use, and not under any contract express or implied which the court will recognize or enforce. As regards the F class of customers, their proofs were admitted as compromises, and they cannot claim anything more.

BUCKLEY, J.—I think that it is made out that by reason of the course of dealing between the company and its customers there was a contract that the company would pay interest to the customers on the amount of their "cover." The result of the winding-up is that happily there has been enough to pay the creditors 20s. in the pound, and the only question I have to determine is whether the customers are entitled to interest in addition. For the purposes of my judgment I do not not think that there is any difference between the classes D, E, and F, with which I have to deal, subject to one point with which Mr. Sargant has pressed me as to Class F., which I will consider separately.

In *Universal Stock Exchange* v. *Strachan*, 44 W. R. 497, [1896] A. C. 166, it was held that the Gaming Act, 1845, does not apply to money deposited as "cover" for differences arising on gambling transaction, in stocks and shares. In the Court of Appeal, [1895] 2 Q. B., p. 335, Rigby, L.J., said: "The claim"—that is, the claim to get back the valuables—"may be called a claim in trover or detinue, or it may be called, and I rather lean to that point of view myself, redemption. Here is a man who claims to be mortgagee." It is the company here. "Directly the transactions are held to be gaming transactions, it follows as a matter of course that his claim in respect of them fails; and where from the nature of the transaction itself nothing can be due on the mortgage, the mortgagee must deliver up his security."

It is quite clear that the Lord Justice was dealing with it as a claim under contract. It was a contract between the parties, with the result that there is no mortgage debt in respect of which the mortgagee can hold his securities. Here the proof in the winding up is the form in which under the circumstances the customers assert their rights to work out the obligations arising under the contract, including, as it seems to me, their rights in respect of interest. I think that they are entitled to the interest which was payable to them upon their cover in the course of dealing. That disposes of classes D and E. With regard to class F, the proof of the creditors were for the amount of their debts at the commencement of the winding up. That has nothing to do with the question of interest after the winding up has commenced. There could be no proof for that. The compromises to prove for those amounts were not compromises as regards the right of the creditors to have the interest now claimed if the company turned out to be solvent.

I think that the interest claimed ought to be paid by the liquidator to all the three classes of creditors. Directions given accordingly.

Solicitors, *Tyrrell Lewis, Lewis, & Broadbent; Emanuel & Co.; Attenborough & Sons; Nathaniel Reynolds.*

K. B. Div. (Bray, J.) — Jan. 14.

AMBLER *v.* BISHOP OF LEEDS. (*a.*)

Light—Ancient lights—Prescription—Ordinary and extraordinary user—Nuisance—Damage—Construction.

To constitute an actionable obstruction of ancient lights there must be a substantial interference with the ordinary user of light, and if in respect of business premises, then with the ordinary user required for an ordinary business. In these expressions the word "ordinary" is used solely with reference to light, and an ordinary user or an ordinary business means a user or business which in fact requires only an ordinary amount of light. This is a question, not of law, but of fact.

There can be no prescription of an extraordinary user of light by user for twenty years, either with or without notice of the owner of the servient tenement.

Colls *v.* Home and Colonial Stores (Limited), *ante*, *p.* 30, [1904] *A. C.* 179, *considered.*

By a memorandum of agreement dated the 1st of December, 1902, the plaintiffs, Herbert Butler and William Fawcett, and the defendant, the Right Rev. William Gordon, D.D., Bishop of Leeds, agreed to submit their dispute and differences to arbitration. For the purposes of this report it is only material to set out part of paragraph 1 of the said memorandum—viz.: "All disputes and differences which have arisen or which shall hereafter arise as to the erection of the said cathedral with or without moderation of the plans already prepared for that purpose or as to the damage sustained . . . are hereby referred to the award and determination of . . ."

At the request of both parties, the umpire, Thomas Blashill, stated a special case for the opinion of the court dated the 20th of July, 1904, as follows: "Whether on the foregoing facts I am bound by the decision in the *Home and Colonial Stores (Limited)* v. *Colls*, *ante*, p. 30, [1904] A. C. 179, and therefore cannot award damages to the plaintiff, or whether I can award damages in respect of interference with such special user of light as aforesaid."

The following are the material facts and findings of the umpire as set forth in the special case stated:

"(1) Herbert Butler and William Fawcett, the plaintiffs, are the owners of 23, 25, 27, 29, 31, 33, and 37, on the west side of Cookridge-street, in Leeds. The defendant is the Right Rev. William Gordon, Bishop of Leeds, who is erecting a cathedral opposite the said premises, and the plaintiffs contend that the said cathedral has interfered with the light to which they are entitled and which has hitherto been enjoyed in connection with the said premises.

"(2) The upper parts of the buildings as to the rooms over No. 25 and 27 are used and have been used for upwards of twenty years past by the plaintiff Herbert Butler, an architect, for the purpose of his offices, including a drawing office on the first floor, for which a special amount of light is required, and at the north end they are occupied and have been occupied for upwards of twenty years past by a tenant of the plaintiff, a cloth merchant, who during such period has used a part of the first floor for the purpose of perching or examining and matching cloth, for which also a special amount of light is required.

"(3) All the lights are ancient, except as to the additional amount of light coming through the new shop fronts.

"(10) The plaintiffs claim that they are entitled to damages in respect of all the premises, and in particu-

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

lar in respect of damages in respect of the special user of parts of the first floor as before mentioned, as the rentals at present obtained, or at which the premises occupied by the said Herbert Ambler were estimated previous to the erecting of the cathedral, will not be obtainable again.

"(11) The plaintiffs also claim that the agreement of reference constitutes a submission to arbitration for the purpose of assessing all damages sustained by them in respect of the interference with, or obstruction of, light to their premises, irrespective of whether or not such damage is sufficiently material or substantial to entitle the plaintiffs to an injunction in an action in this honourable court.

"I therefore award and find as follows: Notwithstanding the defendant's buildings, there remains sufficient light to the plaintiffs' premises for all purposes of ordinary user, and the plaintiffs are not entitled to damages for interference with such ordinary use, but if I am entitled to take into account damages which the plaintiffs have sustained in respect of loss of light to those parts of the said premises used for occupation in respect of which a special amount of light is required, then I award £600 damages to be paid by the defendant to the plaintiffs."

Eldon Bankes, K.C., and *Longstaffe*, for the plaintiffs.—The law applicable to nuisances is now applicable, it has been decided, to interference with light, except in so far as an exceptional amount of light is claimed. The question whether an extraordinary amount of light is required for a particular class of business is a question of law; here the arbitrator finds that a drawing office of an architect requires an extraordinary amount of light, which I submit is a finding of law, and is incorrect. Moreover, the question referred to the arbitrator was whether the plaintiffs had suffered damage in fact, not whether there was an actionable nuisance: see paragraph 1 of the agreement of reference.

They also referred to *Colls* v. *Home and Colonial Stores* (*Limited*), *ante*, p. 30, [1904] A. C. 179; *Rushmer* v. *Polsue*, Times, Jan. 14, 1905.

Waugh, K.C., with him *Waddy*, for the defendants.—The first question to be decided is to what quantum of light are the plaintiffs entitled, and, that being ascertained, then the amount of damage suffered can be arrived at. In paragraph 1 of the agreement of reference the obstruction of light is referred to, and by obstruction is, of course, meant legal obstruction. Now, the umpire has found that the plaintiffs are entitled to £600 damages, not in any event, but only if there has been a legal obstruction of their rights. If the umpire finds that the ground floor has sufficient light, but the floor above has more light, that is nothing but a finding of fact that that particular business carried on on the floor above requires an extraordinary amount of light. The umpire finds there is sufficient light for ordinary purposes, but if he is entitled to award damages for interference with an extraordinary amount of light, then he awards £600 damages. The Prescription Act (2 & 3 Will. 4, c. 71), s. 3, only refers to ordinary user: *Colls* v. *Home and Colonial Stores* (*Limited*). The fact that you have enjoyed for a time a greater user does not entitle you to acquire a right of greater user: *vide* p. 203 of above case. Again, something done by the owner of the dominant tenement cannot affect the quantum of user if the owner of the servient tenement has no notice. There can be no actionable nuisance unless the individual has been deprived of something to which the ordinary individual is entitled: *Lanfranchi* v. *Mackenzie*, 15 W. R. 614, L. R. 4 Eq. 421.

Eldon Bankes replied.

JAN. 20.—BRAY, J., read the following judgment: This is a special case stated by an umpire in his award. The plaintiffs were the owners of eight houses in Cookridge-street, Leeds. The defendant was the Bishop of Leeds, and was erecting a cathedral on a piece of land opposite, partly vacant and partly occupied by old buildings, and the plaintiffs complained that the erection of the cathedral interfered with their ancient lights. The matters in dispute were referred to arbitration by an agreement between the parties dated the 21st of December, 1902. Mr. Blashill was appointed umpire, and the reference proceeded before him. After the evidence was closed he was asked to defer making his award until the House of Lords had given their decision in *Colls* v. *The Home and Colonial Stores*, and subsequently to state his award in the form of a special case. This he did, and by his award, after stating certain facts, awarded and found as follows: "Notwithstanding the defendant's buildings, there remains sufficient light to the plaintiffs' premises for all purposes of ordinary use and the plaintiffs are not entitled to damages for interference with such ordinary user, but if I am entitled to take into account damages which the plaintiffs have sustained in respect of loss of light to those parts of the said premises used for occupations in respect of which a special amount of light is required, then I award six hundred pounds damages to be paid by the defendant to the plaintiffs," and he submitted to the court the following question: "Whether on the foregoing facts I am bound by the decision in *Home and Colonial Stores* v. *Colls*, and therefore cannot award damages to the plaintiffs, or whether I can award damages in respect of interference with such special user as aforesaid." This is the question I have to decide.

Mr. Bankes, on behalf of the plaintiffs, took three points. First, he said that the umpire had found that an architect's business was not an ordinary business, that this was wrong in law, that an architect's business was an ordinary business, and as he had found that the light was insufficient for this business, he had found that it was insufficient for an ordinary business, and, therefore, according to the law as laid down in *Colls's case*, there had been an actionable interference with the plaintiffs' ancient lights and the plaintiffs were entitled to the £600 damages. And as an alternative to this he contended that the question whether an architect's business was an ordinary business was a mixed question of law and fact and the umpire must have misdirected himself or misunderstood *Colls's case*, and that I ought to send the case back for him to state the facts more fully.

Secondly, he contended that the twenty years' enjoyment had given the plaintiffs a right to the special light.

Thirdly, he contended that by the agreement of reference the defendant had agreed to pay for actual damage sustained whether there was actionable interference or not.

I will examine these contentions. First, what is meant by the expressions which are to be found in the special case and in the judgment in *Colls's case*, "ordinary user" or "ordinary business" or "ordinary purposes." I think that the word "ordinary" is used solely with reference to light; and an ordinary user, or an ordinary business means a user or business which in fact requires only an ordinary amount of light. Is this a question of law or fact? In my opinion it is a question of fact. It must depend upon the evidence in each case, and it cannot be adjudicated as a matter of law whether an architect's business or any other business is an ordinary business. If I am right in this I have no power to interfere

with the finding of the umpire. I do not think it is even mixed fact and law; but if it were, I feel quite unable to see where the umpire has misdirected himself or how he has misunderstood *Colls's case*. When I look at the facts as stated in paragraphs 4 to 7 of the case it seems to me that the plaintiffs here have a far weaker case than the Home and Colonial Stores had. The width of the street in *Colls's case* was about equal to the height of the defendant's buildings, viz., forty-one feet. Here the street averages sixty feet in width and the height of the main wall is only fifty feet. It is true that opposite some small parts of the plaintiffs' premises the angle is reduced to forty-four degrees or even less, but these are not the parts of the premises where the special light is required. It seems to me that the umpire would have been wrong even as regards the ground floor if he had found that there was an actionable interference, much more so as regards the first floor. If his findings are to be criticized, the observation I should be disposed to make is that an architect and a cloth merchant must require an extraordinary amount of light if damage to the extent of the £600 have been sustained by the erection of the cathedral. But however that may be, I accept the umpire's finding, and accepting it I am quite unable to see that the umpire has misdirected himself or misunderstood *Colls's case*. In truth the findings that the architect and cloth merchant require a special light, and that this light has been interfered with, are intended by the umpire to be findings in the plaintiffs' favour which will enable them to raise their second point.

Further, it seems to me that the umpire has not intended to state a special case to enable the plaintiffs to raise their first point or to dispute any of his findings of fact. The only point raised is whether "on the foregoing facts he is prevented from awarding damages," and I have no right to question the facts.

I come now to the second point, which does raise a question of law—viz., whether use or enjoyment of a special light for twenty years gives a right to that special light, and thus enlarges the easement and increases the burden of the servient tenement. It is important to observe that the umpire does not state as a fact that the owners of the servient tenement were aware that the premises were being used for businesses that required special light. It was said by the plaintiffs' counsel that no evidence was given at the hearing before the umpire about it, and that if it is a relevant fact I ought to send the case back to the umpire to find it. I do not agree with that contention. A plaintiff has to prove his case, and if he does not prove a necessary fact of his case he must fail. The only fact, therefore, that I have to deal with, is the use and enjoyment of the special light for twenty years. Does that give a right to it? Now, this most important point was not decided in *Colls's case;* it was much discussed, but as their lordships came to the conclusion that there was no sufficient evidence of twenty years' user it became unnecessary to decide it. It is, however, referred to in Lord Davey's judgment, which is also the judgment of Lord Robertson, and is touched upon in Lord Lindley's, but there is certainly nothing in either of these judgments which assists the plaintiffs' contention. On the contrary, the inclination of their opinion seems against it. There is a *dictum* in Malins, V.C.'s, judgment in *Lanfranchi* v. *Mackenzie*, L. R. 4 Eq. 421, at p. 430, distinctly opposed to the plaintiffs' contention if knowledge is not to be assumed, and Mr. Bankes was unable to point to any *dictum* in any case in his favour. Malins, V.C.'s, reasons for thinking that no right could be gained in the absence of knowledge seems to me to be unanswerable.

If the origin of the right to light is a supposed lost grant or covenant, as the cases seem to show, who would presume that the owner of the servient tenement intended to grant a special right beyond the ordinary right when he was ignorant of the special user or enjoyment? I am, however, prepared to go further and to hold that even twenty years' enjoyment to the knowledge of the owner of the servient tenement will not give a larger right. I think that the results of the judgments in *Colls's case* is to show that the test of the right is whether the obstruction complained of is a nuisance. If one turns to the nuisance cases, do we find any trace of a doctrine that a person in bad health or carrying on a delicate trade is entitled to more comfort or freedom from annoyance than ordinary people because for twenty years his neighbours have been aware of his state of health or the trade he was carrying on and have left him undisturbed. I am not aware of any decision that suggests it. Such a proposition sounds absurd. Again, I think in many of the judgments in *Colls' case* and in other cases, it is implied if not expressed that in measuring the *quantum* of light to which the owner of the dominant tenement is entitled the purpose for which he desires to use or uses the light should be disregarded, and does not either enlarge or diminish the easement which he has acquired; see especially the judgment of Lord Davey, where he says that it is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient light or by not using the full measure of light which the law permits. If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary purposes of inhabitancy and business, why, it may be asked, should it be made a test where the use has been of special or extraordinary character in excess of that standard. So in *Yates* v. *Jack*, L. R. 4 Ch. 295, Lord Cranworth rejects the argument of the defendant that the plaintiff's present business did not require a strong light, and for this business there remained a sufficient light. So again in *Courtauld* v. *Legh*, L. R. 4 Ex. 126, 17 W. R. Dig. 101, and it was held that the right was acquired, although for a part of the twenty years the house was uninhabited and unfit for habitation.

It was well observed by Mr. Waugh in his argument for the defendant that the special user on which the claim is founded is a user on the dominant tenement and not on the servient tenement. The servient tenement is not in any way affected by it. If the true doctrine be that it is laid down in *Colls's case* that by twenty years' user all that is acquired is a right to prevent the defendant from building so as to interfere with the light previously enjoyed, so materially as to amount to a nuisance, I think it would not be logically consistent with this doctrine to hold that a larger right can be acquired. I think also to introduce the element of the quantum of user would work inconvenience and introduce uncertainty. If the only right capable of being acquired be the sufficient light for the ordinary user of inhabitancy and business, the owner of the servient tenement knows his exact position, he knows within reasonable limits how high he can raise his buildings, and whether during the twenty years it is worth his while to obstruct his neighbour's windows. If a right to special light be capable of acquisition without his knowledge he cannot know his position, and if he has notice of some special light being required for his neighbour's business he cannot measure the extent with any exactitude. It seems to me altogether unreasonable to presume that any man would have made a grant of such an indefinite easement. On the whole I think both reason and authority compel me to decide this point against the plaintiffs.

The last point seems to depend entirely upon the true construction of the agreement of the 1st of December, 1902. Has the defendant by the agreement agreed to pay for actual damages sustained whether there was an actionable interference or not? Reliance was chiefly placed in the recital and in clause 1. It was said that the recital states that the agreement was a "compromise" which implies concession on both sides, and that if the defendant had not made this concession he had made none. Mr. Waugh pointed out that clause 9 was a concession, and I think he is right. I think the power was given in lieu of the power to grant an injunction. The real question, however, depends on clause 1. Does "interference with or obstruction of light" mean legal or actionable interference or obstruction, or in other words is it interference with or obstruction of light to which the plaintiff was entitled. This was the claim of the plaintiffs as appears by the recital. The recital implies that this was disputed, and this, I think, was the dispute referred to arbitration. I cannot draw from the words of the agreement any inference that the defendant intended to give up any legal defence. I think the dispute was whether the plaintiffs had sustained legal damage for which any action would lie against the defendant.

It remains, therefore, to look again at the findings of the umpire. He has found that sufficient light remained for all purposes of ordinary user. I think that finding was substantially the same as the finding of Joyce, J., in *Colls's case*, and the House of Lords having held that on that finding no action lay either for an injunction or for damages, I must hold that the plaintiffs are entitled to no damages here and must direct judgment to be entered for the defendant with costs so far as I have any jurisdiction to deal with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Pitman & Sons*, for *H. Denison*, Leeds.

Solicitors for the defendants, *Johnson, Weatherall, & Stuart*, for *Watkins*, York.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) Dec. 20.

YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS *v.* ELLIS. (*a.*)

Tramway — Light railway — "Hackney carriage" — "Omnibus"—Tramcars run on rails laid in street and worked by electric energy—Town Police Clauses Act, 1847 (11 *&* 12 *Vict. c.* 89), *ss.* 37, 45—*Town Police Clauses Act,* 1889 (52 *&* 53 *Vict. c.* 89), *ss.* 3, 6—*Light Railways Act,* 1896 (59 *&* 60 *Vict. c.* 48)—*Spen Valley Light Railway Order,* 1901.

The appellants were a light railway company formed under provisional orders made in accordance with the Light Railways Act, 1896, *who had been summoned and convicted for allowing one of their cars to ply for hire in the borough without a licence, contrary to the provisions of the Town Police Clauses Act,* 1847, *as extended by the Town Police Clauses Act,* 1889.

Held, that the appellants had been wrongly convicted, since the provisions in the Town Police Clauses Act, 1889, *which enlarged the definition of hackney carriage in the Town Police Clauses Act,* 1847, *so as to include omnibuses, did not apply to a car plying for hire on a street railway or tram line constructed and worked under an order made under the Light Railways Act,* 1896, *for such car was not a hackney carriage within the meaning of the Town Police Acts.*

Case stated by the justices of the peace in and for the borough of Dewsbury, on an information preferred by the respondent, the town clerk of Dewsbury, against the appellants for permitting one of their tramcars to be used as a hackney carriage plying for hire within the said borough without having obtained a licence from the corporation for such carriage to ply for hire, as required by section 37 of the Town Police Clauses Act, 1847.

The justices held the offence proved, and fined the appellants 2s. 6d.

The case set out the following facts as admitted or proved before the justices:

(*a*) That the appellants were the proprietors of the carriage intended to be referred to in the information.

(*b*) That such carriage was similar to a tramcar worked by electrical energy, and was constructed for and used by the appellants to run over their light railways under and by virtue of the provisions of the Spen Valley Light Railway Order, 1901, and the Spen Valley Light Railway Extensions Order, 1901, both orders being made under the Light Railways Act, 1896, and formed part of the rolling stock equipment for the railways authorized to be provided therefor by the said orders and Act.

(*c*) That such light railway was similar in all respects to a tramway and ran through the public streets of Dewsbury and the adjoining districts.

(*d*) That on the 10th of May, 1904, the said carriage was used by the appellants to carry passengers at separate fares within the borough of Dewsbury.

(*e*) That the carriage had not been licensed by the mayor, aldermen, and burgesses of the borough of Dewsbury, and that no application for any such licence had been made.

4. The respondent contended that such carriage was an omnibus within the meaning of the Town Police Clauses Act, 1889, that it must therefore be deemed to be included within the term "hackney carriage" in sections 37 and 45 of the Town Police Clauses Act, 1847, and that the appellants permitted the same to be used as a hackney carriage plying for hire within the borough contrary to the provisions of the last-mentioned section.

5. The appellants contended:

(*a*) That such carriage was in any event not an "omnibus" within the meaning of the Town Police Clauses Act, 1889, nor a "hackney carriage" within the meaning of the Town Police Clauses Act, 1847; and

(*b*) That by reason of the Light Railways Act, 1896, and the Spen Valley Light Railway Orders, the provisions of the said Town Police Clauses Acts did not apply to such carriage, and in any case no such licence as was referred to in the information was required therefor; and

(*c*) That the said carriage was not only licensed to be used by the said light railway orders, but was required to be so used; and

(*d*) That the said carriage did not ply for hire within the meaning of the Acts.

6. At the hearing the appellants cited the following cases: *City and South London Railway Co.* v. *London County Council*, [1891] 2 Q. B. 513, 39 W. R. Dig. 191, and *Surrey Commercial Dock Co.* v. *Bermondsey Corporation*, 52 W. R. 446, [1904] 1 K. B. 474.

7. The justices (by a majority of three to one) were of opinion that the said carriage was an omnibus within the meaning of the Town Police Clauses Act, 1889, and therefore a hackney carriage within the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

meaning of sections 37 and 45 of the Town Police Clauses Act, 1847; that the provisions of these Acts applied to such carriage and were not overriden by the Spen Valley Light Railway Order, 1901; and that the appellants had been guilty of an offence under section 45 of the Town Police Clauses Act, 1847, in permitting such carriage to be used as a hackney carriage plying for hire within the borough of Dewsbury without having obtained a licence for the same.

8. The question for the opinion of the court was whether upon the above statement of facts the justices had come to the correct determination in point of law, and if not, what should be done in the premises.

By sections 37 and 45 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), as incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), by section 171 of that Act, the proprietor of any carriage used as a hackney carriage without first being licensed by the urban authority is liable to a penalty. By the Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), which is to be deemed to be incorporated with section 171 of the Public Health Act, 1875, the above-mentioned provisions of the Town Police Clauses Act, 1847, among others, are extended to omnibuses, and by section 3 of that Act the term "omnibus" when used in this Act shall include "every omnibus, char-a-banc, wagonette, brake, stage coach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance; but shall not include any tramcar or tram carriage duly licensed under the provisions of the Tramways Act, 1870, or of any Provisional Order made thereunder and confirmed by Parliament or under the provisions of any local Act of Parliament . . ."

The Spen Valley Light Railway Order, 1901, was an order of the Light Railway Commissioners of the ordinary form, authorizing the construction of a street railway in the nature of a tramcar, and containing provisions authorizing the Board of Trade to make regulations with regard to the use of mechanical power on the line and giving the local authority power to make bye-laws for the running of the cars, advertisements, and so forth.

Danckwerts, K.C. (*Llewellyn Davies* with him), for the appellants.—The justices' decision here that a carriage run upon a light railway was a hackney carriage carries with it this absurdity, that a light railway must get a licence from every local authority through whose district the line runs—and there might be a great many. Consequently, although the railway company was bound to run such a number of cars as was necessary to meet the public requirements, each of the local authorities would have the discretion of saying how many of these carriages there must be run within their district. [After referring to sections 11, 12, and 28 of the Light Railways Act, 1896, he was stopped.]

Macmorran, K.C., and *C. Fleetwood Pritchard*, for the respondent.—The licence to be granted by the urban authority under section 37 of the Town Police Clauses Act, 1847, was only extended to omnibuses after the Town Police Clauses Act, 1889, came into force. Therefore tramcars would not have come within the section without special legislation when they were first authorized by the Tramways Act, 1870. We find that there was such a special provision in section 48 of the Act of 1870 referring to the licensing tramcars and the drivers and conductors. The Legislature deeming licences necessary in the case of tramways authorized under the Act of 1870 intended those provisions to extend to those tramways which are termed light railways and authorized by Light Railways Act, the carriages being indistinguishable for all practicable purposes from those used on a tramway. These street trains are not real railways stopping only at stations, but stop where required within certain restrictions to pick up or set down passengers. The definitions of hackney carriage in the Act of 1847 by the Act of 1889 is extended to omnibuses, and tramways are expressly excluded from its operation because provision already existed for the licensing of tramcars under the Act of 1870. The inference therefore is that the Legislature intended that the definition of omnibus in the Act should include a tramcar running on lines authorized by the Light Railways Act. The vehicles now in question are tramcars for all practical purposes, and therefore must be licensed under the Act of 1847 as extended to omnibuses by the Act of 1889.

Lord ALVERSTONE, L.C.J.—It seems to me that the point argued does the greatest credit to the ingenuity of the persons who have raised it, because no one with experience of parallel lines of legislation could possibly have come to the conclusion that that which is for all effective purposes a railway, was to be subject to the provisions of the Town Police Clauses Acts in the matter of the licensing of carriages. The licensing sections are those of the Town Police Clauses Act, 1847, and it is sufficient for this purpose to say that by section 37 the local authority may from time to time licence to ply for hire such number of hackney carriages as they shall think fit. The control given to the local authority by the Act is not only in the matter of vehicles, but in the matter of drivers, and in the matter of the general conduct, and the way in which the carriages are to be conducted. Then came the Act of 1889, which actually enables the local authority to determine what badges were to be worn, what numbers are to be put on omnibuses, the number of people to be carried, and as to the fitness of the horses and so on, and the carrying and lighting of proper lamps upon the vehicles; and, I suppose, it being thought by some ingenious person that it might be well that tramways should not come by implication into that Act, they are expressly excluded, it being the fact that they were already dealt with for certain purposes with regard to the local authority under section 48 of the Tramways Act, 1870. It has been most ingeniously suggested that it was because there had been special legislation for tramways that they were excluded from the Act of 1889, and that everything else of this character not expressly excluded comes within the definition of "omnibus." What is the right and proper view? Over a long period of years there was legislation with regard to hackney carriages, culminating in the combined section of these two Acts of Parliament of 1847 and 1889. There was in 1870 a subject-matter called into existence, somewhat resembling hackney carriages—namely, tramcars—which at any rate in shape come somewhat near to omnibuses; and it was thought desirable that they should be under the jurisdiction of the local authority for this purpose, and accordingly there is an express enactment with regard to the powers of the local authority. A few years later a number of Acts of Parliament were passed with regard to light railways, all directed, so far as I know, to make the light railways, railways in the sense of being subject to the same provisions as ordinary railways were under the previous statutes, and there was no suggestion that the light railways were to be subject in this respect to the local authority.

In the Light Railways Act, 1896, and the orders thereunder, there is not a trace of any intention of

subjecting the light railways or their vehicles to the local authorities in this respect, but on the contrary there are a number of sections indicating that what is going to be constructed under the powers of that Act is to be subject to what I may call railway legislation. Then came the order of the Light Railway Commissioners providing that the Board of Trade shall have jurisdiction with regard to many of the things as to which the local authority have jurisdiction in the matter of hackney carriages, and expressly giving the local authority power to make bye-laws, with reference to the portion of the railway in their district, with regard to the speed, the distances at which carriages shall follow one another, stopping on the route, the traffic on the road, advertisements upon the carriages which would be unsafe or unsightly, overcrowding, and the hours for conducting goods traffic. These are matters which are in *pari materia*, to a very large extent, with those enumerated in section 6 of the Town Police Clauses Act, 1889. I think it is quite impossible to come to the conclusion that if the Legislature really meant to give the powers which are contained in section 6 of that Act to the local authority, they would have cut down the rights of the local authority in respect to the particular matters enumerated.

Some ingenious person persuaded the majority of magistrates that the circular route by which Mr. Macmorran seeks to make the carriages of the light railway subject to the Act of 1889, was a route that they could safely travel, and thereupon they gave the decision, which is now under consideration by us, that every carriage of a light railway, though it is run under circumstances to a large extent entirely different from those under which it was contemplated when the Tramway Act, 1870, was passed, that tramcars would run, must be licensed; and, I suppose, the driver and conductor licensed. The absurdity would be too great. We have given very full consideration to the matter, and our attention has been been directed to many of the sections, but all pointing in the direction that a light railway carriage is a railway carriage. It is not a hackney carriage, and it is not a tramway car. Therefore the appeal must succeed. I have no doubt whatever about it.

KENNEDY, J.—I agree.

RIDLEY, J.—I agree.

Appeal allowed.

Solicitor for the appellants, *Sydney Morse.*

Solicitors for the respondent, *Sharpe, Parker, & Co.*, for *H. Ellis*, Town Clerk, Dewsbury.

Privy Council.

(*On appeal from the Supreme Court of Canada.*)

Nov. 11.

McARTHUR *v.* DOMINION CARTRIDGE CO. (*a.*)

Negligence—Damage by explosion—Absence of exact proof.

Where the precise cause of an accident is not known, there still may be sufficient evidence to render the defendant liable, as when an explosion occurs and the jury acting as reasonable men find under the whole circumstances that there was negligence on the defendants' part, although of the exact cause there is no evidence, or it is unascertainable.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Appeal from a judgment of the Supreme Court of Canada. The facts are given in their lordships' judgment.

R. C. Smith, K.C., and *R. A. Greenshields, K.C.*, for the appellants.

C. A. Russell, K.C., and *A. Falconer*, for the respondents.

The judgment of their lordships (Lords MACNAGHTEN, DAVEY, ROBERTSON, LINDLEY, and Sir ARTHUR WILSON) was delivered by

Lord MACNAGHTEN.—This is an appeal *in formâ pauperis* from a judgment of the Supreme Court of Canada, setting aside the verdict of a special jury in favour of the appellant. The verdict was unanimous. And it had been upheld by the unanimous judgment of the Court of Review for the District of Montreal, and also by the unanimous judgment of the Court of King's Bench for the Province of Quebec. In the Supreme Court, Taschereau, J., dissented from his four colleagues.

The facts of the case may be stated very briefly: On the 10th of June, 1898, the appellant, who was in the service of the respondent company and then about 18 years of age, was seriously injured by an explosion at the company's works. There is no direct evidence to show how the explosion occurred. It seems to have originated in an automatic machine used for filling shells or cartridges with powder and shot. The appellant and another boy of about the same age who was his superior, were minding the machine at the time. It was the appellant's duty to keep the shells with which the machine was fed supplied with shot and wads. The explosion was instantaneous. The flash communicated through a supply pipe with a powder box fixed on the outside of the wall of the room in which the machine stood. The box was placed there so that in the event of an accident the explosion might spend itself in the open air. However, for some reason or other, the box had been strengthened externally, and the force of the explosion took effect inwards. The wall was blown in, the machine knocked to pieces, and the room entirely wrecked.

On the 9th of June, 1899, this action was brought in the name and on behalf of the appellant, then a minor, by his tutor. The case on behalf of the plaintiff was that the explosion was owing to the fault of the company. The company, on the other hand, denied responsibility, and alleged that the mishap was caused by the negligence of the plaintiff himself.

The jury found that the explosion occurred through the fault and neglect of the company "by their neglect to supply suitable machinery" and "by their neglect to take proper precautions to prevent an explosion." They also found that the injury of which the plaintiff complained was not "in any way caused by his own fault, neglect, or negligence." And they assessed the damages at 5,000 dollars.

The learned judge who presided at the trial reserved the case, as he was authorized to do by the Civil Procedure Code, for the consideration of the Court of Review. That court dismissed with costs a motion on behalf of the company for judgment or a new trial, and confirmed the verdict in favour of the plaintiff. No complaint was made of the learned judge's summing up or the way in which the questions were left to the jury.

In Quebec when an unsuccessful party after verdict moves for judgment or a new trial, the function of the court under the Civil Procedure Code is the same as the function of a Court of Appeal in this country in similar circumstances. It is not the

province of the court to re-try the question. The court is not a court of review for that purpose. The verdict must stand if it is one which the jury as reasonable men having regard to the evidence before them might have found, even though a different result would have been more satisfactory in the opinion of the trial judge and the Court of Appeal.

That there was evidence to justify the verdict in the present case can hardly be disputed. The automatic machine which had been in use for rather over a year was designed in the works of the company. The designer himself, who was the company's superintendent, and apparently a clever and skilled mechanic, and the man who made the machine under his instructions and direction, spoke of it in terms of the highest praise. But no independent expert was called to echo their encomium or confirm their view of its suitability for the purpose in hand. It was not patented, but still it does not seem to have been adopted in any other works of the sort. In the judgment of the majority of the learned judges of the Supreme Court, delivered by Girouard, J., it is stated that it was "proved that the machine was perfect, and worked regularly and properly." But the company's witnesses did not go so far as that. They admitted that there was room for improvement, and that improvements were to be introduced in a machine that was then being constructed to take its place. The principal fault or defect of the machine seems to have been in the mechanism used in the last stage of the process. When cartridges are charged they have to be "crimped," that is, the edges have to be turned down so as to hold the charge firmly in its place. The design was that each cartridge, when and as it was loaded, should be clutched by automatic fingers and carried off to another part of the machine and there presented, sitting upright on the inside edge of a hollowed cup, to receive the blow or punch which would complete the operation. But these automatic fingers, occasionally at any rate, acted in an uncertain, not to say an erratic manner. Up to the time of the explosion, though no doubt less frequently at the last than at first, cartridges were now and then presented in a wrong posture, and the blow or punch fell sometimes on the side of the cartridge and sometimes on the metal end in which the "primer" or percussion cap had been inserted. The evidence was that a considerable number of these failures occurred from time to time, and that the injured cartridges were collected and sent away to be "scrapped," or broken up. It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator. The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion. Then, too, the jury may have reasonably thought that the explosion would, or might have been comparatively harmless if the powder box on the outside had been properly constructed.

The learned judges in the Supreme Court appear to have been much influenced by some decisions in France which are stated by Girouard, J., to be "unanimous in exacting proof of a fault which certainly caused the injury." The learned judge had previously observed that "as to the cause of this explosion . . . we are left entirely in the dark." As recent French decisions, though entitled to the highest respect, and valuable as illustrations, are not of binding authority in Quebec, the learned counsel at the bar very properly abstained from examining in detail the cases referred to by Girouard, J. It is enough to say that although the proposition for which they were cited may be reasonable in the circumstances of a particular case, it can hardly be applicable when the accident causing the injury is the work of a moment, and the eye is incapable of detecting its origin or following its course. It cannot be of universal application, or utter destruction would carry with it complete immunity—for the employer.

Their lordships will humbly advise his Majesty that the appeal ought to be allowed, the judgment of the Supreme Court reversed with costs, and the judgment of the Court of King's Bench restored. The respondents will pay the costs of the appeal as in pauper appeals.

Solicitors, *Blake & Redden; Simpson, Rushworth, & Co.*

Court of Appeal.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Feb. 8, 9, 10.

EMBIRICOS v. ANGLO-AUSTRIAN BANK. (a.)

Banker—Cheque—Stolen cheque—Forged indorsement—Foreign law—Conflict of law—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 24, 72.

Where a foreign bank cashes a cheque, drawn in a foreign country on a bank in England, the indorsement of which cheque is forged, the foreign bank acquires a good title which is passed to an English bank obtaining payment of the cheque from the bank on which it is drawn, if the foreign law identifies, as proprietor of the cheque and entitled to the proceeds thereof, a holder who has bought it bonâ fide *and without gross negligence, notwithstanding the cheque has been stolen and its indorsement forged. The general rule of international law which applies to moveables is applicable to negotiable instruments, and any question of title arising out of the transfer of the cheque must be determined by the foreign and not the English law.*

Judgment of Walton, J. (ante, *p.* 92), *affirmed.*

This was an appeal from the judgment of Walton, J., at the trial of the action (reported *ante*, p. 92).

The plaintiffs were the payees of a cheque drawn in Roumania by a native bank on a London bank. The cheque was indorsed over by the plaintiffs to a London firm, and placed in an envelope addressed to that firm. The plaintiffs' clerk, however, stole the cheque, forged the special indorsement, and the cheque was then cashed by a bank in Vienna, who forwarded it in due course to the defendants in London. It appeared that the Vienna bank had acted *bonâ fide* and without gross negligence, and were holders for value.

Under the law of Austria, the Vienna bank obtained a good title to the cheque, notwithstanding it was cashed with them by the thief or by one in concert with him, though under English law the defendants had no defence. The action was brought for damages for wrongful conversion of the cheque.

Walton, J., decided that the title acquired in Vienna, good according to Austrian law, was a good title in England, and gave judgment for the defendants.

The plaintiffs appealed.

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

Cohen, K.C., and *Maurice Hill*, for the appellants.—The general rule that a transfer of ordinary chattels valid according to foreign law is valid in this country, is not applicable to bills or cheques. When the cheque was stolen the property in it was not divested from the plaintiffs. The general rule of law does not apply further than is expressly mentioned in the Bills of Exchange Act, 1882.

They referred to *Kleinwort* v. *Comptoir National D'Escompte de Paris*, [1894] 2 Q. B. 157, and *La Cave* v. *Credit Lyonnais*, [1897] 1 Q. B. 148.

Eldon Bankes, K.C., and *De Gruyther*, for the respondents.—This is a case of a chattel stolen in a market overt; we claim title from a person who had a good title in a foreign country. The foreign law governs the case; there is no distinction between a bill or cheque and another chattel personal.

They referred to *Arnold* v. *Cheque Bank*, 1 C. P. D. 578; *Cammell* v. *Sewell*, 8 W. R. 639, 29 L. J. Ex. 350; *Castrique* v. *Imrie*, 19 W. R. 1; *Alcock* v. *Smith*, [1892] 1 Ch. 238, 40 W. R. Dig. 24; *Hooper* v. *Gumm*, 15 W. R. 464; *Sturtevant* v. *Ford*, 4 M. & G. 101.

VAUGHAN WILLIAMS, L.J.—This action was brought by Messrs. L. & M. Embiricos against the Anglo-Austrian Bank to recover damages for the wrongful conversion of a cheque. The action was tried before Walton, J., without a jury, and he gave judgment for the defendants. The appeal is against that judgment. On the 6th of March, 1903, a Roumanian bank drew a cheque on a London bank payable to the order of the plaintiffs. The plaintiffs at Braila, in Roumania, indorsed the cheque to G. Embiricos & Co., and wrote to them in London enclosing the cheque. The cheque was, however, stolen from the envelope by a clerk of the plaintiffs. On the 9th of March, 1903, the cheque was presented at the bank of Messrs. Schelhammer & Schatterer, in Vienna, by a person who desired that it might be cashed. It then bore the special indorsement G. Embiricos & Co., in addition to the indorsement by the plaintiffs. The indorsements were apparently regular and in order, but the indorsement of G. Embiricos & Co. was in fact a forgery. Messrs. Schelhammer & Schatterer cashed the cheque, and on the same day indorsed it to the defendants, and posted it to them in London, where they cashed it at the bank on which it was drawn. According to an affidavit made as to the Austrian law by a doctor of law of the University of Vienna, "The holder of a cheque which he has bought *bonâ fide* without gross negligence and for value is identified as the proprietor of the cheque and entitled to the proceeds thereof against all the world, notwithstanding that the cheque has been previously stolen and notwithstanding that the indorsement has been forged." Walton, J., decided the case in favour of the defendants on the ground that by the transfer of the cheque to the Vienna bank a good title to the cheque which the English court was bound to recognize passed to the Vienna bank and that that bank gave an equally good title to the defendants who, when they presented the cheque for payment to the bank on which it was drawn, were dealing with their own property and not with the plaintiffs' property at all. He points out that the only question in this action is between the original payees of the cheque and the subsequent holder of the cheque, who derived his title to the cheque through an indorsement which had been forged; and that, inasmuch as under the English law no title could be made under a forged indorsement, but under the Austrian law the *bonâ fide* holder of a cheque for which he has given value in ignorance of any flaw in the title of the transferor, is entitled to the cheque, although it has been previously stolen and the indorsements upon it have been forged, it became necessary to decide whether the validity of the transfer of this cheque ought to be governed by Austrian or English law. Walton, J., decided that the question of the validity of the transfer ought to be governed by Austrian law, first, because it has been decided by Romer, J., and on appeal by the Court of Appeal in *Alcock* v. *Smith*, [1892] 1 Ch. 238, 40 W. R. Dig. 24, that the ordinary rule as to the transfer of chattels as stated by Mr. Dicey in his Conflict of Laws, at page 140, that "An assignment of a movable which can be touched (goods) giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*) is valid," applies to a bill of exchange, and, I suppose, any negotiable instrument. Walton, J., also seemed to be of opinion that his judgment could be justified by the words of section 72 of the Bills of Exchange Act, 1882, which provides that "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows: (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisities in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made, Provided that (*b*) where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become partners to it in the United Kingdom. (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom." For the learned judge says that if the interpretation of the "indorsement" means the legal effect of the transfer by indorsement it would cover this case. I think that the view taken by Walton, J., of the effect of the decisions in *Alcock* v. *Smith*, that the rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by indorsement, is right; although in the case of *Alcock* v. *Smith* the transfer was not by indorsement, but by process of law in the shape of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by payee against an indorsee, who claims under a forged indorsement giving the indorsee a good title in the country where the indorsement was made. But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee a good title as against the payee, but not effective according to English law to give such indorsee a good title against the drawer of the cheque or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such indorsement is good as against the original parties to a negotiable instrument having regard to the contractual liability incurred by them thereby. I do not think that *Alcock* v. *Smith* decides this question; on the contrary, it seems to me that the judgments of Romer, J., and the Court of Appeal both disclaim so doing, and, further, it seems to me that

the law as laid down by Pearson, J., in *Smallpage and Brandon's case*, 30 Ch. D. 598, 34 W. R. Dig. 19, and by Lush, J., in *Lebel* v. *Tucker*, L. R. 3 Q. B. 77, 83, is, in effect, authority to the contrary. At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though such indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract. If the contract of the drawer of a cheque or acceptor of a bill were limited to payment on indorsements valid by the English local law an argument might be raised that, even though the indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign indorsement, yet he would be guilty of a conversion if he used a negotiable instrument to the possession of which he was entitled, for the purpose of obtaining, and did obtain, payment from an original party to the negotiable instrument from whom he could not have recovered by process of law. User of a chattel by a person entitled to possession in such a manner would perhaps give a right of action for money had and received. I, however, have come to the conclusion that as between the payee and this indorsee there is no cause of action for conversion, and that the judgment of Walton, J., must be affirmed. It is to be observed that our decision in this case does not increase the liability of the bank upon which the cheque was drawn and which paid the cheque. I wish to add that I am not satisfied that, having regard to the terms of sub-section 2 of section 72 of the Bills of Exchange Act, 1882, such section is conclusive of the present case. I wish also to add that I do not think that section 24 governs the case of an indorsement abroad.

ROMER, L.J.—I have come to the same conclusion. The only question is one of conversion. Was the property of the plaintiffs converted by the defendants? If the plaintiffs, when they brought the action, had no title to the cheque, the action must fail. If the foreign law applies, the defendants have acquired a good title as against the plaintiffs. Does the foreign law apply? It has been contended that bills of exchange and cheques are wholly outside the general rule of international law which applies to movable chattels. In my opinion that contention is wrong, for the reasons that I gave in *Alcock* v. *Smith*. I can see no reason for departing from what I then said. No subsequent case has, in my opinion, thrown any doubt on the correctness of my decision. It may, of course, be that by reason of some special English law the English courts may be unable to recognize that rule of international law in special cases. But I know of no such English enactment. Section 72 of the Bills of Exchange Act certainly has not that effect, and the general principle is recognized in sub-section 2. The proviso to that sub-section does not touch the present case. Section 24 is only a statement of the general English law, which is local for the purposes of the present case, and it has not the effect of controlling the general rule of international law.

STIRLING, L.J.—I concur. I agree with what was said by Walton, J., and by my brothers, but desire to reserve my opinion about section 72, to which I am inclined to attribute more weight than they do. As regards the case of *La Cave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148, 45 W. R. Dig. 8, it does not appear to me to apply to the present case, because the cheque there did not come into the hands of a purchaser for value.

Appeal dismissed.

Solicitors for the appellants, *Bircham & Co.*

Solicitors for the appellees, *Downing, Handcock, Middleton & Lewis.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Jan. 19.

FITCH v. BERMONDSEY GUARDIANS. (a.)

Lunacy—Asylum—Charges for maintenance of pauper lunatics not settled within the county or borough to which the asylum belongs—Limit of such charges—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 283, *sub-sections* 1 *and* 3.

The weekly charge to be fixed by the visiting committee under section 283 *of the Lunacy Act,* 1890, *for the expenses of maintenance and other expenses of pauper lunatics in an asylum must not exceed* 14*s. for each pauper lunatic, even though the pauper lunatic in respect of whom the charge is made is sent from or settled in a parish or place outside the county or borough to which the asylum belongs.*

Decision of the Divisional Court (ante, *p.* 153) *affirmed.*

This was an appeal from a decision of the Divisional Court (Lord Alverstone, L.C.J., and Kennedy and Phillimore, JJ.) (reported *ante*, p. 153, [1904] 2 K. B. 709).

The action was brought by the City of London Lunatic Asylum against the Guardians of the Poor of the Parish of Bermondsey to recover from them the sum of £11 15s. in respect of the lodging and maintenance in the asylum from the 30th of December, 1903, to the 30th of March, 1904, of a pauper lunatic whose legal settlement was in the parish of Bermondsey.

The visiting committee of the asylum, acting under the power conferred by section 283, sub-section 1, of the Lunacy Act, 1890, which provides that "every visiting committee shall fix a weekly sum not exceeding fourteen shillings for the expenses of maintenance and other expenses of each pauper lunatic in the asylum . . . and such weekly sum may from time to time be altered," had previously to February, 1904, fixed such weekly sum at 12s. 3d. in respect of pauper lunatics chargeable to the Union of the City of London.

On the 4th of February, 1904, the visiting committee, acting under the power conferred by sub-section 3 of the above section, raised the weekly charge for the maintenance and expenses in the asylum of pauper lunatics chargeable to unions outside the City of London to twenty-one shillings, and they gave the defendants notice of such increase.

Sub-section 3 provides: "A committee may fix a greater weekly sum not exceeding 14s., to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."

The committee, suing in the name of their clerk, claimed for £11 15s. for lodging and maintenance, such sum being made up as follows: Forty-five days' lodging and maintenance from the 1st of January, 1904, to the 15th of February, at the rate of 14s. per week, and forty-five days' lodging and maintenance,

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

from the 15th of February to the 30th of March, at the rate of 21s. per week.

The defendants contended that they were only liable at the rate of 14s. for the whole period, and they accordingly paid £9 into court.

The Asylum proceeded with their action for the balance.

The learned county court judge gave judgment for the defendants.

The committee appealed to the Divisional Court, who confirmed the judgment of the county court judge, and the present appeal was from this decision of the Divisional Court.

Danckwerts, K.C., and *Neilson*, for the appellants.—We submit that on the true construction of section 283 of the Lunacy Act, 1890, the "greater weekly sum not exceeding 14s." referred to in sub-section 3 refers to additional expenses that can be legally incurred over and above the 14s. a week referred to in sub-section 1, so that the justices can make an order up to 28s. a week, if necessary, in the case of out-union patients. The Act of 1890 is a consolidating Act, which was not intended to alter the law. By section 54 of the Lunacy Act, 1853, the weekly sum included the expenses of lodging as well as maintenance. This sum was not in that Act limited to 14s. Then in the case of lunatics from outside the district, the committee were empowered to fix a greater weekly sum, which was not to exceed 14s. a week. It is plain, therefore, that under that Act the committee could first fix a weekly charge for pauper lunatics from within the county or borough, and then fix a greater sum up to 14s. in excess of that charge for the maintenance of lunatics from outside the borough. The practice has invariably been in accordance with this view, and we submit that it was not the intention of the Legislature to effect any alteration by the Act of 1890.

C. A. Russell, K.C., and *R. C. Glen*, for the respondents, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I quite feel the force of the arguments of counsel for the appellants. It may well be that the difference which has been pointed out between the legislation of 1890 and that of 1853 was accidental and not intended by the draughtsman. But we have to do with the Act of Parliament as it is drawn, and the words are so strong that we cannot adopt the contention of the appellants. In my opinion the decision of the Divisional Court was quite right. I have only to add that when I spoke of an accidental slip by those who had to draft the Act, I did not wish to speak in any way contemptuously. Whenever I have to deal with consolidating legislation I am always struck by the enormous difficulty imposed upon the draughtsman, and I congratulate myself that I am not responsible for the task.

ROMER, L.J.—I agree.

STIRLING, L.J.—I also agree. I have only to add that I am not quite satisfied as to the correctness of the construction of section 54 of the Lunacy Act, 1853, which has been submitted to us by the appellants; but even assuming that in their favour, I agree with the decision of the Divisional Court and of Vaughan Williams, L.J.

Solicitors, *City Solicitor; Arkcoll, Cockell, & Chadwick.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Jan. 16.

GREAT NORTHERN RAILWAY CO. v. DAWSON. (a.)

Master and servant—Employers' liability—Accident—Compensation — "Earnings" — Railway servant's uniform—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1) (a) (i).

In an arbitration under the Workmen's Compensation Act, 1897, *in respect of the death of a railway guard, it appeared that the deceased was provided by the railway company with a uniform, which he was required to wear when on duty, but which remained the property of the company, and which by the rules and regulations of the company he would be bound to deliver up on leaving the service of the company.*

Held, that the value to the deceased of the right to wear the uniform ought to be taken into consideration in calculating his earnings during the three years preceding the injury.

Appeal from an award of the judge of the St. Albans County Court in an arbitration under the Workmen's Compensation Act, 1897.

The request for arbitration was made by the employers, the Great Northern Railway Co. The matter to be determined was the amount of compensation payable by the company to the widow and children of John Henry Dawson, a goods guard in the employment of the company, whose death resulted from accidental injury arising out of and in the course of his employment. The widow and children claimed compensation as dependants of the deceased man, and the company admitted their liability to pay £193 10s. 2d. The defendants considered that the value of a uniform supplied by the railway company to the deceased man for his use during his service should be added to his earnings for the purpose of calculating the amount of compensation payable by the company. The uniform consisted of a complete suit and an extra pair of trousers supplied every year, and a mackintosh and a pair of leggings supplied every third year. The defendants claimed that the sum of £7, the value of the uniform, should be added to the sum of £193 10s. 2d., which was the amount of the deceased man's earnings paid to him in money during the three years preceding the injury.

The rules and regulations of the company contained the following: "(4) Every servant receiving uniform must, when on duty, appear in it clean and neat, with the number and badge perfect; and if any article provided by the company be damaged by improper use it must be made good by the servant using it. No servant is allowed to convert to his own use any article the property of the company. . . . (14) When a person leaves the service he must immediately deliver up his uniform and all other articles belonging to the company. Any money that may be due for wages to any person leaving the service will not be paid until the clothing, book of rules, lamps, flags, tools, detonators, and all other articles the property of the company which may have been supplied to him and of which he cannot give a satisfactory account, shall have been delivered up in accordance with the company's regulations. If not delivered up, or if any articles be missing or be damaged by improper use, the cost of such article or of the repair of such damage shall be a debt from the man to the company, and may be deducted from any pay then due, or, if such pay be found insufficient

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

to meet the claim, will become a debt recoverable at law."

The county court judge was of opinion that it was clear that the uniform supplied to the guard was not his own property, but that he merely had use of it, just as he had the use of lamps, flags, tools, detonators, &c., for use in his work. On this ground he held that the value of the uniform ought not to be included as part of the earnings of the deceased man, and he made an award for £193 10s. 2d.

The defendants appealed.

S. T. Evans, K.C., and *P. T. Blackwell*, for the defendants.—The value of the uniform ought to be taken into consideration as part of the deceased man's earnings. The county court judge merely found that the uniform remained the property of the company; he did not find that it was a thing the value of which could not be estimated.

They referred to *Noel* v. *Redruth Foundry Co.*, 44 W. R. 407, [1896] 1 Q. B. 453; *Pomphrey* v. *The Southwark Press*, [1901] 1 Q. B. 86, 49 W. R. Dig. 113; *Houghton* v. *Sutton Heath and Lea Green Collieries Co. (Limited)*, 49 W. R. 196, [1901] 1 Q. B. 93; *Midland Railway Co.* v. *Sharpe, ante*, p. 114, [1904] A. C. 349.

Basil Watson (*Montague Lush, K.C.*, with him), for the employers.—A uniform supplied to a railway servant cannot reasonably be said to be part of his wages. The value of the uniform to him is a thing so vague that it cannot be estimated. Neither is there anything in the Workmen's Compensation Act which makes its necessary to take into consideration the value of the uniform in calculating a railway servant's earnings.

COLLINS, M.R.—The question in this case is as to the amount of compensation to which the dependants of a deceased railway guard are entitled under the Workmen's Compensation Act. It is not disputed that compensation must be paid to the extent of £193 10s. 2d., the aggregate amount of the wages received by the deceased in money during the three years preceding the injury. But it is said on the part of the dependants that the deceased in addition to that received from the railway company during the three years certain articles of clothing of the value of £7. The county court judge has rejected the value of this clothing as a factor in calculating the deceased man's wages, having regard to the rule of the company by which the property in the clothing did not pass to the deceased man. In my opinion that is not an adequate ground for excluding it. If a man receives as part of the emoluments of his service certain articles of clothing, the value of the clothing which he so receives is part of his earnings. The privilege of wearing a uniform might be nothing, because the wearing of it might be so disagreeable that a man would rather be without it. But such a consideration does not enter into the discussion here. We are dealing with a case in which a man did in fact work for his employers for three years or more, and during that time did wear their uniform, and wore it under such circumstances as to show that it was an emolument in addition to the money wages received by him in return for his services. This lets in the principle that it must be treated as part of his wages. It is not necessary in this case to consider the difference between the privilege of wearing the uniform and the property in the uniform itself. Strictly speaking, the measure of the value of the uniform as part of his wages is the value to him of the right to wear it, and not the value of the clothes themselves. But in the present case there is probably no distinction between the two things. The appeal must therefore be allowed, and the dependants must be held to be entitled to the extra £7 which they claim.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors for the defendants, *Kingsford, Dorman, & Co.*, for *H. B. Hartley*, Peterborough.

Solicitor for the employers, *R. Hill Dawe.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Jan. 12, 13

FRASER v. FRASER. (*a.*)

Practice—Appeal—Action referred to master—Right of appeal from master—Ord. 14, *r.* 7.

Where an order is made under ord. 14, *r.* 7, *referring an action to a master for trial, an appeal lies from his decision to a Divisional Court.*

Decision of the Divisional Court (ante, *p.* 47, [1904] 2 *K. B.* 245) *reversed.*

This was an appeal from a decision of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.).

The action, which was brought to recover commission on the sale of shares, was, under ord. 14, r. 7, ordered to be referred to a master for decision, and the master directed judgment to be entered for the plaintiff.

Against this decision the defendant appealed to the Court of Appeal (52 W. R. 147, [1904] 1 K. B. 56), but it was held by Collins, M.R., and Mathew and Cozens-Hardy, L.JJ., that no appeal lay to that court, the question whether there was a right of appeal to a Divisional Court being left open.

The defendant next appealed to the Divisional Court on the ground that the master's finding was against the weight of evidence, but the court held that no appeal lay from the master's decision. The defendant then brought the present appeal.

Ord. 14, r. 7, is as follows: "Upon the hearing of the application, with the consent of the parties, an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner."

Hume Williams, K.C., and *McCarthy*, for the defendant, argued that if the framers of the rules had intended to take away the right of appeal they would have expressly said so. There was nothing to exclude the provisions of the Arbitration Act, 1889. Since that Act the distinction is that if the parties have chosen their arbitrator before coming into court, they have chosen their *forum* and have no appeal, but when they bring their disputes before the court the second part of the Arbitration Act applies, and it admits of appeal.

They referred to sections 14 and 15 (1) (2) of the Arbitration Act, 1889, and cited *Gower* v. *Tobitt*, 39 W. R. 193, and *Wynne-Finch* v. *Chaytor*, 52 W. R. 24, [1903] 2 Ch. 475.

Frampton, for the plaintiff.—There is no appeal where the arbitration is by consent. The object of the rule is to give summary judgment and save unnecessary litigation. If there is an appeal from every decision of an officer of the court why should the right be expressly mentioned in some cases—*e.g.*, in ord. 35, r. 9, and ord. 59, r. 3? Section 15 (2) of the Arbitration Act, which makes the report or award

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

equivalent to the verdict of a jury, shows that if there is an appeal it is not to a Divisional Court.

He cited *Clark* v. *Sonnenschein*, 38 W. R. 717, 25 Q. B. D. 226, and referred to the judgments in the Court of Appeal in *Fraser* v. *Fraser*, 52 W. R. 147, [1904] 1 K. B. 56.

Trevor Lloyd, for parties who were garnishees of the judgment, submitted that the whole object of the rule was to avoid a multiplicity of appeals.

McCarthy, in reply, submitted, in answer to the court, that ord. 59, r. 3 was no longer in force. It was a rule made under the Common Law Procedure Act, 1854, and was only intended to apply to compulsory references under that Act. The rule must have escaped notice when sections 3 to 17 of the Act were repealed by the Arbitration Act.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J.—The question for our decision is the one left undecided by the Court of Appeal when this case was before them in 1904—namely, whether there is any appeal against the decision of a master where an order has been made under ord. 14, r. 7 referring an action to him.

On the former occasion referred to there was an attempt to appeal from the master direct to the Court of Appeal, and the court only held that an appeal did not lie to the Court of Appeal, but left open the question whether an appeal would lie to the Divisional Court. An appeal has now been carried to the Divisional Court, and that court has held that where an order is made under the rule named, referring an action to the master, no appeal lies from his decision. We have now to consider whether the Divisional Court is right.

The question depends on the construction of ord. 14, r. 7, and particularly on the words "referring the action to a master." The Divisional Court have held that these words mean "referring the action to a master as arbitrator," and that therefore there is no appeal. I agree that *primâ facie* the words have that meaning, though it is to be observed that the appeal here is from a judgment, but I am not sure I quite understand the reasoning upon which the conclusion is based that therefore there is no appeal. It seems to me that, having regard to the terms of sections 14 and 15 of the Arbitration Act, 1889, there are some cases of references under an order of court made by consent which fall within the operation of section 15, and in which, according to my view, there is plainly a right of review. I think, therefore, that the judgment of the Divisional Court must mean that the order of reference made under rule 7 of order 14 is an order of reference made by consent by a judge's order in the sense in which such orders were made independently of the Common Law Procedure Acts and the Judicature Act. It is common knowledge that quite independently of any such Act orders of reference by consent were made by order of *nisi prius*, or by rule of court, or by judge's order, but that such orders could only be made where an action was pending, and could only be made by consent. Such orders were in fact submissions to arbitration embodied by consent in orders of the court. The Divisional Court has, I understand, based their decision upon the ground that, according to the true construction of rule 7 of order 14, the reference to arbitration referred to in that rule is a reference of this character.

I hesitate to come to this conclusion. It is plain that not every reference consequent upon an order made by consent is a reference of this character—is a common law reference by consent by virtue of a submission embodied in an order—for it is plain that clause (*a*) of section 14 of the Arbitration Act, 1889, covers orders of reference made by consent, and it is also plain from the latter part of that section that it covers orders, by consent, of reference to an official referee or officer of the court, and officer of the court includes, in my opinion, a master of the court. Moreover, the case of *Gower* v. *Tobitt*, a decision of the Court of Appeal, shows that the decision of an official referee, and, I think, of a master of the court, on a reference under an order made pursuant to section 14 of the Arbitration Act, 1889, may be reviewed by a motion for a new trial made to a Divisional Court, and in my opinion this decision of the Court of Appeal covers equally the case of a decision under a reference of an action to a master, and the decision in *Wynne-Finch* v. *Chaytor* seems to me to involve the same conclusion.

Now, if the view which I have expressed is right, why should the court construe the words of rule 7 of order 14 as if the reference therein referred to was a reference to a common law arbitrator embodied in an order made under the general power of the court embodying a submission to arbitration, rather than construe it as authorizing an order referring the whole cause to be tried by an officer of the court? Why, in other words, should we treat the rule as authorizing an order embodying a submission rather than as an order providing a mode of trial? If we treat rule 7 as authorizing a mode of trial, then it is plain that rules 6 and 6*a* of order 40 apply, and that a motion to set aside the judgment will lie. This is the conclusion at which I have arrived, and with unfeigned deference to the opinions of the judges of the King's Bench Division, I think I ought to give effect to my opinion, and hold that the decision of the Divisional Court was wrong. I may add that I think the omission of the words "without appeal" in the first limb of the rule goes to confirm my view.

ROMER and STIRLING, L.JJ., concurred.

Appeal allowed.

Solicitors, *Neville, Fisher, & Co.; R. Barnes; Gerald & Arthur Marshall.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Jan. 12.

ELLIS v. JOSEPH ELLIS & CO.
(ROBERTS AND TAYLOR, SURVIVING PARTNERS). (*a*.)

Master and servant—Employers' liability—Accident—Compensation — Workman — Partnership — Partner employed as workman—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1; *s.* 7, *sub-section* 2.

By an arrangement between three persons who had entered into a partnership for the purpose of working a mine, one of them worked in the mine as an ordinary workman and received weekly wages out of the profits of the business, independently of what he received as a partner. On his death, in consequence of an accidental injury sustained by him while working in the mine, his widow claimed compensation from the two surviving partners under the Workmen's Compensation Act, 1897.

Held, that the deceased man was not a workman within the Act, as the Act contemplated two opposite parties, an employer and a workman, and did not apply to cases where the same person was both employer and employed.

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from an award of the judge of the Flintshire County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow and personal representative of Joseph Ellis, whose death had resulted from accidental injury sustained by him while working in a mine.

In 1898 the deceased man obtained a licence to work the mine for the term of twenty-one years, and in July, 1903, he entered into a deed of partnership with two persons, named John Taylor and Thomas Roberts, for the purpose of working the mine, by which it was provided that the profits and losses of the undertaking should be divided between the three partners in equal shares. A short time afterwards they arranged among themselves that if any of the partners should work in the mine he should be paid as an ordinary workman. The deceased man was accustomed to the work of a miner or quarryman, but neither of the other partners had any knowledge of it, Taylor being a potter and Roberts a draper. The deceased man accordingly performed manual labour about the works, sometimes on the surface and sometimes below the surface. Practically he managed the whole business and acted as a working foreman. He gave the other men employed in the pit the immediate orders as to their work, engaging them as a rule and arranging their wages, though it appeared that in some instances the other partners were consulted. He was also constantly employed in doing manual labour himself, for which he drew weekly wages out of the profits of the business independently of anything he might be entitled to as a partner.

On the 14th of October, 1903, he gave notice to his partners that he would give up his employment in a fortnight's time, but this notice was not acted upon, and he continued working in the same manner as before.

On the 15th of November, 1903, he went down the pit to relay metals, and while so engaged he met with the accident which caused his death.

During the period of his employment as a workman he had received weekly wages averaging 33s. per week.

The applicant addressed her claim for compensation to "Joseph Ellis & Co. (John Taylor and Thomas Roberts, surviving partners)."

At the hearing of the arbitration it was contended on the part of Taylor and Roberts that the deceased man was not a "workman" within the meaning of the Workmen's Compensation Act.

The county court judge was of opinion that the deceased was a workman within the Act, and he made an award of compensation in favour of the applicant.

Taylor and Roberts appealed.

Arthur Powell, K.C., and *Ellis Griffith*, for Taylor and Roberts.—The deceased man was not a workman, and the surviving partners of the firm were not his employers. In order that a case may be brought within the Workmen's Compensation Act the relation of master and servant is necessary; the Act only applies to workmen who are engaged as servants of an employer: *McGregor* v. *Dansken*, 1 F. 536; *Vamplew* v. *Parkgate Iron and Steel Co. (Limited)*, 51 W. R. 691, [1903] 1 K. B. 851.

C. A. Russell, K.C., and *H. C. Davenport*, for the applicant.—The deceased man was in an employment to which the Act applies, and he received workman's wages, which were something quite independent of the share of the profits to which he was entitled as a partner. There is nothing in the definition of "workman" in the Act to exclude such a case as this. It is possible for a person to occupy a dual position and to be at the same time employer and workman.

COLLINS, M.R.—The question is whether in the circumstances of this case the deceased man was a person in respect of whose death the benefit of the Workmen's Compensation Act can be claimed. He appears to have belonged to what are called the working classes. But finding an opportunity of getting a licence for working a mine for twenty-one years he entered into a partnership with two other persons for the purpose of the undertaking. Being a skilled workman he worked in the mine, by an arrangement with his partners, for a workman's wages, which he received out of the profits of the business. While engaged in such work he met with an accident which resulted in his death, and thereupon his representative made a claim under the Workmen's Compensation Act. The question is whether he can be treated as a workman and the firm as employers within the meaning of the Act. In my opinion the intention of the Act was to exclude cases in which the same person occupied the position of both employer and employed. It seems to contemplate the existence of a relationship between two opposite parties, the one being a workman and the other an employer. When the position of the deceased man in the present case is analyzed, I do not think it shows that any relation of employer and employed had been created. He was himself one of the partners in the firm for which he was working, and he cannot properly be said to have been employed by them. The arrangement under which he worked was a mode of arranging how the partnership assets should be distributed in favour of a partner who worked as a miner. Having regard to section 1, sub-section 1, of the Act, it seems to me that a person in the position of the deceased cannot be held to be a workman within the meaning of the Act. In the circumstances of the case, therefore, I think the learned county court judge arrived at a wrong decision, and the appeal must be allowed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors for the applicant, *Royds & Rawstorne*, for *E. S. Giles*, Chester.

Solicitors for Taylor and Roberts, *Treadwell & Aylwin*, for *Keene, Son, & Kelly*, Mold.

High Court of Justice.

Chan. Div. } Joyce, J. } Dec. 14, 15, 16.

ATTORNEY-GENERAL v. STAFFORDSHIRE COUNTY COUNCIL. (a.)

Local government — Highway — Repairs — Mandatory injunction — Retaining and supporting walls — Local Government Act, 1888 (51 & 52 *Vict.* c. 41), s. 11.

Where certain walls adjoining a highway, which was vested in a county council as the highway authority for purposes of maintenance and repairs, were allowed to become out of repair,

Held, that the court would not interfere with the discretion of the highway authority by making a declaration that such authority was liable to repair the walls on the

(a.) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

ground that their becoming dilapidated might cause an obstruction in the highway.

Sandgate Urban District Council v. Kent County Council, 79 *L. T.* 425, 47 *W. R. Dig.* 106, *followed.*

Action.

This was an action by the Attorney-General at the relation of the trustees of Lord Macclesfield's settled estates, against the defendant council in respect of the repair and maintenance of a portion of the Leek and Macclesfield highway, situate in the county of Stafford, and running through land forming part of Lord Macclesfield's estate.

The said road was in certain places cut out of a hillside, the adjoining land being on one side of the road higher, and the other side lower, than the level of the road. Where this occurred the land on the high side was kept from falling on the road by a retaining wall, and on the low side the roadway was kept up by a supporting wall.

The plaintiffs alleged that the said walls were out of repair and constituted a nuisance, and asked for (1) a declaration that the defendants were liable to repair and maintain the said walls, and (2) an order that the defendants should forthwith repair such of the walls as were in need of repair.

The defendant council admitted that the said highway was a "main road" within the meaning of the Highway and Locomotives Act, 1878, and that under the Local Government Act, 1888, s. 11, they, the defendant council, were liable to repair and maintain the said road, but they denied any liability as to the repairing and maintaining of the said walls.

It appeared from the evidence that the said road had been a turnpike road up to the passing of the Highway and Locomotives Act, 1878, when it became a "main road" within the meaning of that statute, and that it had always been maintained by the highway authority for the time being until the passing of the Local Government Act, 1888, when by that Act the said road became vested in the defendant council.

Hughes, K.C., and *Glen*, for the plaintiffs.—The defendant council is liable, under section 11 of the Local Government Act, 1888, to keep the walls in repair, and if they become ruinous or a danger to the users of the highway the council is responsible, and if their obligation to repair is not fulfilled there is a right of action: *Baron* v. *Portslade Urban District Council*, 48 W. R. 191, [1900], 2 Q. B. 588.

Attorney-General v. *Shrewsbury Bridge Co.*, 30 W. R. 916, 21 Ch. D. 752; *Attorney-General* v. *Wimbledon House Estate Co.* (*Limited*), 52 W. R. Dig. 174, [1904] 2 Ch. 34; and *Regina* v. *Watson*, 2 Raym. 856, were also cited.

Danckwerts, K.C., and *Leslie*, for the defendants.—This action is misconceived. The only duty of a county council to repair and maintain is under section 11 of the Local Government Act, 1888, and the courts have always held with regard to repairs and maintenance that a certain result must be arrived at, but have never interfered with the discretion of the highway authorities: *Sandgate Urban District Council* v. *Kent County Council*, 79 L. T. 425, 47 W. R. Dig. 106; *Regina* v. *The Inhabitants of Claxby*, 3 W. R. 451, 24 L. J. Q. B. 223, and *Stockport Highway Board* v. *Grant*, 46 L. T. 388, 30 W. R. Dig. 71.

Hughes, K.C., replied.

JOYCE, J., in giving judgment, said: This is ostensibly an action to compel the defendants to perform the statutory duty imposed on them by section 11 of the Local Government Act, 1888, of maintaining and repairing a certain "main road," and it is alleged that they have committed default by failing to keep in repair certain retaining walls. In my opinion the real object of this action is to compel the defendants to keep up the retaining walls on Lord Macclesfield's estate where the level of the adjacent land is higher than that of the road. The plaintiffs seek to attain their object in this way: they say that section 11 of the Act of 1888 imposes on the defendants a statutory liability to maintain and repair the road. They next say the defendants are therefore bound to keep in repair everything necessary for the maintenance of the road, and that these walls are necessary; so that the defendants are bound to maintain and repair these walls and, as I suppose, keep them in perfect condition. It seems to me impossible to impose such a liability on a county council without in effect adding a new clause to the statute.

The plaintiffs claim a declaration that the defendants are liable to maintain and repair the walls, and "that the defendants be ordered forthwith to repair such of the said embankments and walls as are in need of repair." In my opinion no such mandatory order as is asked for could properly be made; it is a necessary requisite of every mandatory injunction that it should be certain and definite in its terms, and it ought to be clear what the person enjoined has got to do. A mandatory order cannot be made to repair; the court will not supervise work. No doubt the realization of this difficulty by the plaintiffs has led them to abandon their claim for such an order.

I am asked, then, to make a declaration that the defendants are liable to repair certain walls, without anything being said as to the height or length to be repaired or the time at which the work is to be completed or anything of that sort. How can I possibly say that these particular walls are necessary for the maintenance and repair of this main road? On the evidence it is impossible to say so. In the case of *Sandgate Urban District Council* v. *Kent County Council*, in the House of Lords, all the facts were found, and the question was, In what proportion the cost of the works was to be contributed by the two authorities? But even in that case Lord Davey said: "There is no liability upon the road authorities which could be enforced, either by indictment or otherwise, to do any particular work. Their liability either at common law or by statute is general, to repair and maintain the highway, leaving it to them to find out the best, or at any rate adequate, means of discharging that liability." There has been no case cited in which the court has taken upon itself to say what the local authority has to do. I do not hesitate to say that I am unable to do so, and I decline to prescribe what particular works or repairs are necessary for the maintenance of this road.

It is clear no *mandamus* would lie against a local authority to do any particular work. If the road were allowed to get out of repair the local authority would be liable to the proper legal proceedings. But here the road is not out of repair, nor was it proved that there was a public nuisance or anything of that sort.

In my opinion this action has been misconceived, and fails on the merits, and must be dismissed with costs.

Solicitors for the plaintiffs, *Lawrence, Graham, & Co.*

Solicitor for the defendants, *Herbert M. Davis.*

Chan. Div.
Swinfen Eady, J. } Jan. 11, 12; Feb. 3.

In re DOD'S CHARITY. (*a.*)

Charity—Petition—Certificate of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 62.

By a will lands were given and bequeathed to the six clerks or petty canons in Chester Cathedral. The dean and chapter were not directly interested in the lands settled by the will, but under an Act of Parliament and Order in Council they were required to provide that the stipends of the minor canons should not be less than £150 *each.*

Held, that such an interest was not sufficient to bring the case within the exception contained in the Charitable Trusts Act, 1853, *s.* 62. *The exception of "any cathedral or collegiate church" cannot be interpreted so as to exclude from the operation of the Act every endowment in which any minister or officer of the cathedral is interested. The exception does not extend to an endowment over which the dean and chapter have not any control, and which does not form portion of their capitular estates, and is not held by them upon any trusts.*

In re Meyrick's Charity, 3 *W. R.* 435, *considered.*

Petition.

This was a petition by the Dean and Chapter of Chester Cathedral, which raised the question whether the petitioners were trustees under the will of Barbara Dod, and asked that in case, on the construction of the will, they were not, that the court should constitute them trustees, and that a scheme should be directed for the administration of the said charity under the will of Barbara Dod.

The testatrix by her will, dated the 2nd of May, 1703, made the following disposition: "I give and bequeath unto Dean Fogg Mr. Wright and Mr. Langford Prebendarys of the Cathedrall Church in Chester all of the County of Chester and their heires or such persons as shall succeed them in that Cathedrall Church as Dean and Prebendarys All my lands in the County of Cheshire except the land here after named devised In trust for the use and benefitt of the several persons I shall nominate (that is to say) I doe for ever give and bequeath All my lands in Boughton and Childer Thornton in the County of Chester to the six Clerks or Petty Cannons or Singing men what other names you distinguish them by that doe officiate in the Cathedrall Church in the City of Chester dureing their natural life and continuing to officiate in that Cathedrall Church and to their successors that are thought fitt persons to officiate in that place that is to say my will and desire is that these six ministers that doe officiate in this place shall have paid them by equall shares and proportions the growing rents and yearly profitt of these my lands lying in Boughton and Childer Thornton aforessid always provided that the persons chose in these severall places be in priests' Orders."

Eve, K.C., and *Franey*, for the dean and chapter, contended that the gift was in effect a gift for the cathedral, and came within the exception in section 62 of the Charitable Trusts Act, 1853, and that, the jurisdiction of the Charity Commissioners being excluded, their consent to the presentation of the petition was unnecessary.

Macnaghten, K.C., and *MacSwinney*, for the minor canons.

R. J. Parker, for the Attorney-General, referred to *In re Duncan* 15 W. R. 526, L. R. 2 Ch., p. 359.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

SWINFEN EADY, J., in giving judgment, said: The first question arising on this petition is whether, according to the true construction of the will of the testatrix, the Dean and Chapter of Chester Cathedral take any estate or interest in her real estate, which is the subject of this application. In my opinion the dean and chapter are not thereby constituted trustees of the real estate at Boughton and Childer Thornton. Assuming that the language of the will—namely, "I give and bequeath unto Dean Fogg, Mr. Wright, and Mr. Langford, Prebendarys of the Cathedrall Church in Chester, all of the county of Chester, and their heires or such persons as shall succeed them in that Cathedrall Church as Dean and Prebendarys"—is a sufficient description of the dean and chapter, the lands thereafter named (and which are the subject of this petition) are excepted from the devise to the dean and chapter, and are given and bequeathed "to the Six Clerks or Petty Cannons or Singing Men, what other names you distinguish them by, that doe officiate in the Cathedrall Church in the city of Chester, dureing their natural life and continuing to officiate in that Cathedral Church, and to their successors that are thought fitt persons to officiate in that place." These singing men, or minor canons, are not a corporation, and there are no words of limitation in the will, so that they took only an estate for life, and on their death the legal estate was vested in the heir-at-law of the testatrix. The dean and chapter take no estate or interest in it.

The next question raised before me is whether the dean and chapter are entitled to present this petition without first obtaining the certificate of the Charity Commissioners—that is to say, whether the charity constituted by the will of Barbara Dod is exempted from the operation of the Charitable Trusts Act, 1853, by the provision in section 62 of that Act—namely, "This Act shall not extend to . . . any cathedral or collegiate church." The petition has been served on the four minor canons, and they contend that they are the persons acting in the administration of the charity and the beneficiaries thereof, and that they are entitled to apply to the Charity Commissioners for a scheme, and that the dean and chapter, who are not trustees, and who are not entitled to interfere in the management of the charity, cannot present this petition to the court without the consent of the Charity Commissioners. The Attorney-General, who has been served with the petition, also contended that the certificate of the Charity Commissioners was necessary. Although the dean and chapter are not directly interested in the lands settled by the will of Barbara Dod, they are indirectly interested in the following way. Under and by virtue of the statute 3 & 4 Vict. c. 113, and an Order in Council pursuant thereto, dated the 15th of January, 1842, they are required to provide that the stipends of the minor canons shall not be less than £150 each per annum, so that a total annual sum of £600 is required for this purpose. The minor canons have not any source of income other than the said charity, and any deficiency is made good out of the capitular revenues. If the income from the land in question can by judicious management and by granting building leases be raised to £600 a year or upwards (and the petitioners allege that a larger income than £600 can eventually be obtained), the result may be to relieve the dean and chapter altogether from any financial burden with regard to the stipends of the minor canons. In this manner and to this extent the dean and chapter are interested, but is an interest of this kind sufficient to bring the case within the exception contained in section 62? In my opinion it is not. It was contended on behalf of the petitioners that, wherever a charity exists for the benefit of any class

of ministers or officers within a cathedral church, such a charity is within the exception; and for this proposition reliance was placed on a passage in Kindersley, V.C.'s. judgment in the report of *Re Meyrick's Charity*, in 25 L. T. O. S. 92. In that case the objection taken was that, as the funds which were the subject of the petition did not wholly belong to Jesus College, but another charity was or might be interested therein, the case was not within the exception. The Vice-Chancellor is reported to have said: "The purpose of that exemption (in section 62) is that, so far as relates to an application to the court in respect of any charity in which the universities or colleges are interested, it shall be unnecessary, so far as regards such universities or colleges, to go before the commissioners. The object of the present petition, though it may affect funds in which another charity is interested, is in effect one in which Jesus College is alone concerned." This report differs from the report of the same case in 1 Jurist N. S., 438, which is as follows: "The purpose (of the exemption) was that, so far as related to the application to the court with respect to any charitable purpose of which the colleges or universities were the object, it should not be necessary to go before the commissioners. Now, here the object of the petition, though it may affect another charity, is in effect an end of which the college alone is the object. . . . If it is to affect matters of which the college is the object, then you need not go before the commissioners; but if it is to affect an end of which another charity is the object, then it would be necessary to go before the commissioners." It is this latter report which was cited with approval by Hall, V.C. in *Attorney-General* v. *Dean and Canons of Manchester*, 18 Ch. D. 596, 611, 29 W. R. Dig. 36, and, if any cathedral or collegiate church is the object of a charity, an application to the court may be made with reference thereto, without any application to the Charity Commissioners.

The petitioners, however, are in effect seeking to extend this rule to all cases in which a minister or officer of a cathedral or collegiate church is interested in a charitable endowment. As was said by Lord Lindley in *In re Stockport Ragged, &c., Schools*, 47 W. R. 166, [1898] 2 Ch., at p. 695, section 62 is a very obscure section; and, as Lord Davey pointed out in *In re Clergy Orphan Corporation*, 43 W. R. 150, [1894] 3 Ch., at p. 154, it is for those claiming that they are exempt from its provisions to make out the exemption. In my judgment the petitioners have failed to do so. The exception of "any cathedral or collegiate church" cannot be interpreted so as to exclude from the operation of the Act every endowment in which any minister or officer of the cathedral is interested, nor so as to exclude from the operation of the Act this particular endowment of the minor canons. By 29 & 30 Vict. c. 111, s. 18, the Ecclesiastical Commissioners are empowered under certain circumstances to make provision out of certain income "for securing adequate stipends and allowances to the minor canons, schoolmasters, organists, vicars choral, lay clerks, officers, choristers, bedesmen, servants, and other members of the cathedral or collegiate church." A large class of persons is here designated, and the argument of the petitioners is that, if a charity be established for any of these persons, such charity is outside the Charitable Trusts Act, although not within the jurisdiction of the Ecclesiastical Commissioners, unless the persons entitled constitute a corporation, when statutory powers are given of transferring the property to the Ecclesiastical Commissioners on terms. I cannot construe the exception of "any cathedral or collegiate church" as extending to an endowment over which the dean and chapter have not any control, and which does not form a portion of their capitular estates and is not held by them upon any trusts. I therefore direct the petition to stand over until further order, giving leave to the respondents to apply, in the event of the certificate of the Charity Commissioners not being obtained within a reasonable time.

Solicitors, *Tatham & Proctor*, for *Barker & Rogerson*, Chester; *Woosam & Smith*, for *Boydell & Taylor*, Chester; *Treasury Solicitor*.

Chan. Div.
Swinfen Eady, J. } Dec. 13, 14.

In re COHEN & COHEN. (*a*.)

Solicitor — Costs — Taxation — Third party — Master's certificate — Objections — Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

Under section 38 *of the Solicitors Act*, 1843 (6 & 7 *Vict. c.* 23), *where a third party obtains an order to tax a bill, this taxation is one as between solicitor and client, and not between the solicitor and the third party. Any items unnecessarily incurred cannot be imposed on a third party.*

In re Brown, 15 *W. R.* 1030, *L. R.* 4 *Eq.* 464; In re Negus, 43 *W. R.* 68, [1895] 1 *Ch.* 73; In re Gray, 49 *W. R.* 298, [1901] 1 *Ch.* 239; *and* In re Longbotham, 52 *W. R.* 660, [1904] 2 *Ch.* 152, *followed.*

Adjourned summons to review taxation.

This was a summons taken out by a third party to discharge or vary a certificate of taxation of the master, filed the 13th of July, 1904, on the ground that the taxation had proceeded on a wrong principle, and that the taxation might be reviewed in respect of the items mentioned in the objections.

Certain litigation had been pending between a lady and a theatrical manager, the third party, which ultimately culminated in an agreement dated the 12th of January, 1904, whereby two actions, one a common law action and the other in the Chancery Division, were stayed, the third party agreeing to pay the lady's costs as between solicitor and client relating to the matters in dispute in the two actions, such costs to be agreed or taxed. The solicitors duly delivered their bill of costs, which came to £486. In it were numerous items which the master subsequently disallowed, such as the employment of an eminent King's counsel and well-known junior to settle the statement of claim, a special copy of the pleadings, &c., and which had been incurred on the lady's express instructions. A petition was later presented on the usual third party order for the taxation of the bill of costs of the above-named solicitors who had acted for the lady, when the master, on the 2nd of March, 1904, taxed the bill as between solicitor and client in the presence of the opposing solicitors. Upon objections being carried in the master suggested that they should apply for an order to tax under section 38 of the Solicitors Act, 1843. This they accordingly did, when the master by an order dated the 2nd of May, 1904, disallowed many items which he had previously allowed. By this order he disallowed various items to the amount of £111 as being too unreasonable, and allowed £375. The solicitors then carried in objections, saying that the agreement was for an indemnity. The master on the 6th of July, 1904, made the note, referred to in the judgment, replying to the objections; and on the 13th of July replied formally, dealing very

(*a*.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

fully with the various objections. After stating that he had followed the principle in *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, and referring to *In re Negus*, 43 W. R. 68, [1895] 1 Ch. 73; *In re Abbott*, 4 L. T. N. S. 576, 9 W. R. Dig. 85; *In re Morecroft*, 29 SOLICITORS' JOURNAL, 471; *In re Holliday and Godlee*, 58 L. T. N. S. 301, 36 W. R. Dig. 56; and *In re Longbotham*, 52 W. R. 660, [1904] 2 Ch. 152, he continued: "I have followed the practice in the taxing office on taxations under this section, and I have taxed apart from the order as between the solicitor and the party liable to pay, and I have disallowed several items which did not come, in my opinion, within the scope of the said agreement, and the third party did not contract to pay all these costs, only specified charges which I have carefully allowed item by item." The solicitors at once took out this summons to vary and discharge, and for review of taxation.

Hon. E. C. Macnaghten, K.C., and *H. Greenwood*, for the solicitors.—The agreement must be construed as it stands. If the decision in *In re Holliday and Godley* is correct, it covers my case. [SWINFEN EADY, J.—Is not the correct view this, that where a third party applies for an order he does not render himself liable to pay any other item but as between solicitor and client?] Yes, partly. No objection can be taken here under section 38 for the settling of the statement of claim, if it was an item properly charged for, though undoubtedly her employing two counsel was expensive.

They cited *In re Holliday and Godlee, In re Gray, In re H. L. Longbotham, In re Abbott, In re Brown, In re Morecroft*, and *In re Negus*.

Peterson, for the third party.—The taxing-master is right, and it is in accordance with the practice in *In re Longbotham*. Ord. 65, r. 27, sub-rule 29, regulates the master's duty.

He referred to *In re Ermen*, 51 W. R. 475, [1903] 2 Ch. 156.

Hon. E. C. Macnaghten, K.C., replied.

SWINFEN EADY, J.—In this case I have communicated with the taxing-master, and I am not satisfied that he has proceeded upon a wrong principle, but his certificate is, I think, open to the criticism that has been addressed to it. There is no difficulty in regard to the practice in ascertaining exactly what should have been done. The difficulty I had was in appreciating exactly what had been done, having regard to the language of the certificate and to the note to the objections and the answers carried in. In the answer to the first objection there is a note of the master, dated the 6th day of July: "By consent these objections are disallowed *en bloc*, and need not be answered by me in detail, the question for the court being on what principle these costs are to be taxed on an indemnity as between the solicitor and his own client, or what is fair and proper for a third party to pay." That note was dated the 6th of July, and I think that is in effect superseded by the answers which were ultimately signed on the 13th of July. The note was made while the matter was still before the master. Now, in the master's answers to objections, he says: "I have followed the practice in the taxing office in taxation under this section, and I have taxed apart from the order as between the solicitor and the party liable to pay"; and it is upon the language of this part of the certificate that the difficulty has arisen. It is quite clear from the decision in *In re Gray*, the principle of which was affirmed by the Court of Appeal in *In re Longbotham*, that where a third party obtains an order to tax that does not alter the nature or enlarge the scope of his liability. Cozens-Hardy, L.J. (then Cozens-Hardy, J.), stated that in terms, and all the Lords Justices in *In re Longbotham* affirmed that decision, and Vaughan Williams, L.J., says: "I think all that it is necessary for the court to do in its present judgment is to affirm the principle of those two decisions"—that is, *In re Negus*, before Chitty, L.J., and *In re Gray*. At the same time it is equally clear from *In re Gray* that a taxation on the application of a third party is a taxation that must proceed on the condition of the third party paying what is due to the solicitor from his own client, which may be more than the client, if he had paid it, could have recovered over from the third party. Romer, L.J., in *In re Longbotham* (at p. 156) says the same: "It is clear, both from the wording of the section itself and the authorities, that the taxation must be on the footing of a taxation between the solicitor and the client"; that is to say, that the bill must be taxed between the solicitor and the client, and not as between the solicitor and the third party. Now, I think it is quite clear that this is not an indemnity taxation. The cases of *In re Gray* and *In re Longbotham* followed older authorities, as was pointed out both by Romer and Vaughan Williams, L.JJ., in the Court of Appeal. In the case of *In re Brown* Lord Romilly was dealing with a taxation on the application of a third party, a *cestui que trust*, taxing a solicitor's bill which had been paid. The solicitor had charged and the trustee had paid the bill, but on the application of the *cestui que trust* to tax, the taxing-master disallowed a considerable number of items, "in particular charges for certain attendances upon the trustee and for letters written to him or to third parties by his direction." That affords a very good illustration of the rule that there may be a considerable number of items for which the client may be liable to the solicitor as having been items incurred on express instructions of the client for instance, but yet that the third party may not be liable to pay. That is quite consistent with the rule that when once the items, for which the third party is liable, are ascertained the taxation of those items for which he is liable must proceed upon the footing of a taxation as between the solicitor and the party chargeable, and not as between the solicitor and the third party. The case of *In re Negus* before Chitty, L.J., is another illustration of the same thing. There it was held that the lessee was not liable to pay for the costs of the counterpart lease; but it did not at all follow that the solicitor was not entitled to recover them from his client, the lessor, for whom he had acted. It was an item for which the third party, the lessee, was not liable to pay, but which, nevertheless, the party chargeable was liable to pay to his solicitor; and Chitty, L.J., dealing with the point, says: "This is a third party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable," that is to say, as regards the taxation. Then he goes on: "But that rule does not prevent the taxing-master from considering the question of the liability of the third party," that is to say, from considering for what items the third party is properly liable.

Under these circumstances I am of opinion that the practice as laid down by all the four cases to which I have referred is clear, but I am not satisfied with the language of the master's certificate, and if he has followed that practice, in my opinion he has not stated that he did so, and his certificate is open, certainly as a matter of language, to the criticism which counsel for the applicants addressed to it. He does not say that he has taxed as between the solicitor and the party chargeable, but as between the solicitor and the party liable.

Under these circumstances I do not think it would be satisfactory to allow the matter to stand in its present position, and the matter should be sent back to the master. It will be for the master to consider whether the slip made has been in the language of his certificate, or in the principle upon which he has in fact taxed the bill. Under the agreement, the third party is liable to pay the costs of the lady as between solicitor and client "with relation to the matter in dispute in the said two actions," and it is those costs that have to be taxed; but in my opinion this is not an indemnity taxation, and it does not follow that because on this taxation there are disallowed items for which the third party is not liable, those items have not been authorized by the client. It may well be that the solicitor will be entitled to recover them over against his client, but the liability of the third party is not enlarged or increased by reason of his having obtained the third party order. Under these circumstances I think the proper order will be to send the matter back to the master to review, and he will amend the certificate. Whether the ultimate result of the taxation will be altered will depend upon whether he has in fact proceeded upon the principles I have indicated. If he has, it may be that the result will be the same, but the language of the certificate must be altered.

In conclusion I think I should say that the master appears to have followed the language of the certificate given by the taxing-masters to Kekewich, J., as set out in the report in *In re Longbotham*. The taxing-masters appear to have been of opinion that *In re Gray* had altered the practice, and they stated that "since that case the practice in the taxing office in taxations under this section has been to tax apart from the order as between the solicitor and the party or estate liable to pay." The matter was put as clearly as possible by Romer, L.J., when he said that the taxation must be on the footing of a taxation between the solicitor and the client.

Solicitors, *Cohen & Cohen; Slark, Edwards, & Co.*

Chan. Div. Warrington, J. } Nov. 3.

In re HORNE.

WILSON *v.* COX-SINCLAIR. (*a.*)

Trustee and cestui que trust—*Administration—Tenants for life—Overpayments—Adjustment—Trustee also a beneficiary—Right to impound.*

Where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, and died before any adjustment had been made.

Held, that the executors of the deceased trustee were not entitled to recover from the other beneficiaries the amounts so overpaid, or to have accrued or future income impounded till the shares were equalized, by reason of the fact that their testator was, as trustee, himself the person responsible for the mistake that had been made.

Adjourned summons.

The question raised by this application was whether the executors of a beneficiary, who had been underpaid his share of the income of a trust fund, were prevented from recovering the amount from the other beneficiaries by the fact that their testator was also the trustee who had made the overpayments.

Swithin Horne, by his will, gave and bequeathed a number of leasehold messuages to his trustees upon trust to pay the residue, after certain other payments, of the net rents and profits unto and amongst his three sons, Richard, William, and Edwin, as tenants in common. The testator, who died in August, 1886, appointed his son Richard one of the executors and trustees of his will.

Richard Horne was the acting trustee of the will; he personally managed the estate, receiving the rents and keeping an account of the trusts down to the time of his death in August, 1903, making payments out of the net income to his brothers every year for or on account of their respective shares, retaining a portion for himself.

After Richard Horne's death it was discovered that he had been in the habit of making payments to his brothers in round sums which were not exact thirds of the income received. One brother appeared to have received a small payment monthly, and the other a larger sum, approximately corresponding in total amount, once or twice a year, while Richard Horne had only appropriated for himself various sums at irregular intervals, with the result that during the seventeen years since the testator's death William Horne and Edwin Horne had been overpaid to the extent of £99 3s. 4d. and £83 3s. 4d. respectively, so that Richard Horne had altogether underpaid himself to the extent of £182 6s. 8d. It was admitted that Richard Horne as trustee had made no mistake of fact with regard to these payments.

The executors of Richard Horne claimed this sum of £182 6s. 8d. as part of the estate of their testator, and asked for an adjustment.

The plaintiff, as the surviving trustee of the will of Swithin Horne, still held leasehold messuages and a sum representing net rents, part of which had accrued prior to the death of Richard Horne.

The plaintiff accordingly took out an originating summons against the executors of Richard Horne and against Edwin Horne for the determination of the question whether he ought to pay or allow to the executors of Richard Horne the sum of £182 6s. 8d., and, if so, whether out of capital or income.

H. C. Bickmore, for the surviving trustee of the will.

E. S. Cox-Sinclair, for the executors of Richard Horne.—Any member of a family who has obtained possession of any portion of a trust fund to which he is not entitled can be compelled to repay it at the suit of another *cestui que trust*: *Harris* v. *Harris*, 9 W. R. 444, (1861) 29 Beav. 110.

Forder Lampard, for Edwin Horne.—There was no mistake of fact with regard to the payments; the trustee appears to have been careless and inaccurate only. It is clear, therefore, that Richard Horne could not have recovered these overpayments from his brothers during his lifetime, and his representatives cannot be in any better position than their testator. [WARRINGTON, J.—You must admit that if Richard had not been a trustee, but merely one of the beneficiaries, these overpayments would have to be adjusted.] Certainly, but the fact that Richard was the trustee who made the overpayments differentiates this case from the authorities cited.

Cox-Sinclair, in reply.—The fact that Richard was a trustee as well as a beneficiary ought not to be allowed to deprive him of his right in his capacity of beneficiary to recover these overpayments. Mere *laches* as trustee ought not to deprive Richard as one of the beneficiaries of his right to an adjustment. The inconvenience to beneficiaries who have been overpaid is just the same whether their income is stopped at the suit of a beneficiary or at the instance of a trustee. Inconvenience, therefore, is no ground for refusing relief.

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

WARRINGTON, J.—The exact point I have to decide does not seem to be covered by any of the authorities cited. If Richard Horne had not himself been a trustee, but only one of the beneficiaries, the case would be plainly covered by authority, and it would now have been the duty of the plaintiff, as the surviving trustee of this will, in administering the trusts of it for the future, to equalize the payments which have been made out of income. That proposition is established by the three cases of *Harris* v. *Harris*; *Dibbs* v. *Goren*, 11 Beav. 483; and *Livesey* v. *Livesey*, 3 Russ. 287—perhaps the point is most clearly put in *Dibbs* v. *Goren*; but in the present case we have the fact that the person claiming a readjustment is the trustee himself. This fact introduces into the case an element of an essential character which was absent in the authorities referred to. When a trustee comes to the court to have an account adjusted upon the ground that he, being also one of the beneficiaries, has paid himself too little, one must consider what will be the effect of the proposed adjustment upon the other beneficiaries, and particularly with reference to the great inconvenience that may be caused to them if the claim is allowed and their income has to be impounded to make good the deficiency to the trustee beneficiary. Here are the three beneficiaries, Richard, William, and Edwin; let me assume that Richard Horne, the trustee, is the first to die; Richard's executors after his death come and say to William and Edwin, "You have been receiving a great deal more income than you were entitled to; we, the representatives of Richard, who has paid you too much, must have your future income stopped until Richard's estate has been repaid what he has overpaid you." This would be very inconvenient, and a great hardship on the other legatees. The same inconvenience and hardship arises where an adjustment is thus made at the suit of a beneficiary, but in that case the beneficiary is not the person responsible for the mistake which causes the inconvenience. In the present case it is the trustee who claims an adjustment, and he is the person responsible for the mistake that has been made. Upon what principle is the trustee entitled to recover? I see none at all. Having regard to the circumstances and the mode of payment, it is clear that Richard Horne made no mistake. He seems to have made these payments without any exact reference to the actual amount of the income of these leaseholds, but there was no mistake of fact, and therefore he cannot recover them at law. Can he recover in equity? I am of opinion he has no such right. Any equity that he might have had in his character of beneficiary is displaced by the fact that he is himself responsible for the mistake which has been made.

As was said in *Ridgway* v. *Newstead*, 9 W. R. 31, (1861) 30 L. J. Ch. 889, the right of a creditor to make legatees refund may be affected by the course of conduct of that creditor, and in the present case I think that, not only has the trustee no equity to entitle him to the interference of the court, but that the course he has adopted makes it highly inequitable for the court to allow him to assert any right against these beneficiaries, who were themselves perfectly innocent, and were only receiving what was paid to them in good faith and under the belief that it was the amount to which they were entitled.

I must therefore make a declaration that the surviving trustee of the will of Swithin Horne ought not to repay or allow to the executors of Richard Horne the sum of £182 6s. 8d., being the amount appearing on the accounts to have been overpaid. This was quite a proper case for the opinion of the court; the plaintiff as trustee was bound to come and have this question decided; and therefore I shall direct that the costs of all parties as between solicitor and client may be paid out of the estate.

Solicitors, *Walter A. Jennings*; *J. Arscott Bartrum*.

K. B. Div. (Kennedy, J.) — Dec. 7.

POLENGHI BROTHERS *v.* DRIED MILK CO. (LIMITED). (*a.*)

Sale of goods—Contract—Construction—Right to inspect bulk before or after payment—"Payment on arrival against shipping documents"—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 15 (2) (b), 27, 34 (1), 55.

Where a contract for the sale of goods provides that payment is to be made . . . on the arrival of the goods against shipping or railway documents, the purchaser on the arrival of the goods and on the production of the shipping or railway documents cannot inspect the bulk with the sample before payment.

The right to subsequently reject if the goods are not in accordance with the sample is not impaired by the payment.

Action tried in the Commercial Court.

A contract for the sale of certain shipments of dried milk powders contained the following clause: (9) "Prices . . . 6d. per lb. c.i.f. London. . . . Payment to be made in cash in London on the arrival of the powders against shipping or railway documents."

Subsequently the defendants refused to pay for any deliveries on the production of the shipping documents, demanding an opportunity of first inspecting the bulk to see whether it corresponded with the sample.

Chaytor, for the plaintiffs.—The defendants could not refuse to make the payment on production of the shipping documents on arrival of the goods. After payment, and when received by the defendants, the bulk could be compared with the sample, and the right to reject might then arise. The buyer had agreed to pay in advance. The arrival must be before delivery. The buyer is not excluded by payment from the right to inspect the goods. By the Sale of Goods Act implied terms are subjected to express terms made by the parties: *Sanders* v. *Maclean*, 31 W. R. 698, 11 Q. B. D. 327; *Causton* v. *Chapman*, L. R. 2 H. L. Sc. 250; *Pettit* v. *Mitchell*, 4 M. & G. 819; *Tregelles* v. *Sewell*, 7 H. & N. 574; *Castle* v. *Playford*, 20 W. R. 440, L. R. 7 Ex. 98; Sale of Goods Act, 1893, ss. 15 (2), 27, 34 (1), and 55.

Leck, for the defendants.—The contract was to sell and deliver, and not a c.i.f. contract, although the price was fixed on a c.i.f. basis. If the contract was regarded as one where the seller had to deliver to the buyer, the defendant had the right to inspect. Unless the clause excluded the right to inspect before payment the defendants were entitled to inspect before payment. The clause in effect meant the arrival and tender of delivery, and the opportunity of inspecting must then be given: *Lorimer* v. *Smith*, 1 B. & C. 1; *Isherwood* v. *Whitmore*, 11 M. & W. 347; *Toulmin* v. *Hedley*, 2 Car. & K. 157; *Mody* v. *Gregson*, 17 W. R. 176, L. R. 4 Ex. 49; *Drummond* v. *Van Ingen*, 36 W. R. 20, 12 App. Cas. 284; Chalmers' Sale of Goods Act, p. 111 (note); Benjamin on Sales (4th ed.), pp. 592, 709.

Ryan v. *Ridley*, 8 Com. Cas. 105, was also referred to.

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

KENNEDY, J.—This case raises an interesting point of law. The point is a narrow one—whether on the construction of the contract the buyer is entitled, in respect of the goods contracted for, to insist on the provisions of section 15, sub-section 2 (*b*), of the Sale of Goods Act, and to have an opportunity of comparing the bulk with the sample before paying the price. The goods in question were manufactured abroad, and were sent, partly by sea and partly by rail, to London. The goods having arrived, the difficulty arises between the parties by the refusal of the buyer to pay the price until he has found out whether the goods correspond with the sample. The goods were arrived goods at the railway company's warehouse. They were goods in respect of which the sellers were in a position to tender to the buyer the shipping documents. The buyer refused payment until he had had an opportunity of satisfying himself that the goods were equal to sample. What is the reasonable meaning of clause 9 of the contract? Generally section 15 of the Sale of Goods Act applies, and gives the buyer a reasonable opportunity of inspecting the goods before payment. The contract contains these words: "Payment is to be made . . . in London on the arrival of the powders against shipping or railway documents." That is an express provision. With regard to payment there are two stipulations, and two only. The seller must (1) show that the goods are arrived goods; and (2) produce the shipping documents. Payment on delivery is excluded by express stipulation which provides for payment on arrival. The plain meaning of the contract is that on those two conditions being fulfilled payment is to be made. If the goods do not answer the description the buyer has a right to reject, which right is not impaired by the express condition in the contract that "payment is to be made . . . in London on arrival of the powders against shipping or railway documents."

Judgment for the plaintiffs.

Solicitors for plaintiffs, *M. Attenborough.*

Solicitors for defendants, *A. P. Stokes.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) Dec. 20.

LONDON COUNTY COUNCIL *v.* PAYNE & CO. (*a.*)

Weights and measures—"False and unjust" scales—Paper bag placed under scale—Scales used in a particular way at request of customer—Absence of fraudulent intention—Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The respondents, who were wholesale tea merchants, with a view to expedite the weighing out of tea to certain of their customers—retail dealers who requested to be supplied with parcels of tea of such weight that each with its wrapper would be of some given weight, for instance, ¼lb.—made it their practice to temporarily adjust the scales while weighing a series of parcels for such a customer by placing a paper bag supplied by such customer under the goods scoop; special pains were taken to prevent the scales in that condition from being used for any other customer.

Held, that the scales were rendered "false or unjust" within the meaning of section 25 of the Weights and Measures Act, 1878, *and that the respondents were liable to a penalty accordingly.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

London County Council *v.* Payne & Co., 52 *W. R.* 299, [1904] 1 *K. B.* 194, *explained and followed.*

Case stated by a metropolitan police magistrate, who had dismissed an information preferred on behalf of the appellants by an inspector of weights and measures against the respondents, wholesale tea dealers, carrying on business in Bermondsey, charging them with having used for trade purposes a beam scale which was "false or unjust" within the meaning of section 25 of the Weights and Measures Act, 1878.

The case stated was as follows:

1. On the 17th of May, 1904, the respondents appeared before me at the Southwark police-court, to answer an information laid by John Abberly Hutchins on behalf of the appellants, which charged that the respondents on the 21st of March, 1904, at Boss-street, Tooley-street, in the metropolitan borough of Bermondsey, in the county of London, and within the metropolitan police district, did use for trade a weighing instrument, to wit, a beam scale, which was false or unjust (that is to say, underneath the goods scoop of the said beam scale was placed a paper bag) contrary to section 25 of the Weights and Measures Act, 1878.

2. By section 25 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), it is provided as follows: "Every person who uses or has in his possession for use for trade any weight, measure, scale, balance, steelyard, or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and any contract, bargain, sale, or dealing made by the same shall be void and the weight, measure, scale, balance, or steelyard shall be liable to be forfeited."

3. Upon the hearing of the said information the following facts were either proved before me or admitted by both parties:

(*a*) The respondents were solely wholesale tea merchants, and occupied for the purposes of their business a warehouse in Boss-street, Tooley-street. Two adjoining rooms in this warehouse were used by the respondents for weighing out tea, and about eighty girls were employed in these two rooms under the superintendence of a forewoman and under the general supervision of the respondent's manager. The forewoman had an assistant, and such rooms had an opening between them.

(*b*) On the 21st of March, 1904, about 10.30 a.m., an inspector of weights and measures visited the above premises, and was taken round the said two rooms by the manager and inspected the weights and scales there. In the course of this inspection, one of the girls handed down to the inspector, from a shelf above her, a beam scale which had a folded paper bag under the scoop in which the tea to be weighed is placed. In that condition the scale would turn with 2½ drachms of tea less than the weight on the other side of the scale. The scale without the piece of paper was correct. The scale had been used that morning by the said girl to weigh out for a customer 50lbs. of tea into ¼lb. packets, that is to say, rather over 200 parcels of tea had been weighed out with it. When the inspector came up the girl had recently finished weighing out the 50lbs., and was sweeping her counter so as to be ready for another order.

(*c*) Tea was weighed out by the respondents in the manner and by the means above described for three or four of their customers, of whom one, being the customer above referred to, was a customer for considerable quantities of tea, and the others for comparatively small quantities. Tea was never so weighed out by the respondents, unless at the request

of the customer for whom it was intended, and only in bags supplied by the customer, and of the kind exhibited. On some days of the week no such weighing out took place, but on other days several chests or bags were so weighed out.

(*d*) The girl who handed the scale down to the inspector was not called, but the respondent's manager and forewoman were both called, and they described the practice followed at the respondents' warehouse. From their description it appeared that a chest or bag containing, say, 50lbs. of tea would be put down by the girl's counter, and she would be given an order and directed by the forewoman to weigh out into packets of some given denomination, say ¼lbs., and one of the above-mentioned bags, which were supplied by the customer, would be given to the girl to fold up and place under the scoop of the scales. Having placed this bag under the scoop she would proceed to weigh out the tea, and when she had finished this she would place the scales on the shelf above her without removing the bag from under the scoop, and report to the forewoman that the weighing-out was finished. Shortly afterwards, that is to say, usually within three or four minutes, and always within ten or fifteen minutes, the forewoman would come round; the girl would then hand down the scales, and the forewoman would remove the bag and annex to it a paper tag having certain memoranda written upon it. No one would be allowed to, nor was it suggested that they did in fact, make use of the scale between the time of its being put up on the shelf and the time of its being handed down to the forewoman. The forewoman would afterwards place the bag and tag upon her desk, where it would probably remain three or four days and then be thrown away. One of these tags was produced before me, and I have initialled it for the purpose of identification. No two weighings-out with a bag were allowed to be consecutive, a full weight order being always interposed.

(*e*) The practice above described was followed in this and all cases. The substantial difference between this practice and the practice obtaining in the respondents' warehouse in November, 1902, as described in the special case of *London County Council* v. *Payne & Co.*, 52 W. R. 299, [1904] 1 K. B. 194, was that under the present practice the paper bag was given for each operation by the forewoman, before it (the weighing) commenced, and was always removed by the forewoman when it was finished, whereas formerly it was left to the girl to remove it. The change was not made for commercial reasons, but with the object of complying with the Weights and Measures Acts.

(*f*) The respondents used the said beam scale with the bag under the scoop for trade, as and to the extent above described.

4. The appellants contended that the beam scale was false or unjust within the meaning of section 25 of the Weights and Measures Act, 1878, and they relied upon the case of *Lane* v. *Rendell*, 48 W. R. 153, [1899] 2 Q. B. 673, 69 L. J. Q. B. 8, and the respective judgments of Lawrance and Kennedy, JJ., in the said case of *London County Council* v. *Payne & Co.*

5. The respondents contended that the weighing-out of the chest or sack of tea in the manner and by the means above described was "a particular weighing operation" within the meaning of the judgment of the Lord Chief Justice in the case above referred to, and that the beam scale was therefore not false or unjust.

6. Inasmuch as the bag was temporarily placed under the scoop for a particular customer, and the condition of the scale was temporary and not permanent, and special pains were taken to prevent the scale in that condition from being used for any other customer, I was of opinion that the respondents had kept within the law as laid down by the Lord Chief Justice in the case of the *London County Council* v. *Payne*, and that the beam scale was therefore not false or unjust within the meaning of section 25 of the Weights and Measures Act, 1878. I accordingly dismissed the information, subject to this case.

7. The question of law for the opinion of the court is whether upon the facts above stated the beam scale was false or unjust within the meaning of section 25 of the Weights and Measures Act, 1878.

The London County Council appealed.

Dickens, K.C., and *Daldy*, for the appellants.—The decision in *London County Council* v. *Payne & Co.* really governs this case, for the difference relied on by the respondents is insufficient to distinguish the two cases in principle. The rule there laid down by Kennedy, J., in his judgment is thus reported in [1904] 1 K. B., at p. 202: "The weighing instrument itself must be such as in its condition when it is being used for trade gives a just and true—that is, an accurate result as regards the weight of the thing placed in the scales"; and "the trader renders himself liable, however honest his intention, if in fact he uses or employs an adjustment which is not an adjustment of the thing within the scale—that is, the thing to be weighed—but is an adjustment which reflects the truth and accuracy of the weighing machine itself." There is no allegation of fraud here. Under section 26 the consent of the purchaser is material, for under that section fraud has to be proved, but under section 25 the question of motive is wholly immaterial. It is no defence to show that care and supervision is exercised to see that the scales manipulated in one way or another to meet the wishes of a particular customer, are used only for executing the order of that customer.

Avory, K.C., and *George Elliott*, for the respondents.—It would be impossible to get through the weighing-out of a chest of tea into quarter-pound packets within a reasonable compass of time unless some method like the one adopted here was used to accurately allow for the weight of the wrapper into which the tea after being weighed was to be put up in. It is not on offence to sell a packet of tea of the net weight of say ¼lb. if it is sold with a statement that in that weight the weight of the paper is included. It is no offence to place the paper in the goods scoop first and then make up the weight with tea. If so, how can it be an offence to place the paper bag underneath the scoop instead of in it. The use of the bag is temporary. The scale is not for a moment rendered *per se* "false or unjust." Paragraph 3 (*d*) of the case shows that proper care and supervision was taken to guard against the scale being used for weighing tea for an ordinary customer, as the bag was at once removed when this particular order was executed. These scales, therefore, were found by the magistrate to be honest scales, and the respondents' method of weighing-out the tea comes within the words of the judgment of Lord Alverstone, L.C.J., in *London County Council* v. *Payne & Co.*, where he says: "If I had come to the conclusion that a temporary adjustment was made solely for the time when these scales were being used for this particular purpose, and the condition in which these scales were found by the inspector was not their condition as ordinarily kept, I should have come to a different conclusion." This was an honest attempt by the respondents to conform with the requirement of the statute as laid down by the Lord Chief Justice. The test is the same as that applied in *Lane* v. *Rendall*, 48 W. R. 153, [1899]

2 Q. B. 673, 69 L. J. Q. B. 8, and the respondents ought not to be convicted, because the bag placed for the time being under the goods scoop is not part of the weighing machine, which is therefore not rendered "false and unjust," as it was held to be in the first prosecution, by the fixing on to the beam itself a detacheable disc.

Dickens, K.C., replied.

Lord ALVERSTONE, L.C.J.—The effect of this, to me, most interesting discussion, has been rather to bring me to the conclusion that in *London County Council* v. *Payne* I was over anxious not to strain the statute, and that, perhaps, I have, by what I then expressed, and, I hope, expressed very carefully, quite innocently led persons to believe that the statute had a less wide effect and operation than I now think it has. I do not, however, see any reason to qualify or depart from anything I said in that case. It seems to me that we have to apply the statute to this particular set of facts. That the line must be drawn somewhere is perfectly plain. The fact that if the scales were right and something were put into one pan to make the tea weigh a particular weight as against the weight on the other side, shows that there may be what we have all called a temporary use of lawful scales to weigh a particular thing in a particular way; but I think that the necessity for public protection, and the fact that these packets really only representing a weight of paper and tea, when they get into the hands of other people, may be possibly used so that persons who buy may be misled by not getting what they think they are buying, may have led the Legislature to use this language advisedly, and that section 25, which, after all, is that on which we have to decide this point, in using the language "every person who uses . . . any scale . . . which is false or unjust," means the using for the weighing operation of a scale which, as a scale, is false or unjust. It may be, and it probably is, a safer view that what the statute means is—as the inspector only goes from time to time when he sees the scale empty, and tests it as an empty scale—that it shall be a just balance, that it shall hang, so to speak, true, and, if the inspector puts a pound weight in to test the weighing, the pound weight will weigh it down in the sense of balancing it, and if the scale when used is a scale which will not fulfil the test which I endeavoured to lay down, and which my brother Kennedy laid down, perhaps in better language than I did, that is, to weigh truly what is put into the other pan, it is an unjust balance. It is not disputed in this case—in fact it is very properly and fairly admitted and argued—that putting the bag underneath the scale for the purpose of weighing tea less paper on four or five hundred occasions would, within the judgment of this court in the previous case, have been a breach of the statute, if the bag had not been removed until the scale was used again for the same purpose, and the scale had been kept on a shelf in such a condition that it would only weigh truly paper and tea. It does not certainly seem to me, after weighing as carefully as I can what Mr. Avory has so forcibly and clearly set before us, that that ought to be a sufficient distinction to make what is done an offence in the one case, and not an offence in the other. I am not able satisfactorily in my own mind to exclude from the operation of section 25 a case in which the scales are rendered for the time being unjust, because a lawful operation is desired to be carried out. If those scales are kept in that condition for that purpose and with that object, and are never used for any other purpose, it seems almost impossible to say it would be outside the statute, if the only distinction is, that between the time of the two weighings the paper is temporarily removed.

While I agree with Mr. Avory that if it be taken as a fact, and to my mind rather a strange fact, that in order to secure the paper being taken out, they always in sales to other customers have the true weight of tea without the paper weighed in between the sales to these particular customers, it seems to me quite possible that, unless there be some supervision in that particular operation, the weighing to the ordinary and not the particular customer might take place with the paper underneath the scale. I therefore think it is safer to give the natural meaning to the language of the statute, and to say that if the person has used in the operation of weighing, and is found by the inspector to be using in the operation of weighing, an unjust balance in the sense that we have already described in *London County Council* v. *Payne*, it comes within the statute. Therefore, although I fully recognize the difficulty, and perhaps regret that the difficulty has been to a certain extent accentuated by my endeavouring not to strain the statute beyond that to which I thought it ought to apply, I have come to the conclusion that the statute does intend to prevent the using, in weighing, of a balance which is at the time, as a balance, unjust—which will not hang true when there is nothing in either pan, and which will not hang true when an equal weight is put into the goods pan on the one side and the weight pan on the other.

I therefore think, although I myself feel the difficulty of the case very much, that the appeal must be allowed, and that the magistrate in this case was not justified in differentiating, as he thought he could differentiate, the previous case of *London County Council* v. *Payne*.

KENNEDY, J.—The facts in this case do not appear to me to differ essentially from the facts with which this court had to deal in the previous case against the same company, and, therefore, I do not wish to add anything to the judgment my lord has just delivered.

RIDLEY, J.—I agree with the judgments that have been given, and I wish to say a very few words only. I do not think that this case is distinguishable from the former case, *London County Council* v. *Payne*, though there are indeed some differences in the facts. I recognize that it may be thought by some people that the court errs by giving too full a meaning to this statute, but I do not shrink from saying that the statute when it employs the words, "uses or has in his possession for use for trade any weight, measure, scale . . . or weighing machine which is false or unjust," it means that the trader ought not to have in his possession any scale which can be called at the time false or unjust. It is not necessary, in order to bring him within the statute, that he should actually be found to use it for any particular operation, for the inspector who comes round may probably come at a moment when it is not so being used. If he found it not being used, but in the condition in which I have described, then it is in possession for use. Under one or other of those expressions comes, as I think, this case, that is to say, although the inspector does not find it being used (he may not do so) still he finds it in possession for use. I do not find myself able to recognize the distinction founded on the intention of the orders, which were issued by Messrs. Payne, that the forewoman is to come round within a short interval of time and remove the paper bag. It is, no doubt, a thing which goes in the direction which has been pointed out by the Lord Chief Justice, but it is not sufficient, as it seems to me, to establish that that which has been done

is outside the purview of the Act of Parliament. I agree with the judgments that have been pronounced.

Appeal allowed; case remitted.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Lamb, Son, & Prance.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Dec. 15.

CHESHIRE *v.* BAILEY. (*a.*)

Bailment—Contract to supply carriage and driver to commercial traveller—Duty of driver to safeguard goods in carriage—Larceny of driver—Loss of goods.

The defendant, who was a jobmaster, agreed to let to the plaintiff, who was a wholesale silversmith, a commercial brougham, horse, and coachman for the use of the plaintiff's traveller when taking samples to customers. The defendant did not know the nature of the plaintiff's trade nor the character of the samples to be carried. While the brougham was being so used the traveller went to lunch, leaving the brougham with the samples in it in the charge of the coachman, when, with the connivance of the coachman, the samples were stolen. The coachman had always borne a good character. In an action to recover the value of the samples,

Held, that, though the defendant had undertaken by his coachman to use due care in safeguarding the samples in the brougham during the temporary absence of the traveller, and though he would therefore have been liable for the negligent act of the servant within the scope of his employment, he was not liable for the felony of his servant acting outside the scope of his employment.

Abraham *v.* Bullock, 50 *W. R.* 626, 86 *L. T.* 796, *considered.*

Judgment of Walton, J. (52 *W. R.* 631), *reversed.*

Appeal from the judgment of Walton, J. (52 W. R. 631).

The action was brought by a wholesale silversmith, carrying on business at Birmingham, to recover damages for the loss of certain goods. The defendant, who was a jobmaster carrying on business in London, let to the plaintiff a specially fitted commercial brougham, horse, and coachman for use by his traveller in London when taking round samples of his goods to customers and seeking orders. The defendant, though he did not know the plaintiff's trade, knew the purpose for which the brougham was required. The brougham was used for several months by one Gray, the plaintiff's traveller, for the purposes above-mentioned. On one occasion the brougham contained samples of silver goods to the value of about £1,000, and after visiting certain customers the traveller at midday went to get his lunch, leaving the brougham and its contents in charge of the coachman. The coachman thereupon, in the absence of the traveller, drove to a place agreed upon with certain confederates of his, who stole the brougham and its contents. The driver and his confederates were convicted of the offence at the Central Criminal Court. Some of the goods were subsequently recovered, and the plaintiff brought this action to recover the value of the goods that were lost. It appeared from the evidence that the defendant, when he took the coachman into his service, received a good character with him, and that the coachman bore a good character while he was in the defendant's service up to the time of committing the offence.

Walton, J., found as a fact that the brougham, with a horse and coachman, was supplied for the purpose of taking the plaintiff's commercial traveller and his samples round London to see his customers and transact his business. He further found as a fact that the defendant was not told that the traveller was in the service of a silversmith, but that he did know that samples of goods were to be carried about in the brougham—that was to say, samples of goods such as were dealt in by London tradesmen, which might, therefore, be of considerable value. He did not think that it could be said that there was anything extraordinary or unusual, having regard to the way in which broughams of this kind were used in London, in the nature or value of the goods carried. The defendant might have inquired as to the nature of the goods, had he wished to do so, and limited his liability. The defendant did not do so. He let the brougham to be used as a commercial brougham for the purpose of being taken about by a commercial traveller, and he (the learned judge) thought that the samples, such as were carried in the present case, might be within the contemplation of the parties. If that were so, the decision of the Court of Appeal in *Abraham* v. *Bullock*, 50 W. R. 626, 86 L. T. 796, applied to the present case, and therefore the contract involved an obligation upon the defendant that the driver he supplied should use ordinary care, not merely in driving, but in looking after the carriage when the traveller was away. That obligation embraced the obligation of taking reasonable care to safeguard the goods in the brougham in the absence of the traveller. He, therefore, upon the authority of that case, held that there was a contract by the defendant that the coachman should use ordinary and reasonable care to safeguard the goods in the brougham in the intervals of driving when the traveller was not in the brougham, but was engaged in calling upon customers or on other business, or when, as in the present case, he was taking his lunch in the middle of the day. That being the contract, it seemed to him that the coachman did not use reasonable care, but, on the contrary, he wilfully allowed the goods to be stolen, and there having been a failure on his part to use reasonable care to safeguard the goods in the brougham, it appeared to him (the learned judge) that there was a breach by the defendant of the contract between himself and the plaintiff, and that the failure to use such care was not any the less actionable, because what was done amounted to a criminal act. Different considerations would arise if it was a question of the master's liability to a stranger for something done by the servant, for in such cases the fact that the act of the servant was a criminal act might have an important bearing upon the question whether the servant was acting within the scope of his authority. He accordingly gave judgment for the plaintiff for £800.

The defendant appealed.

English Harrison, K.C., and *Clavell Salter, K.C.* (*Thorn Drury* with them), for the defendant.—The decision in *Abraham* v. *Bullock*, 86 L. T. 796, is not in point. That case merely decided that the duty of a jobmaster in such a case as the present is to provide a driver who will take reasonable care to safeguard the goods in the brougham during the temporary absence of the traveller. The jobmaster contracts that he, through his servant, will use due care. A negligent act of the servant within the scope of his employment is imputable to the master, but an

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

independent felony by the servant cannot be so imputed. There is no implied obligation by a bailee, in the case of a bailment for reward, to be responsible for the crime of his servant unless his negligent act facilitated the crime: *Finucane* v. *Small*, 1 Esp. 315; *Foster* v. *Essex Bank*, 17 Mass. Rep. 478; *Giblin* v. *McMullen*, 17 W. R. 445, L. R. 2 P. C. 317; *Jobson* v *Palmer*, 41 W. R. 264, [1893] 1 Ch. 71; Story on Bailments (9th ed.), s. 88. It is no breach of the bailee's undertaking to use due care if the bailee's servant steals the goods entrusted to him. In *Abraham* v. *Bullock* the driver's negligence in safeguarding the goods within the scope of his employment was the cause of their loss, and no question of any felony arose. It was not in the contemplation of the defendant here when he entered into the contract that the brougham would be used for carrying about silver articles of great value which might be easily stolen. The judgment was therefore wrong.

They also referred to *Daniels* v. *Harris*, 23 W. R. 86, L. R. 10 C. P. 1; *The Moorcock*, 37 W. R. 439, at p. 440, 14 P. D. 64, at p. 68; *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 590, 18 Q. B. D. 714; *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413, at p. 416, 40 W. R. Dig. 11; *Speight* v. *Gaunt*, 32 W. R. 435, 9 App. Cas. 1.

C. A. Russell, K.C., and *Sims Williams*, for the plaintiff.—The question is, what was the contract between the parties? If it is as found by Walton, J., the cases cited have no bearing upon the point. The contract was to furnish a brougham, horse, and coachman, to drive the plaintiff's traveller about with samples in such circumstances that the samples would from time to time be in charge of the coachman. There is no distinction, so far as the contract is concerned, between this case and *Abraham* v. *Bullock*. An act may be a crime from one point of view and a negligent act from another: *Osborn* v. *Gillett*, 21 W. R. 409, L. R. 8 Ex. 88; *Dyer* v. *Munday*, 43 W. R. 440, [1895] 1 Q. B. 742. The contract here was that the coachman would take due care in safeguarding the samples, and not having done so, the defendant is liable: *Ellis* v. *Turner*, 8 T. R. 531; *Clark* v. *Earnshaw*, Gow 30. *Giblin* v. *McMullen* was a case of a gratuitous bailment apart from any special contract, and the bank did not contract for safe custody, but only for house room. *Jobson* v. *Palmer* was not a case of bailment. The property in the goods was in the trustee, and he would not have been liable if he had injured them by his negligence. Where one person contracts by his servant to do an act, he is liable if the servant deliberately or inadvertently fails to do that which his master has contracted to do. A servant's act may render his master liable, though it is not merely negligent, but fraudulent: *Hamlyn* v. *Houston & Co.*, 51 W. R. 99, [1903] 1 K. B. 81; *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423, 52 W. R. Dig. 87.

They also referred to *Kettle* v. *Bromsall*, Willes 118; *Coggs* v. *Bernard*, 1 Smith's L. C. (11th ed.), p. 173, at p. 184 (*locatio operis faciendi*); *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338, 23 W. R. Dig. 39; Story on Bailments (9th ed.), s. 57.

English Harrison, K.C., in reply, referred to *Sanderson* v. *Collins*, 52 W. R. 354, [1904] 1 K. B. 628, where *Coupé Co.* v. *Maddick* was considered by the Court of Appeal.

Cur. adv. vult.

Dec. 15.—COLLINS, M.R., read the following judgment: This is an appeal by the defendant from the decision of Walton, J., in favour of the plaintiff. The short facts are that the defendant, a jobmaster, let to the traveller of the plaintiff, a silversmith, what is known in the trade as a commercial brougham. The defendant, though he did not know the plaintiff's trade, had notice of the purposes for which the brougham was required—viz., that the plaintiff's traveller might be driven about in it by a coachman supplied by the defendant for the purpose of seeking orders and showing samples. He knew that this would involve carrying samples of some value in the brougham, and that the traveller would have to get out frequently for the purpose of visiting his customers or having refreshment. He agreed accordingly to supply a brougham specially fitted for the purpose, together with a horse and driver. The inferences of fact drawn by Walton, J., are not disputed by the appellant. The brougham had been used at intervals extending over several months by one Gray, the plaintiff's traveller, for the purposes described. On one occasion, when he had with him plate and other articles to the value of about £1,000, the driver, acting in concert with other persons, who as well as the driver were afterwards convicted at the Old Bailey, stole the greater part of the contents of the brougham during the traveller's absence at lunch. Thereupon the plaintiff brought this action claiming to recover from the defendant the value of the stolen goods.

Walton, J., being, as he conceived, bound by the decision of this court in the recent case of *Abraham* v. *Bullock*, gave judgment for the plaintiff for £800. Putting that case aside for a moment, I desire to consider whether on principle the decision of the learned judge can be supported. I have come to the conclusion that it cannot. There was no special contract in this case altering the ordinary rights of the parties as implied by law upon a bailment of this class. Technically it seems to come under the class described as *locatio operis faciendi*. The defendant, though not a common carrier, has come under the ordinary obligations of a person who undertakes for consideration to do the work of carrying the plaintiff's traveller and his goods to such destination as he shall direct. He is bound therefore to bring reasonable care to the execution of every part of the duty accepted. He may perform that duty by servants or personally, and if he employs servants he is as much responsible for all acts done by them within the scope of their employment as he is for his own. But he is not an insurer, and is not answerable for acts done by his servants outside the scope of their employment. Hence he is not responsible for the consequences of the crime committed by the driver in this case, which was clearly outside the scope of his employment, unless it can be shown that the happening of the crime was due to the defendant's negligence. It is a crime committed by a person who in committing it severed his connection with his master, and became a stranger, and as the circumstances under which it was committed are known it raises no presumption of negligence in the defendant. He took reasonable care to perform his duty in that he sent out a servant whom he reasonably supposed to be trustworthy to drive the brougham and watch its contents in the traveller's absence, and he was not bound to do more. That an ordinary contract of bailment of this class does not involve a warranty that the servant shall not turn thief, and so cease to exhibit reasonable care, where the master has devolved the duty of custody on the servant, is clear from the fact that no class of bailee except common carriers and innkeepers are now at common law deemed responsible for the theft of their servants unless such theft was attributable to the negligence of the master. This immunity rests on the combination of two well-established factors—(*a*) that such bailees are only bound to ordinary care; (*b*) that *qua* masters they are not responsible for acts done by their servants

outside the scope of their employment. It is not necessary to refer to the authorities in detail which support these propositions. They will be found collected in *Coggs* v. *Bernard*, and the notes thereto in 1 Smith's Leading Cases (11th ed.), p. 173.

This being, in my view, the law clearly established as the result of many authorities, it remains to consider whether we are bound in this court to hold the contrary by reason of the case on which Walton, J., acted. I have carefully reconsidered that case, and am quite satisfied that the decision is right, and that it does not support the decision under appeal. The short facts there were that the driver of a commercial brougham, hired under similar circumstances, negligently left the brougham unguarded while the traveller was at lunch, and thus gave opportunity to thieves to steal its contents. The negligence of the servant in that case was clearly committed within the scope of his employment, and was, therefore, negligence for which the master was responsible just as much as if he had elected to watch himself instead of doing it by his servant and had then neglected it in the same manner. The case is only reported in the Law Times Reports, and I am there reported to have said, "I think that the defendant was under an obligation to use ordinary care in looking after the carriage in Cohen's"—that is, the traveller's—"absence, and that his servant failed in that respect." This seems to be substantially accurate. The proposition I was combating was that of the judge below, "that it was not in the scope of the driver's duty to protect the goods as the servant of the defendant, so that the latter was not liable for negligence in the performance of any duty owed by him," and I am reported to have said, "It is a reasonable and proper inference to draw from the contract and the circumstances under which it was made that the defendant undertook to supply a driver who would take ordinary care of the carriage when Cohen was obliged to leave it." Substitute for "who would" in the above sentence, "whose business it should be," and I think it would be verbally accurate. Again, lower down I say, "The very thing contemplated by the obligation on the defendants to take care of the carriage in Cohen's absence was the guarding against the possibility of a thief taking the jewels." I certainly did not intend to hold in that case that the defendant warranted that due care should be taken, though I did hold that he was responsible if his servant, acting in the scope of his employment, did not take it. I regret that any infelicity of language on my part should have misled Walton, J. I think that the appeal must be allowed.

STIRLING, L.J.—I agree. I think the implied obligation on the part of the jobmaster which was held by this court to exist in the case of *Abraham* v. *Bullock* ought, so far as regards the acts of the jobmaster's servants, to be restricted to acts done by them in the course of their employment. For the existence of such limitation the case of *Sanderson* v. *Collins*, appears to me to be an authority. The head-note is: "The defendant sent his carriage to be repaired by the plaintiff, who was a coachbuilder. The plaintiff lent a carriage of his own to the defendant for use while the repairs were going on. The coachman of the defendant, without his knowledge, took the plaintiff's carriage out for his own purpose, and while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it, held, that as the coachman at the time when the injury was done to the carriage was not acting in the course of his employment, the defendant was not liable." There are a few observations of Romer, L.J., which seem to me to apply to the present case. He says: "It is admitted that when the arrangement was made between the plaintiff and the defendant no special contract was made with regard to the obligations to be undertaken by the defendant. What, then, are the obligations that must be implied? Certainly the insurance of the safe return of the carriage is not one of them." That applies, with slight verbal alterations, here also. Then he proceeds: "The case is one of an ordinary bailment for mutual benefit and the defendant as bailee is under an obligation, now well settled in law, by which he was bound to take reasonable care of the chattel entrusted to him, but was not liable for loss or injury which might happen to it during the bailment unless caused by his negligence or that of his servants acting in the course of their employment." Here also the bailment, though of a slightly different nature, is one by which the defendant was bound to take only reasonable care of the chattel entrusted to him, and, in my opinion, was not liable for loss or injury except caused by his own negligence or that of his servant acting in the course of his employment. Here there was no evidence of any negligence on the part of the defendant, and as regards the acts of the coachman it seems to me that he ceased to be acting in the course of his employment when he drove away from the spot where the plaintiff's traveller had left the brougham and proceeded to meet his accomplices for the purpose of doing the wrong. I think, therefore, the appeal ought to be allowed.

MATHEW, L.J., read the following judgment: I see no reason to doubt that in a contract of this kind the jobmaster undertakes with the hirer that the coachman will take care to protect the goods in the brougham from damage or depredation. This was the decision of the court in *Abraham* v. *Bullock*. The object of the present action was to establish that the defendant had guaranteed the honesty of his servant, and was therefore responsible for the theft of which the coachman had been guilty. But I see no ground for the implication of any such undertaking on the part of the defendant. It was not shown that the plaintiff had informed the defendant that he insisted upon any such liability on the part of the defendant. If he had done so there seems little reason to doubt that the defendant would have declined to take upon himself without remuneration the obligation of an insurer. The coachman was not the class of person who would, in the ordinary course of business, have been entrusted for safe keeping with money or money's worth to the amount of many hundreds of pounds. The true inference from the facts would seem to be that the plaintiff relied for the protection of his property, not upon any contract with the defendant, but upon the strong arm of the criminal law, and the dread which is felt of being brought within its grasp. The plaintiff had no reason to assume that the coachman, in committing a crime, would be acting within the scope of the authority given him by his master, which must be measured by reference to the ordinary duties of a coachman. In the absence of any evidence of a contract the law applicable to the case would seem to be clear. Any departure by the servant for his own purposes from the discharge of his ordinary duties would relieve his master from responsibility, and from the time that the coachman drove the brougham to the public-house with the intention of assisting in the theft of the contents the master ceased to be liable for any loss or damage that followed. The contract between the plaintiff and the defendant must be regarded as having been made on this footing of this well-known rule of the law of master and servant. The defendant is no more liable than he would have been if the

brougham and its contents, without negligence on the part of the coachman, had been carried away by a stranger. The authority relied upon by Walton, J., seems clearly distinguishable from the present case, and I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiff, *G. F. Hudson, Matthews, & Co.*

Solicitors for the defendant, *H. Clifford Turner & Co.*

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — Dec. 6.

UNDERGROUND ELECTRIC RAILWAYS CO. OF LONDON (LIMITED) *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue — Stamp — Conveyance on sale — Ad valorem *duty—Purchase-money payable on contingency—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 56, *sub-section* 2.

A company agreed to sell its undertaking to a new company in consideration of a sum payable in cash and a further sum payable in shares. It was also agreed that the profits of the new company available for dividend in respect of each year should be applied, first, in payment of a cumulative dividend at the rate of 5 per cent. per annum on the amount for the time being paid up on any shares issued by the new company; and, secondly, in paying to the vendor company "as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital . . . in the new company as shall for the time being have been issued by the new company."

Held, that this latter part of the consideration, though payable on a contingency, was "money payable" within the meaning of section 56, *sub-section* 2, *of the Stamp Act,* 1891, *and must therefore be brought into account for the purpose of assessing the* ad valorem *duty payable in respect of the consideration for the sale.*

Judgment of Channell, J. (ante, *p.* 61, [1904] 2 *K. B.* 198), *reversed.*

Appeal by the Crown from the judgment of Channell, J., upon a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891. The case is reported *ante*, p. 61, [1904] 2 K. B. 198.

The facts and arguments are fully set out in the report below.

Sir Robert Finlay, A.G., and *S. A. T. Rowlatt* appeared for the Crown.

Roskill, K.C., and *Austen-Cartmell* appeared for the railway company.

The following cases were referred to: *Mortimore* v. *Inland Revenue Commissioners,* 2 H. & C. 838, 12 W. R. Dig. 126; *Lord Canning* v. *Raper,* 1 E. & B. 164, at pp. 176, 177; *Inland Revenue Commissioners* v. *City of Glasgow Bank,* 8 R. 389; *Onslow* v. *Inland Revenue Commissioners,* 39 W. R. 373, [1891] 1 Q. B. 239; *Mersey Docks and Harbour Board* v. *Inland Revenue Commissioners,* 45 W. R. 448, [1897] 1 Q. B. 786, [1897] 2 Q. B. 316, 46 W. R. Dig. 74; *Rowell* v. *Inland Revenue Commissioners,* [1897] 2 Q. B. 194, 45 W. R. Dig. 71; and *Maxwell* v. *Inland Revenue Commissioners,* 4 McPherson 1121.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

COLLINS, M.R.—This is an appeal from the judgment of Channell, J., and it raises the question whether stamp duty is payable under section 56, sub-section 2, of the Stamp Act, 1891, on a sum of money the payment of which is provided for by the terms of an agreement of the 25th of June, 1902, between the Traction Co. and the Underground Electric Railways Co. Clause 3 is the material clause upon which the question arises. That clause provides that "the profits of the new company available for dividend in respect of each year shall be applied in the following order and manner, that is to say . . . (2) in paying to the Traction Co. or its assigns as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of £5,000,000 in the new company as shall for the time being have been issued by the new company." As a matter of fact, at the date of the agreement a sum of £1,300,000 had been paid up upon the share capital in question, and a dividend of 3 per cent. upon that sum would amount to £39,000. That being part of the consideration, the question is whether the provisions of the Stamp Act, 1891, are sufficient to reach it. The provision relied upon is that contained in section 56, sub-section 2, which provides that "where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument." In the present case a part of the consideration for the sale unquestionably is, as provided in the above clause of the agreement, a sum of money payable periodically for an indefinite period not terminable with life, and therefore it seems so far that the sum of 3 per cent. on the amount for the time being paid up on the original share capital falls within the words of the section, and is chargeable with *ad valorem* duty, unless the respondents' contentions are correct. Their first contention is that the words "money payable" means money payable absolutely and not upon a contingency. They take a further point—namely, that there must be an ascertained sum in respect of which duty can be levied, and they say that the sum upon which the 3 per cent. is payable is an uncertain sum, inasmuch as the agreement contemplates that a great deal more capital will be paid up than was actually paid up at the date of the agreement. That objection does not press me, because I find that there is a fixed minimum already paid up at the date of the agreement, and the fact that that minimum may be increased does not, in my opinion, alter the fixity of that minimum below which the capital cannot fall upon which 3 per cent. is payable. Therefore the argument that a possible future increase of capital has rendered the sum so uncertain as to be incapable of being brought within the provisions of the Stamp Act, 1891, fails.

It is then said that the £1,300,000 is not such a minimum, because the company may at any time reduce its capital under the Companies Acts, and that in such a case the above minimum would go. The Attorney-General has, in my opinion, answered that by pointing out that the agreement provides for the payment of 3 per cent. on the amount paid up on the capital issued, and that this £1,300,000 has been paid up on the capital which has been issued, and that nothing which the company does afterwards can undo that fact, and that the court can only have regard to

the sum actually paid up at the date of the agreement as the minimum.

With regard to the argument that the words "money payable" do not embrace money payable on a contingency, it seems to me in the first place, that if it is once taken that the money may be payable on a contingency we are not pressed by the fact that several uncertainties combine to make up the contingency. Therefore the question is narrowed down to this—Do those words embrace money payable on a contingency? I do not rely upon the use of the word "may" in the later part of the sub-section, because it seems to me that that word is well capable of the explanation given of it by the respondents. But I come to the conclusion that the words in question, "money payable," embrace money payable on a contingency, because I find that in the cases cited the words were equally absolute, and did not necessarily import payment on a contingency, and yet they were held to include money payable on a contingency. *Mortimore* v. *Inland Revenue Commissioners* was the case of a mortgage, and it was held that the word "debt" in the then existing Stamp Act included a contingent as well as an absolute debt. It seems to me that the reasons upon which the court in that case held that the word "debt" included money payable on a contingency apply equally to the words "money payable." I cannot see anything in the fact that the cases cited for the Crown are cases either of mortgage or of settlement. No doubt these different classes of instrument are dealt with in certain fasciculi of clauses in the Act, but I do not think that there is any particular significance in that fact. It seems to me that we can get an underlying principle from those cases. The principle is that the word "debt" means money payable either on a contingency or absolutely. That principle applies to the words "money payable" in this section. "Money payable periodically for an indefinite period" covers money which is payable on a contingency, and which may therefore never become payable unless the profits of the company are sufficiently large to admit of the payment of 3 per cent. on the paid-up capital after paying 5 per cent. on it. It is money which will become payable upon the happening of that event, and the Crown is therefore entitled to duty. The appeal must be allowed.

STIRLING, L.J.—I am of the same opinion. The question turns upon section 56, sub-section 2, of the Stamp Act, 1891. Part of the consideration for the sale in the present case, according to the agreement of sale, consists of a sum of money payable out of the profits of the company—namely, "such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of £5,000,000 in the new company as shall for the time being have been issued by the new company." At the date of the agreement the whole of the £5,000,000 ordinary share capital of the company had been issued, and a certain amount had been paid up thereon, and the Inland Revenue Commissioners state that a dividend of 3 per cent. upon the amount so paid up amounts to £39,000, and they came to the conclusion that this sum constitutes money payable periodically either in perpetuity or for an indefinite period within the meaning of section 56, sub-section 2, of the Stamp Act, 1891. In my opinion that conclusion is right. We start with this, that the money must be payable periodically. It is urged that "money payable periodically" means money payable absolutely. It seems to me that the words include money payable either absolutely or on a contingency, just as the word "debt" in a former Stamp Act has been held to include a debt payable either absolutely or contingently. There is nothing in the subsequent language of the section which lends itself to the other view. The words "will or may," which were relied upon by the Crown, do not, at any rate, tend to negative the construction which the commissioners have placed upon the words of the section.

MATHEW, L.J.—I agree, for the reasons which have been given by my lord and my brother Stirling.

Appeal allowed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the railway company, *Bircham & Co.*

From K. B. Div. (Stirling and Mathew, L.JJ.) — Dec. 2.

GEEN v. HERRING. (a.)

Practice—Costs—Taxation—Action for recovery of land—Landlord and tenant—Costs occasioned by making all persons in possession defendants — Ord. 65, *r.* 27 (20).

The plaintiff was the holder of four leases for long terms comprising fifty-two houses. The plaintiff's predecessors in title had granted four sub-leases, each comprising a portion of the houses, all of which became vested in the defendant H. Both the leases and the sub-leases contained covenants to repair and conditions for re-entry on breach of covenant. H. let the houses to weekly tenants. The premises having got out of repair, the freeholder served notices under section 14 *of the Conveyancing Act,* 1881, *on the plaintiff. The plaintiff entered into a correspondence with H., from which it appeared that the plaintiff looked to H. as the proper person to do the repairs, and that H. was ready to meet any proceedings that might be taken for non-repair. The plaintiff commenced four actions to recover possession of the houses, the defendants named on the writs being the weekly tenants, who were* 119 *in number. H. obtained leave to defend the actions, and, having put the houses into repair, applied for relief against forfeiture. Four orders were made by consent, one in each action, granting the defendant H. relief against forfeiture, and directing him to pay the plaintiff's costs as between solicitor and client. On taxation the master taxed the costs of the four actions, and allowed the costs of serving the various defendants with notice of the writs in the respective actions.*

Held, that the master ought, having regard to the object with which the actions were brought, to have disallowed all the costs occasioned by the weekly tenants having been made defendants, but that the form of the consent orders was a bar to the objection that only one action was necessary.

Appeal from the refusal of Bruce, J., to order a review of taxation of costs.

The costs in question were the plaintiff's costs in four actions brought for the recovery of possession of fifty-two houses.

The owner of the freehold had granted four leases for long terms, each lease comprising a certain number of the houses, and each of the four lessees had granted a sub-lease. The leases and sub-leases all contained the usual covenants to repair and conditions for re-entry on breach of covenant.

Before the year 1902 the leases became vested in the plaintiff, and the sub-leases became vested in the defendant Herring, who let the houses to weekly

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

tenants and paid the rents reserved by the sub-leases to the plaintiff.

In 1902, the houses being out of repair, the freeholder served on the plaintiff, under section 14 of the Conveyancing Act, 1881, notices specifying the breaches of covenant and requiring the plaintiff to remedy the same, and the plaintiff served similar notices on the defendant Herring.

A correspondence ensued between the plaintiff's agents and Herring's solicitor, which terminated in the two following letters:

On the 21st of April, 1903, the plaintiff's agents wrote to Herring's solicitor: "Dear Sir,—The time allowed by the notice attached to the schedule of dilapidations served upon this property has now expired, and unless we can have some satisfactory guarantee from you that the repairs will be completed at an early date, we must instruct the lawyers to start an action of ejectment. We will delay communicating with the lawyers until Friday next, which will give you sufficient time to let us have a reply to this letter."

On the 22nd of April Herring's solicitor wrote to the plaintiff's agents: "Dear Sirs,—I have received your letter of yesterday. You have already been informed that the builder is carrying out the repairs, and this is being done as fast as reasonably can be. If this does not satisfy you, you may take any course you choose, and I am prepared to accept service."

On the 6th of May, 1903, the plaintiff commenced the four actions above mentioned. The defendants named in the writs were the weekly tenants of the several houses, numbering altogether 119 persons. A copy of the writ in each action was served upon each of the defendants in the respective actions. Herring obtained leave under ord. 12, r. 25, to appear and defend as being in possession by his tenants, and he entered an appearance in the actions and delivered a statement of defence in each action. The other defendants did not enter any appearance.

Herring, having put the houses into repair, applied at chambers for relief against forfeiture, and the following order was made by consent in each action: "Upon hearing counsel for the defendant George Herring and for the plaintiff, and upon reading" certain affidavits, "and by consent, and the plaintiff accepting the statement of the said defendant that the freeholder is satisfied as to the repairs carried out by the said defendant, it is ordered that the said defendant George Herring be relieved from the forfeiture (if any) of the lease dated the 21st of March, 1862, and all further proceedings in this action be stayed (except for the purpose of enforcing this order), the said defendant George Herring paying to the plaintiff his costs as between solicitor and client in this action and the proceedings for relief and surveyor's fees in respect of the service of notice and preparation of the specification incurred before action brought, to be taxed."

The plaintiff accordingly carried in his bill of costs in each action for taxation, a charge of 1s. being made for making a copy of the writ in the case of each defendant, and a charge of 5s. for service thereof upon each defendant in the respective actions.

The taxing-master taxed the costs of the four actions, and allowed 1s. for the costs of making a copy of the writ in the case of each of the 119 defendants; but he refused to allow 5s. for the costs of serving a copy of the writ on each defendant, allowing what would have been the cost of serving notice of the writ upon each of the defendants—viz., 3s. for each notice.

The defendant Herring carried in objections to the taxation, contending that, as the plaintiff knew at the time of action brought that Herring was in possession of the property by his under-tenants, it was unnecessary to make the under-tenants defendants, and that Herring should have been the sole defendant, and that the items of the bill of costs resulting from the bringing of four actions instead of one, and from making persons other than Herring defendants, should be disallowed.

The taxing-master gave the following reasons in writing for allowing the items objected to: "This case raises a somewhat interesting point of practice. It has been suggested that the course taken by the plaintiff's solicitors was improper and an abuse of the court, but I am satisfied that they have acted *bonâ fide* throughout on the advice of their counsel, and in my opinion rightly. The Common Law Procedure Act enacts that in actions for ejectment all persons in possession shall be joined as defendants. This Act is repealed by the Judicature Act, 1873, except so far as no new practice is laid down by that Act (ord. 72, r. 2), and I understand that, notwithstanding the case of *Minet* v. *Johnson*, 63 L. T. 507, 39 W. R. Dig. 164, cited in these objections, and the provisions of ord. 12, r. 25, the practice has remained the same, and that it is still customary to join all persons in actual possession of the land to an action for ejectment. I asked for authority supporting the *dictum* of Lord Esher in the case referred to, that judgment against a lessee entitles the sheriff to eject anyone claiming under him; but counsel for the defendant stated he was not aware of any. It is suggested that ord. 12, r. 25, gives ample protection to any tenant, whether claiming under a person against whom judgment has been obtained or adversely to him, or that in any case all that is required is to serve the tenants with notice of the action. In the first place the plaintiff is, I submit, entitled to so constitute his action as to make it effective as soon as judgment has been obtained, and it would be embarrassing to him to be subject to a fresh defendant being brought in after, say, a lapse of twelve months, during which he had obtained judgment; and, in the second place, as personal service would presumably be necessary, the expense would be the same. An action for ejectment is highly technical, and in the absence of a direct authority for altering the practice it seems to me that a plaintiff would not be justified in doing so, and at any rate I should not be right in compelling him to do so. Whether, however, the practice I have referred to is right or wrong is not, I submit, necessary for me to decide here, inasmuch as I am taxing these costs as between solicitor and client, and it is my duty to allow all costs which are reasonably incurred; and I cannot say, under the circumstances, that the course taken here by the plaintiff, under the advice of his counsel, was the result of over-caution, and still less was it improper, and I accordingly overrule the objections. Objection has also been taken that four actions were unnecessary. No application was, however, made to consolidate, and I am taxing under four separate orders. Under the circumstances, moreover, apart from this, in my opinion, the plaintiff was not acting unreasonably in commencing four separate actions."

The defendant Herring applied to the judge at chambers to direct a review of taxation. Bruce, J., refused the application.

The defendant Herring appealed.

Montague Lush, K.C., and *Herbert-Smith*, for Herring.—There is no obligation on the plaintiff in an action of ejectment to make all the tenants in possession defendants. The plaintiff's only object was to get the repairs done, and it was therefore unneces-

sary to bring four actions or to make the tenants parties.

They referred to *Minet* v. *Johnson*; *Guéret* v. *Young*, W. N. 1883, p. 216; and *Hume* v. *Somerton*, 38 W. R. 748, 25 Q. B. D. 239.

Danckwerts, K.C., and *Holman Gregory*, for the plaintiff.—The plaintiff followed the universal practice in suing and serving all the persons in possession: Cole on Ejectment, p. 83; Woodfall on Landlord and Tenant (16th ed.), p. 846. Herring having consented to an order being made in each of the four actions providing for the payment of costs, the taxing-master under these orders was bound to tax the costs of all four actions.

STIRLING, L.J., after stating the facts, and saying that the letters of the 21st and 22nd of April were important as showing that the plaintiff was looking to Herring as the proper person to do the repairs, and that Herring was ready to meet any proceedings that might be taken for non-repair, continued: It is contended that, the orders for relief against forfeiture having been made by consent, the court are bound by them and are precluded from going into these objections. So far as regards the objection that the costs of serving the weekly tenants were necessary, I do not think this contention is well founded. The orders no doubt provide that the costs of each action shall be taxed as between solicitor and client, but that does not preclude the master from disallowing, under ord. 65, r. 27 (20), any costs which appear to him to have been unnecessary or improper. In my opinion the costs of serving the weekly tenants either with copies of the writ or with notice of the writ were unnecessary and ought to be disallowed. It is said that these actions are in common form, and doubtless it is common practice in actions of ejectment to sue the tenants who are in occupation and not the landlord. But in every case regard must be had to the existing circumstances. It is not disputed that the action to recover these houses might have been well brought against Herring alone without joining anyone else, and, in my opinion, the object which the plaintiff had in view in bringing the actions—viz., to secure the execution of the repairs and not to recover possession of the houses—would have been obtained by issuing the writ against Herring alone, and not against the weekly tenants. I think, therefore, that the master was right in disallowing the costs of serving copies of the writs on the weekly tenants, and I think he ought to have gone farther and, having regard to the object of the action, he ought to have held that to serve the tenants at all was unnecessary. In my opinion the objections taken in each action to the allowance of these items, which were occasioned by the weekly tenants being made defendants, must prevail.

There remains the question as to the allowance of the costs of four actions. It follows logically that, if the weekly tenants were unnecessary parties, Herring ought to have been the sole defendant, and therefore only one action was necessary. But in my opinion the form of the consent orders is a bar to that objection. Herring saw fit to consent to an order to tax the costs of each action as between solicitor and client, and in face of that he cannot now insist that any of the actions were unnecessary. I regret the result, but I think Herring must pay these costs. The appeal, therefore, must be allowed to the extent which I have mentioned, but as to the rest it fails.

MATHEW, L.J., concurred.

Appeal allowed in part.

Solicitors for the plaintiff, *Surr, Gribble, & Oliver.*

Solicitor for the defendant, *Seaton F. Taylor.*

High Court of Justice.

Chan. Div. } Feb. 24; March 10.
Farwell, J. }

In re ASHFORTH.
ASHFORTH *v.* SIBLEY. (*a.*)

Will — Perpetuity — Real estate — Legal contingent remainders.

A devise of real estate was made to trustees upon trust for testatrix's children for life with benefit of survivorship, then to grandchildren born within twenty-one years of testatrix's death for life, with benefit of survivorship, remainder to last surviving grandchild in tail, remainder over.

The estate tail was held bad for remoteness, although, if good, it could have been determined within the prescribed period, and although it was a legal contingent remainder supported by a particular estate.

Doctrine of perpetuity and its applicability to legal contingent remainders discussed.

In re Hargreaves, 38 *W. R.* 470, 43 *Ch. D.* 401; Evans *v.* Walker, 25 *W. R.* 7, 3 *Ch. D.* 211; *and* Garland *v.* Brown, 10 *L. T. Rep.* 292, *upheld.*

In re Frost, 38 *W. R.* 264, 43 *Ch. D.* 246, *discussed.*

Adjourned summons.

The facts were as follows:

Martha Sarah Ashforth made her will on the 21st of February, 1863, and thereby devised her real estate to trustees and their heirs upon trust to receive the rent and profits and divide the same as soon as they conveniently could after Lady Day and Michaelmas Day in each year into three equal parts, and pay the same as therein mentioned to her three children and the survivors or survivor of them during their lives and the life of the survivor, and she then proceeded as follows: "And from and immediately after the decease of the longest liver of my said three children, John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth, I direct my said trustees for the time being, subject nevertheless to the payment of the said annuity to Miss Eliza Robinson, if she should be then living, to pay and divide the said rents and profits of the said farm half-yearly, as soon as conveniently can be after the days hereinbefore appointed, unto and equally amongst all such of the children born in my lifetime, or within twenty-one years after my death, of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth who shall be living on the Lady Day or Michaelmas Day preceding such payment and division. And after the death of all such children of the said John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth except one, I devise my said farm and all my said real estate to such surviving child and the heirs of his or her body in tail with remainder to the right heir of John Morris, son of my grandfather, Thomas Morris."

The testatrix died on the 7th of July, 1864.

Of her three children, George died in 1870, having had issue three children only, the present plaintiffs; Martha died without issue in 1877; and John died without issue in 1897.

The question for decision was whether the limitation in tail was or was not too remote.

Upjohn, K.C., and *J. G. Wood*, for the plaintiffs, the children of George Ashforth, argued that the estate tail given by the will was good for the following reasons: (1) The three plaintiffs could combine to release the right of survivorship and thus prevent the

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

estate tail from being obnoxious to the rule against perpetuities as being too remote: *Gooch* v. *Gooch*, 3 De G. M. & G. 383. (2) A legal contingent remainder supported by a particular estate is not affected by the rule against perpetuity, not being a limitation to unborn persons for life with remainders to the issue of such unborn persons.

Jenkins, K.C., and *G. Henderson*, for the heir-at-law, argued that the limitation in tail was void for remoteness.

Carr appeared for the trustees.

FARWELL, J., in a considered judgment, stated the facts as above, and continued: Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities: *In re Hargreaves*, 38 W. R. 470, 43 Ch. D. 401; *Evans* v. *Walker*, 25 W. R. 7, 3 Ch. D. 211. Mr. Wood did not dispute this, but argued that, inasmuch as one of the three plaintiffs must necessarily be the survivor, they could combine to release or destroy the right of survivorship and take the property at once. But this assumes the existence of a present estate after the life estates, which will remain when the obnoxious contingency is destroyed, and there is none such. The only estates of inheritance are contingent interests in remainder. The court has first to construe the will, and is driven to conclude that these interests are void for perpetuity. There is, therefore, no estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing is left but the three life estates. The fallacy lies in the lack of appropriate definition. No release or destruction of the contingent interest would be of any avail. What is required is a dealing by way of conveyance of all the three contingent interests, and this is impossible, because they have been declared void, and three void contingent remainders will not make one good vested remainder. Mr. Wood relied on a passage in Lewis on Perpetuities (p. 164): "A perpetuity is a future limitation, whether executory or by way of remainder, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." It is to my mind plain that the learned author in speaking of destructibility is referring to remainders after an estate tail; but in any case the passage does not help Mr. Wood, because the validity of the estate which he wishes to create must depend on the conveyance of the ultimate remainders. The persons entitled subject to that limitation are entitled for life only. Mr. Wood also pressed on me a *dictum* of Lord Cranworth's in *Gooch* v. *Gooch*, 3 De G. M. & G., p. 383. I think that if the whole of that passage is read it is plain that the Lord Chancellor was really thinking of a joint tenancy, and not of a gift to three with a contingent limitation to the survivor of them. But, however that may be, it is only a *dictum*; and the reasons given are not easy to reconcile with the judgments of the Court of Appeal in *In re Hargreaves* and *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562. The case before me is really undistinguishable from *Garland* v. *Brown*, 10 L. T. Rep. 292, before Wood, V.C., where there was a gift to the surviving children of the testator's surviving child for life in equal shares as tenants in common with remainder to the survivor of those children in fee, and the remainder in fee was held void for remoteness.

Then it is said that this is a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren and of the survivor of them, and this was not disputed. But the plaintiffs argue further that such a remainder is not affected by any doctrine of remoteness, except the rule that life estates cannot be limited to unborn persons for life with remainders to the issue of such unborn persons. I might have contented myself with following Kay, J.'s, decision in *In re Frost*, 38 W. R. 264, 43 Ch. D. 246; but it is said that this was only the second or alternative reason for his judgment, and I have accordingly considered the point for myself. It is very difficult to say when the conception of perpetuity in its modern meaning first appeared in our courts. There is no doubt that the common law regarded all attempts to restrict the free alienation of property with extreme disfavour, as is stated in Mr. Butler's note to Coke on Littleton (342, *b*, i.). Although the suspense or abeyance of the inheritance (as distinguished from the freehold) was allowed by the common law, it was discountenanced and discouraged as much as possible, and modern law has added her discouragement of every contrivance which tends to render property inalienable beyond the limits settled for its suspense, because it is clear that no restraint on alienation would be more effectual than a suspense of the inheritance. He adds: "The same principles have in some degree given rise to the well-known rule of law that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder, and they influence in some degree the doctrines respecting the destruction of contingent remainders." There was also the rule that an estate by purchase cannot be limited to the unborn child of an unborn child: *Whitby* v. *Mitchell*, 38 W. R. 337, 44 Ch. D. 85. With all respect to Kay, J., I do not think that much reliance can be placed on the existence of an independent rule of law forbidding a possibility on a possibility: see Gray on Perpetuities, p. 86, and Williams on Real Property (6th ed.), p. 245. The phrase seems due to Lord Coke's unfortunate predilection for scholastic logic, and may possibly be a pedantic and inaccurate reason for avoiding remoteness: see *Blamford* v. *Blamford*, 3 Bulst., 98, cited in Gray at p. 86. "Coke moves another matter in this case on Popham's opinion, Coke I., Rector de Chedington, that a possibility on a possibility is not good, for here in our case is a possibility on a possibility; yet it seems that it is good, for, if Popham's opinion should be law, it would shake the common assurances of the land. . . . But I agree that in divers cases there shall not be a possibility upon a possibility, and he puts the diversities in *Lampet's case* (10 Coke, 50, *b*)." It seems probable that contingent remainders could not anciently have been created (see Williams on Seisin, p. 190), and that down to the time of the Commonwealth the usual mode of settlement on marriage was by giving vested estates tail to living persons, and not estates tail to unborn children (*ibid*, 189). Although, therefore, there was a general principle that alienation should not be restricted by the creation of estates beyond a particular estate for life with a remainder in fee, or in tail, I can find no trace of any statement of the present rule in terms in any of the old books. But the general principle was well established, and as the ingenuity of real property lawyers invented new devices for rendering land inalienable for as long a time as possible, it became necessary to mould the expression of the old law so as to meet new emergencies. Thus

in *Cadell* v. *Palmer*, 1 Cl. & F. 372, the House of Lords settled the question of the extent to which executory limitations and shifting uses, which had become possible under the Statute of Uses, could be lawfully carried, and they did this, not by creating any new law, for that would have been legislation, not decision, but by applying the limits of the old law to the new circumstances. The judges who advised the House supported their opinion by numerous authorities, and I would refer in particular to the quotation from Lord Kenyon's judgment in *Long* v. *Blackall*, 7 Term Rep. 102: "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estates shall not be inalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance." Here, then, is an authoritative statement, in terms of precision, of the rule of law which had existed for centuries, but had not been theretofore defined, and had been applied from time to time as occasion arose by judges, who without formulating the precise limits of the rule held, as Lord Nottingham said in the *Duke of Norfolk's case*, 3 Ch. Cas., p. 31: "If it tends to a perpetuity, there needs no more to be said, for the law has so long laboured against perpetuities that it is an undeniable reason against any settlement if it can be proved to tend to a perpetuity." The rule, however, was only to be applied to cases where it was really necessary in order to defeat remoteness, and accordingly Lord St. Leonards, in *Cole* v. *Sewell*, 4 Dru. & War. 1, points out that it has no application to remainders limited to arise after an estate tail, because they are destructible by barring such estate tail, and are no more open to objection than the estate tail itself; and this is the meaning of the reference to destructibility in the passage that I read above from Lewis on Perpetuities, p. 164. But this reason has no application to contingent remainders not so limited and destructible; nor do I think that Lord St. Leonards so intended: see Sug. Prop., House of Lords, 116-121, and Lord Brougham's speech in the same case in the House of Lords, 2 H. L. Cas., at p. 234, where he puts this ground plainly as the reason for his observations. It would be very strange indeed that Lord St. Leonards should have referred to the "sacred rule" enunciated in *Purefoy* v. *Rogers*, 2 Wms. Saund. 768, 781, n. 9, that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of remainder—a rule which probably owes its origin to the chance of destruction by the failure of the particular estate incident to that one and not to the other—and should at the same time have affirmed that the rule against perpetuities had no application to such contingent remainders, although they might exceed the limits allowed for executory limitations, because they could not exceed the limits of perpetuity, for the proposition is self-contradictory. Assume that the doctrine of the destructibility of contingent remainders by failure of the particular estate is due to the desire of the courts to avoid remoteness (as Mr. Butler suggests), it does not follow that such remainders should be free from all other bonds. Liability to destruction for a particular cause at or before a given period is not incompatible with, or any ground for immunity from, destruction at the same period for a cause common to all other interests, executory, equitable, or otherwise, which may lead to remoteness. It is plain, moreover, that the courts have acted upon the principle that the rule against perpetuities is to be applied where no other sufficient protection against remoteness is attainable. Thus, inasmuch as equitable contingent remainders never failed for want of a particular estate, is was held that the rule must apply to them. In *In re Finch, Abbiss* v. *Burney*, 28 W. R. 903, 29 W. R. 449, 17 Ch. D. 211, the gift was to trustees on trust for A. for life, and after his death on trust to convey to such son of his as should first attain twenty-five. Sir George Jessel, M.R., at p. 230, said: "Where the legal fee is outstanding in trustees, that doctrine of contingent remainders which until the recent statute prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate of freehold, has no operation, and on that ground I think that this appeal should succeed." In *In re Hollis Hospital Trustees and Hague*, 47 W. R. 691, [1899] 2 Ch. 540, the late Byrne, J., held that the rule against purpetuity applied to a common law condition. He says at p. 552: "The courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and then to apply it to new and ever-varying states of fact and circumstances. . . . New statutes and the course of social development give rise to new aspects and conditions, which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation." In *Chudleigh's case* (the case of perpetuities), 1 Rep. 120, the court defeated an attempt to make the Statute of Uses serve as the means of protecting contingent remainders from destruction, lest lands should remain too long in settlement. In *Abbiss* v. *Burney* the Court of Appeal defeated an attempt by vesting all the property in trustees. The present attempt is made by vesting a legal estate *pur autre vie* in trustees and limiting the contingent remainders as a legal use. In my opinion, the court is equally bound to defeat this; nor can I find any rule of law, or decision, or principle to the contrary. The opinion of the late Mr. Challis (Real Property, 2nd ed., 174-177) is, I think, sufficiently displaced by Byrne, J.'s, judgment in the *Hollis Hospital case*, and that of the late Mr. Joshua Williams by Gray on Perpetuity, 283-298; and the conclusion at which I have arrived is supported by (in addition to the text writers cited in that case and in *In re Frost*) an argument in the first edition of Jarman on Wills, vol 2, p. 727, and repeated in some of the later editions, by Mr. Serjeant Stephens's note in his Commentaries, vol 1, p. 554 (8th ed.), and by Mr. Gray's excellent treatise on perpetuities. The rule against perpetuities applies to all contingent equitable limitations of real estate and all contingent limitations of personality, including leaseholds. It would certainly be undesirable to add another to the anomalies that adorn our law, as I should succeed in doing if I held that the rule did not apply to legal contingent remainders. I therefore answer the first question by saying that the limitation in question is void for remoteness, and the second question in the negative.

Solicitors, *Bird & Eldridges; G. A. Buxton Carr.*

Chan. Div.
Farwell, J. } Feb. 9, 10.

In re GENT AND EASON'S CONTRACT. (a.)

Vendor and purchaser—Title—Will—Trustees—Trust funds to be laid out in purchase of freehold lands—"Vary and transpose"—"Securities"—No trust for

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

conversion or reconversion — Concurrence of beneficiaries.

A testator by his will had authorized his trustees to sell his real estate and to lay out and invest such moneys coming to their hands under the trusts of his will in the purchase or upon mortgage of freehold or leasehold properties in England or in Government stocks or funds or certain railway debenture or preference stock, or in any investments in which they could legally invest trust funds, with full power to vary and transpose such securities for others of a like description thereinbefore authorized. In pursuance of this power the trustees entered into a contract to sell certain freehold ground-rents, which it appeared from the abstract of title they had previously purchased under their power in the will to purchase freehold land. In the contract for sale they were expressed to be selling as trustees, and there was a condition stating that the beneficiaries were not to be required to concur in the sale. On an objection by the purchasers that there was no trust for conversion or reconversion, and that the beneficiaries must concur,

Held, that the trustees had a power of reconversion having regard to the words in the will "vary and transpose such securities"; that the word "securities" was synonymous with "investments"; and that the trustees could therefore show a good title without the concurrence of the beneficiaries in the conveyance, or receipt of the purchase-money.

In re Rayner, Rayner *v.* Rayner, 52 *W. R.* 273, [1903] 1 *Ch.* 176, *discussed.*

Adjourned summons.

This was an originating summons taken out for the purpose of determining the question whether William Gent, Henry Barker, and William S. Cottrell, purporting to sell as trustees of the will of William Gent, and in pursuance of a power therein contained, were able to show a valid title to certain real estate, and give a valid receipt for the purchase-money, without all the beneficiaries under the will, being *sui juris*, joining in the conveyance and receipt thereof.

The facts were shortly as follows:

By his will dated the 15th of February, 1893, William Gent, after making various bequests, devised and bequeathed all his real estate and the residue of his personal estate unto his trustees therein mentioned (the above-named vendors) upon trust to allow his wife during her life or widowhood to reside in his dwelling-house rent free, and also pay to her £150 per annum, and upon further trust to pay unto each of his sons, H. S. Gent and the said William Gent, £100 per annum during their lives on certain conditions. And the testator further directed his trustees to pay to each of his daughters, A. R. Gent and J. A. Gent, during the life of his wife, £250 per annum. And after the decease of his said wife he directed his said trustees to stand possessed of the sum of £6,000 for each of his said daughters who should be living at the time of his decease. And to stand possessed of the remainder of his real and residuary personal estate in trust for his said sons and daughters in equal shares. And the testator continued: "I authorize and empower my said trustees or trustee to sell and absolutely dispose of all or any part of my real and personal estate of a saleable nature at such time or times and in such manner and form as they or he shall think beneficial. I authorize and empower my said trustees or trustee to lay out and invest the moneys coming to their or his hands under the trusts of this my will in the purchase or upon mortgage of freehold or leasehold properties in England, or in or upon the Government stocks or funds or in or upon the debenture or preferential stock of the Great Western Railway Co., the Midland Railway Co., or the London and North-Western Railway Co., or in or upon any other investment in or upon which trustees are for the time being authorized or empowered by law to invest trust funds, with full power to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorized." And he appointed the above-named vendors trustees and executors of his will.

The testator died on the 10th of June, 1895, and his will with a codicil thereto was proved on the 16th of August, by all the executors. The widow died on the 28th of May, 1904, and the trustees of the will, for the purpose of distributing the estate among the children of the testator in accordance with the terms of the will, gave instructions to their solicitors to sell by public auction under the printed particulars and conditions of sale certain freehold ground-rents in ten lots arising out of hereditaments at Hackney and elsewhere, the property of the testator. Several of the lots having failed to realize the reserve price, were withdrawn.

By a contract dated the 27th of October, 1904, but signed on the 15th of November, 1904, the vendors agreed to sell to Harriett Eason, widow, and E. H. P. Eason, the purchasers, certain property comprising lot 2 in the printed particulars, consisting of eight freehold ground-rents, amounting to £57 5s. per annum, secured on eight dwelling-houses in Hackney aforesaid. The purchasers thereupon paid a deposit of £152 10s. An abstract of title was delivered by the vendors, purporting to be an "abstract of title of the trustees of the will of the late William Gent, Esq." It commenced with an indenture of conveyance, dated the 28th of July, 1884, being a conveyance in fee simple to one John Clutton, subject to some leases, followed by another conveyance, dated the 28th of September, 1896, and made between the trustees of the will of John Clutton, and the vendors, by which, after reciting the conveyance above-mentioned to John Clutton, his will, death, and probate of his will, and also the will of William Gent, his death, and proof of his will, it was witnessed that in consideration of the sum of £1,890 then paid by the vendors "out of moneys coming to their hands under the trusts of the said will of the said William Gent, deceased," to the trustees of John Clutton, the latter thereby granted to the present vendors the hereditaments therein described, which included the said ground-rents, to hold the same, "unto and to the use of the said vendors, their heirs and assigns, subject to and with the benefit of the several leases of the same premises specified or referred to in the said schedule thereunder written, nevertheless upon the trusts and subject to the powers and provisions upon and subject to which the same premises ought to be held by virtue of the said will of the said William Gent, deceased."

In the contract the vendors were expressed to be selling as trustees of the will of the late William Gent, in consequence of the death of the testator's widow, and for the purpose of distributing his estate, and the beneficiaries under the said will were not to be required to concur in the sale or to join in the conveyance.

The testator left four children, all of whom were living.

The purchasers in their requisitions on title denied that the property, the subject of the contract, was the real estate of the testator, but was purchased by the vendors in 1896 and paid for out of moneys coming to their hands under the trusts of the will of William Gent, and this was apparently done under a power in William Gent's will empowering the trustees to invest such moneys in the purchase of real estate

but that no power of conversion or reconversion was shown by the will. The purchasers therefore declined to accept the title of the vendors unless it could be shown that all the parties interested under the said will in the residuary real and personal estate and the proceeds thereof were *sui juris* and would concur in the sale and the receipt of the purchase-money.

To this the vendors on the 5th of December, 1904, replied as follows: "Without admitting the purchasers' assumption that the express power of sale contained in William Gent's will does not extend to cover investments made by his trustees, we fail to see how the trustees can 'vary and transpose such securities' except by sale."

The purchasers replied the title was too doubtful and called for a return of the deposit.

The vendors alleged that they had an implied power to sell or an actual power to sell under the power to vary, and that they could not carry out "the trusts of the will without realizing the whole of the estate."

Subsequently the purchasers took out this summons to have the question settled by the court.

H. Fellows, for the applicants.—The property contracted to be sold was purchased by the trustees, it is not the testator's real estate, and the question is whether there is an express power given by the will to reconvert the property so purchased. There is not sufficient in this will to justify the court in extending the meaning of the word "securities." Real estate is in no sense a "security." If there is a power to reconvert, then there is a power to alter the interests under the will. To treat this as a security would be straining the will. [FARWELL, J., referred to *In re Rayner, Rayner* v. *Rayner*, 52 W. R. 273, [1903] 1 Ch. 176.] Here the trustees have a power to lay out the trust moneys in the purchase of land, and to invest in a string of securities, and *In re Rayner* is very different from the present case. [FARWELL, J.—It comes to this, does it mean "investments" in the popular sense or the strict sense; or must I read "securities" in the popular sense as "investments."] It would be carrying *In re Rayner* very much further than before to say that the power to vary and transpose "securities" can only apply to an investment in land, because the power to invest in land is mixed up with investments. The devise is "my real estate," therefore by section 24 of the Wills Act, 1837, it means that particular real estate at the time of the testator's death. There is either a power of conversion under the power "to vary and transpose" or by implication arising from the context, but there is nothing in the will to imply that power.

He cited *Tait* v. *Lathbury*, 14 W. R. 216, L. R. 1 Eq. 174.

Upjohn, K.C., and *S. B. Druce*, for the respondents.

FARWELL, J.—I am unable to bring myself to feel any doubt about this case. The testator by his will has authorized his trustees to lay out and invest the moneys coming to their hands under the trusts of his will in the purchase or upon mortgage of freehold or leasehold properties in England, or in or upon the Government stocks or funds, or in or upon debentures or preferential stock of the Great Western Railway Co., the Midland Railway Co., or the London and North-Western Railway Co., or in or upon any other investments in or upon which trustees are for the time being authorized or empowered by law to invest trust funds, with full power to vary and transpose such securities for other securities of any of the descriptions hereintofore authorized. Now, the Court of Appeal in *In re Rayner*, 52 W. R. 273, [1903] 1 Ch. 176, had to consider the meaning of the word "securities," and Romer, L J., says: "The word is a flexible one, and I recognize that it is largely used in a wider or different sense, and in particular is widely used as a synonym for investment." It is quite plain to my mind that in the present case the word "securities" is used as a synonym for "investment." When he uses the term "preferential Great Western stock," that is sufficient to show that the word "security" is used in a wider sense than investment, as preference stock is not an "investment" in the strict meaning of the word. There is also this curious variation of the phrase "or in or upon any other investments in or upon which trustees are for the time being authorized or empowered by law to invest." It is clear he uses the word "securities" as synonymous with "investments." Here I have a trust to invest the money in the purchase or mortgage of land with a power to vary and transpose such securities for other securities of a like nature. I cannot see any ground for doubting that this does come within the words of the will. I am not impressed with counsel for the applicants' horror as a conveyancer at not having the usual trust for reconversion. At the same time it would not be unreasonable to suppose that a testator would authorize his own trustees to convert his own real estate as they thought fit at their own discretion if he did not give them a like power to turn back into personalty that which was made realty by their own act. I confess there is no difficulty about the title which the counsel for the applicants need fear, or which I need shrink from giving effect to.

Solicitors, *Gamlen, Burdett, & Gamlen*, for *Cottrell & Son*, Birmingham; *Lattey & Hart*.

Chan. Div.
Buckley, J. } Jan. 31.

In re WENBORN & SONS (LIMITED). (*a*.)

Company — Voluntary winding up — Pending action against company—Adoption of defence by liquidator—Plaintiff's costs of action—Costs out of assets of company.

If the liquidator of a company in liquidation, whether voluntary or compulsory, elects either to prosecute or defend proceedings in a pending action to which the company is a party on behalf of the estate, the company must be treated as an ordinary litigant, and if costs are given against it the liquidator must pay those costs in full to the plaintiff out of the assets of the company.

The liquidator of a company in voluntary liquidation, which was defendant in an action pending at the date of liquidation, upon the demand of the plaintiff as to his intentions, adopted the defence, and refused to admit the plaintiff's claim. The company had judgment given against it with costs.

Held, that the plaintiff was entitled to have these costs paid out of the assets of the company, and was not obliged to add them to his claim for proof in the winding up.

Summons.

This was a summons on the winding up of the above company asking that the costs of an action against the company continued after the commencement of the winding up might be paid out of the assets of the company.

In February, 1904, the applicant, Louis Charlier, brought an action against the company for damages for breach of contract, extending over a considerable

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

time, for non-delivery of coal contracted to be supplied by the company and delivered at Port St. Nazaire, in France.

The action proceeded in the Commercial Court.

The company appeared and delivered their defence, and the case was ready for trial on the 17th of May, 1904. The parties, however, not being ready, trial was postponed.

On the 16th of June, 1904, upon an application to the court, a day in July was fixed for the trial.

In the meantime, on the 17th of June, 1904, the company passed a resolution to wind up voluntarily, and the respondent to the summons was appointed liquidator.

On the 22nd of June the solicitors of the applicant wrote to the solicitor of the liquidator as follows: "In view of the resolution for voluntary winding up of the above company, we shall be glad if you will write us definitely stating whether your client, the liquidator, is prepared to admit the claim of our client, M. Charlier, in respect of the breach of contract for which the action is now proceeding, at the amount claimed, or at any smaller amount, or whether your client proposes, as we understood at our interview with you that he does, to dispute the claim altogether. We should, however, like to have it definitely put in writing whatever course is proposed to be adopted."

A similar letter was also sent to the liquidator. The solicitor to the liquidator on the following day replied as follows: "In reply to your letter of yesterday's date, as I informed you at the interview, the liquidator cannot admit the claim of your client in the action."

The action consequently went to trial, and was heard in July, 1904, and in August judgment was given for the plaintiff for £750 and for a certain proportion of costs.

The plaintiff's costs of action were taxed, and after certain agreed costs of the defendant had been deducted, amounted to £543 11s.

The company not being solvent, the applicant took out the present summons against the liquidator asking for an order that the liquidator should pay the £543 11s. out of the assets of the company to the applicant.

E. Todd, for the applicant.—The liquidator was entitled to proceed with the defence of the action under the Companies Act, 1862, s. 133, sub-section 7, without the sanction of the court. He did so, and adopted the defence on behalf of the creditors of the company. He must be treated in the same way as a liquidator in a compulsory winding up who obtains the leave of the court to defend, and must consequently pay the costs of the action out of the assets of the company: *Bailey and Leetham's case*, 17 W. R. 1079, L. R. 8 Eq. 94; *In re London Drapery Stores*, 47 W. R. 118, [1898] 2 Ch. 684; *Boynton* v. *Boynton*, 27 W. R. 825, L. R. 4 A. C. 733.

Hon. J. Mansfield, for the liquidator.—The practice of the court is that in cases such as this the costs given against the company shall be added to the debt and proved for in the liquidation: *In re Poole Firebrick and Blue Clay Co.*, 22 W. R. 247, L. R. 17 Eq. 268; *In re Thurso New Gas Co.*, 38 W. R. 156, 42 Ch. D. 486; *In re Snyder Dynamite Projectile Co.*, (1893) W. N. 37, 41 W. R. Dig. 36. In all the cases cited on the other side, except *In re London Drapery Stores*, the action the costs of which were paid out of the assets was brought after the winding up. The claim of the applicant depends upon the trial not having taken place before the winding up. This was a mere accident, and ought not to give the plaintiff rights he would not otherwise have had.

BUCKLEY, J.—The cases cited to me are not perhaps easily reconcilable, but the principle which seems to underlie all of them is that when there is a winding up of a company—whether the liquidation be compulsory or voluntary—all claims of creditors ought *primâ facie* to be dealt with in the winding up in accordance with the rules applicable to the distribution of the assets, and that the costs ought also to be dealt with there; but that if an action is pending to which the company is a party then, if the company which is in liquidation by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure bear the costs. In other words, the other creditors, for whose benefit the action is defended, must pay the costs. The question here is: Did this liquidator adopt the proceedings on behalf of the estate and fail? If he did, the estate must pay the costs. The present case falls to be decided—as many cases do—on its own particular circumstances. The effect of the correspondence between the parties is that the plaintiff says: "I have an action against your company for damages. You are its liquidator. Do you propose to admit my claim for any, and what, amount?"; and the liquidator replies, "I do not admit your claim at all." The liquidator adopted the defence in the action, and elected that it should go on. The action went on, and the plaintiff succeeded in obtaining judgment for damages and costs. The proper course for the liquidator to pursue when he got the plaintiff's letter was to apply, as he could have done, to have the action stayed; and very likely the judge would have taken the view that the action ought to proceed, and would have let it go on on the terms that the plaintiff, if he succeeded, should add his costs to the amount he succeeded in recovering judgment for. But the liquidator, instead of taking this course, resisted the claim altogether and adopted the defence on behalf of the estate, and it seems to me that the other creditors will have to bear the costs—in the sense that the costs must be paid out of the company's assets. As to *Bailey and Leetham's case* and other cases which have been cited to me, there is no real difficulty. When the voluntary liquidator, or the liquidator in a compulsory winding up, comes to the court for leave to bring or to defend an action by or against the company, and obtains this leave, the judge in effect pledges the assets of the company for the costs of the action which he authorizes the liquidator to bring or to adopt. In *Bailey and Leetham's case* leave was given to the liquidator to defend an action brought against the company, and when the company lost the action James, V.C., as he then was, ordered the costs in full to be paid out of the company's assets. The principle of that case applies here. This liquidator was not bound to go to the court for leave, although he might have done so, but he elected to defend the action and adopted the defence, and the costs in full must come out of the assets. I was properly pressed by Mr. Mansfield with the case of *In re Thurso New Gas Co.*, but I have two observations to make on that case. One is that the passage relied on at p. 491 of the report (42 Ch. D.) deals with the case of a creditor suing for a debt and shows that there is some difference between suing for a debt and suing for damages; and the other is that there was not in that case, as there was here, a request for the liquidator to admit the claim. Here the reply of the liquidator is such an adoption of the defence to the action as to bring the case within the principle of *Boynton* v. *Boynton*, which was adopted by Wright, J., in *In re London Drapery Stores*. The defence has been adopted with all its consequences, including the

liability to pay costs. It has been adopted as a whole, and the liquidator must out of the assets pay in full the costs of the action from its commencement and also the costs of this application.

Solicitors, *Church, Rendell, & Co.; Goodacre, Harrison, & Darrell.*

Chan. Div. Warrington, J. } Nov. 23, 24.

WRIGLEY *v.* GILL. (*a.*)

Mortgage—Mortgagee in possession—Redemption—Rests—Accounts—Sale of part of the mortgaged property—Proviso for capitalization of interest—Right to compound interest.

*Under a proviso in a mortgage for the capitalization of interest in arrear for twenty-one days, on the default of the mortgagor, a mortgagee in possession is not entitled, on the accounts being taken, to charge the mortgagor with compound interest, unless he can show that, after crediting the rents received each half-year, the interest was actually in arrear at the time specified in the proviso. Sale by a mortgagee in possession of part of the mortgaged property does not by itself entitle the mortgagor to an account with a general rest of the rents and profits as well as of the proceeds of sale, as on the date of the receipt of such proceeds.**

A summons to vary the master's certificate in a mortgagor's action for redemption had been taken out, and, amongst other matters, two questions in practice on the taking of accounts came up for consideration: (1) Whether a proviso for the capitalization of interest in arrear applied to the case of a mortgagee in possession, on the ground that the receipt of the rents by the mortgagee, though more than sufficient for the purpose, was not punctual payment by the mortgagor; (2) Whether a sale by a mortgagee in possession of part of the mortgaged property entitled the mortgagor to an account with a general rest, as well of the proceeds of the sale as of the rents, as on the date of such sale.

The material facts and documents were as follow:

By a mortgage of the 22nd of October, 1887, certain leasehold properties were sub-demised by the plaintiff to a building society to secure £1,800.

On the 8th of October, 1890, and the 4th of July, 1892, further charges for £120 and £60 respectively were given by the plaintiff to the building society on the same security.

On the 13th of March, 1893, by a second mortgage, plaintiff mortgaged the equity of redemption of these properties to secure £200 to the defendant Ann Gill. The mortgagor covenanted to pay the mortgagee interest at the rate of 6 per cent. per annum. The deed also contained the following proviso:

"Provided also, and it is hereby agreed that if and so often as any interest due under the covenant hereinbefore contained or this present provision shall be in arrear for twenty-one days after the day hereby appointed for payment thereof, such interest shall be treated as an accession to the capital moneys hereby secured as on the day on which the same ought to have been paid, and shall thenceforth bear interest payable at the rate and on the days aforesaid, and this security shall extend to such capitalized interest in all respects."

On the 29th of May, 1894, half-a-year's interest on this second mortgage being over two months in arrear, the defendant entered into possession of the mortgaged properties.

On the 16th of June, 1894, the plaintiff paid the interest then due to the defendant, but the latter still remained in possession.

On the 11th of September, 1894, the defendant took a transfer from the building society of the mortgage of the 22nd of October, 1887, and the two further charges.

On the 24th of November, 1899, the defendant sold a portion of the mortgaged properties for £250 under the power of sale in the mortgage.

On the 20th of September, 1900, the present action was commenced, the plaintiff claiming redemption of the mortgaged properties, with the usual accounts.

The master, by his certificate of the 29th of July, 1904, certified that there was due to the defendant from the plaintiff under the second mortgage of the 13th of March, 1893, the sum of £200 for principal, and £158 13s. 1d. for compound interest thereon at the rate of 6 per cent. per annum from the 13th of March, 1894, to the date of the certificate. That there was due on the first mortgage and further charges £1,299 8s. 1d. for principal, and £642 1s. for simple interest thereon at 5 per cent. from the 11th September, 1894, to date of certificate. From these amounts he set off the £250 proceeds of sale thereinafter referred to, and also certified the amount of the rents and profits received by the defendant, and that a part of the property had been sold by the defendon the 24th of November, 1899, for £250, and that this sum had been applied by the defendant in reduction of the principal and interest due under the said mortgage securities.

The plaintiff took out a summons to vary the master's certificate in the following particulars:

(1) "By declaring that no interest having been due under the mortgages mentioned in the said certificate to the defendant at the date when possession of the mortgaged premises was taken by the defendant, only simple interest at the rate of 6 per cent. is payable upon the mortgage dated the 13th of March, 1893."

(2) "By directing that a rest be taken on the 24th of November, 1899, upon the sale by the defendant of a portion of mortgaged premises, and that upon taking such rest the defendant bring into the account all sums received by her in respect of the rents and profits of the said premises up to that date."

(6) "That the account be directed to be taken with annual rests, upon the ground that the defendant before action brought set up an unfounded claim to the property, and denied the plaintiff's character as mortgagor, and the rents have materially exceeded the expenditure, especially since the plaintiff applied for an account which was refused."

Peterson, for the plaintiff.

Rowden, K.C., and *Austen-Cartmell*, for the defendant.

WARRINGTON, J., in a lengthy judgment, said: The first point raised by the summons to vary is whether on the defendant's second mortgage of the 13th of March, 1893, interest ought to be computed as simple or compound interest. The plaintiff says it ought to be simple interest only, and the defendant says that the master was right in computing it as compound interest. This question depends upon the effect to be given in the events which have happened to the proviso for capitalization of interest in this deed of March, 1893. It appears at first sight, and with sufficient certainty to justify me in assuming this fact for the purposes of this judgment, that the rents received by the defendant were sufficient to make up the half-yearly payment of interest, at any

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* See also *Ainsworth* v. *Wilding*, *ante*, p. 282.

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

rate in some half-years. In that state of things, What is the rule which I am to apply? In the first place, in this case I am dealing with a provision in a mortgage which imposes a special and peculiar liability upon the mortgagor, and it is for the mortgagee, therefore, to make out that the event has happened on which that provision takes effect so as to entitle him to the special and peculiar advantage which it gives him. What the mortgagee has to show affirmatively is that in each half-year, or the particular half-year in which he says he ought to be allowed interest on interest, the interest was in arrear for more than twenty-one days.

This also is to be noticed, that by taking possession the mortgagee himself takes the rents, to which presumably the mortgagor would look as providing the fund out of which he would pay the interest on the mortgage, and under these circumstances, if I am unfettered by authority, I should come to the conclusion that where, *primâ facie* at all events, the rents are enough to keep down the interest, in that case the mortgagee has not made out the affirmative case which he has to make out, that the interest is in arrear.

How far am I bound by authority? There have been three cases referred to: (1) *The Union Bank of London* v. *Ingram*, 29 W. R. 209, 16 Ch. D. 53. In that case, unlike the present, it was the mortgagor who had to establish affirmatively that the event had happened which entitled him to the advantage secured to him by the provision, and the event which he had to establish affirmatively as having happened was that he had punctually paid the interest. On that the Master of the Rolls held that, inasmuch as he had paid no interest at all, but the mortgagee had been receiving the rents which, when the accounts were taken, were applicable not only to interest but also to principal, it could not be said that the mortgagor had paid the interest within the forty days contained in the provision, and accordingly he had not made out his case to be entitled to the privilege given him by the mortgage deed. (2) *Bright* v. *Campbell*, 37 W. R. 745, 41 Ch. D. 388, which was really the same case as the *Union Bank of London* v. *Ingram*. (3) *Cockburn* v. *Edwards*, 29 W. R. 136, 18 Ch. D. 449. This case gives me rather more trouble. It was shortly as follows: There was a mortgage taken by a solicitor from his own client in which he had inserted a power of sale which did not contain the usual restrictions on the exercise of the power, that it should not be exercised unless the interest was in arrear. The mortgagee had taken possession and had been receiving the rents, and a question arose whether, assuming that the mortgagee had inserted a power of sale with a proper restriction, whether even on that assumption the power of sale had arisen, and accordingly the question arose, Was the interest in arrear? The Master of the Rolls held that the interest was in arrear, because if the clause had contained that provision the interest must be treated as in arrear, inasmuch as the receipt of the rents was not sufficient to discharge the interest. What he says is this, after referring to the omission of the clause and saying it ought to have been inserted: "The sale, then, was improper unless there was interest three months in arrear; and I think there is great weight in the argument for the respondent, that it was improper, whether there was interest in arrear or not, for that the client had a right to be informed what the terms were upon which the estate could be sold, and that the absence of such information made the sale improper. But was there any interest in arrear? It has been argued that a mortgagee in possession, if he receives rents to an amount more than sufficient to pay the interest, must be taken to have been paid his interest. I cannot accede to that argument. A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest; but till an account is taken there is no set-off, there is no appropriation of the rents. But the receipt of rents by the mortgagee is not a payment by the mortgagor, or by anyone on his behalf. The mortgagee receives rents which are his own, subject, of course, to the right of redemption; he is not receiving interest or principal, but receiving the rents of property which belongs to him subject to the right of the mortgagor to redeem it." The result was that he treated the interest as in arrear notwithstanding the receipt of rents. The other two learned judges deal with the point in a different way. Brett, L.J., holds that the interest was not in arrear, that the rents had been appropriated to the interest, and that it had been paid. Cotton, L.J., said: "The accounts show that there was not any interest in arrear for three months when the sale was effected." [His lordship, after reading the above judgment, said:] I have read those two judgments because it is quite clear on Cotton, L.J.'s, judgment that he did not accept the *dictum* of the Master of the Rolls in his judgment, but, on the contrary, said he was not prepared to decide that that was the law, and Brett, L.J., though not so emphatic as Cotton, L.J., was obviously not prepared at the moment to follow what the Master of the Rolls had said.

The result is, I think, that in dealing, as I have to deal here, with a provision in which it is for the mortgagee to show that an event has happened which entitles him to this special peculiar privilege of compound interest, I am entitled to say that I am not fettered by authority, and can give effect to my own opinion, which is, that in a case like the present the mortgagee has not shown that the interest is in arrear so as to entitle him to claim compound interest on this security. The result is that, in reference to that second mortgage of the 13th of March, 1893, I think the interest ought to have been computed as simple interest at 6 per cent., and not as compound interest, and to this extent the certificate must be varied.

The second objection taken to this certificate raises a very important point of practice. It is this: A mortgagee in possession sells a part of the mortgage property. The judgment directs the ordinary account, an account of the money due on the security, an inquiry as to the proceeds of sale, and an account of the rents and profits, with the usual direction to set off against what shall be found due on the first account the amount found due on the rents and profits account. Now, I have ascertained from a very experienced master—[one of the Chancery masters had been sent for and consulted as to the usual practice in chambers in taking accounts of this kind]—and I think it is substantially admitted, that under a judgment in this form the ordinary course of practice in chambers is this: The first account is treated as separate from the account of rents and profits. If money is received from an exercise of the power of sale, that money is credited to the mortgagor under the first account at the date at which it is received, but unless rests have been directed in the judgment the account of rents and profits, following the usual rule, goes on without rests. That is ordinarily the common practice in chambers under the usual mortgagee's account, but the argument before me here really is that, having regard to the reservation in the judgment of the 30th of July, 1901, in the terms which I have already read, namely, that the direction to set off what is found due on the account of rents and profits is to be "without prejudice to any question upon further consideration as to rests," I am now to deal with this case

as if I had at the hearing to determine whether rests ought so be ordered or not. The ordinary rule is admitted that in the absence of special circumstances the account against a mortgagee in possession is not directed with rests—that is to say, the account of the rents and profits runs on from beginning to end without reference to the question whether he has at any particular time had in his hands more than sufficient to pay the interest or not, the reason being that a mortgagee is not bound to accept payment by dribblets, but is entitled to have the account taken as a whole and not to be treated as repaid until that account has been so taken. It is said there are certain exceptions. One of those is where the mortgagee has himself claimed the property—that is to say, has insisted that the mortgagor is not entitled to redeem. So far as I can make out, the only principle upon which an exception is made in that case is that it is by way of punishment to the mortgagee; there can be nothing else, because his receipts have been the same whether he has been insisting upon his title to the property or not. I think it is merely a means whereby the court has penalized the mortgagee in order to show dissatisfaction with the case he has set up. That is one exception, and it is sought to bring the present case within that.

Now, it is quite true that the defendant, the mortgagee, did originally say that the property had been sold; but when the case came on for trial, in fact when the defence was put in, that part of the case was abandoned, and, in my judgment, where that is so, I am not in a position to say I am bound to impose that penalty upon the mortgagee which has in some cases been imposed where he has insisted on his ownership of the property. I think in all the cases cited he had insisted on that till the trial, and then the court imposed that penalty upon him. It was suggested that there is another exception where the excess of the rents and profits over the interest is great and notorious. The only case which supports that contention is the case of *Thompson* v. *Hudson*, 18 W. R. 1081, L. R. 10 Eq. 497. In reality that was not a case of rests at all. What happened in that case was that it appeared when the accounts came to be taken that at a certain date in June, 1861, the mortgagees, having exercised the power of sale, were found to have in their hands a sum, £20,673 or thereabouts, more than what was due to them for interest and costs. Sir John Romilly, M.R., having analyzed the accounts at that date, and finding as a fact that there was that large excess at that moment of receipts over expenditure, took what I think I am bound to say was an exceptional course, and there I am only speaking on the authority of *Nelson* v. *Booth*, 6 W. R. 845, (1858) 3 De G. & J. 119, of drawing a line at that date on seeing that there was a sum of £20,673 in the hands of the mortgagees which they ought either to have applied in discharge of the principal, or have paid over to the mortgagor. Now, am I at liberty in this case to take that view? I have looked at the accounts to form an opinion, so far as it is possible to do so, and I cannot find on an inspection of the accounts that on the 24th of November, 1899, the receipt of rents, having regard to the money expended for repairs, had more than discharged the interest due under the mortgage; on the contrary, so far as I can see, again only from such inspection as I am able to make here in court, they were not quite sufficient for that purpose at that time; at all events, there is no excess so great and so notorious that if the matter were now before me on motion for judgment or notice of trial I should, in my opinion, have been justified by the authorities on this point in regarding the case as so exceptional as to direct rests; and without direction rests I do not see how I can do what the plaintiff now asks me to do with regard to this £250. On the accounts as they have been taken the £250 has been dealt with in the ordinary way; that is to say, it has been brought in on the first account, the account of what is due on the mortgage as at the date of its receipt, the account of rents and profits running on without interruption. In my opinion that is right, and in that respect the master's certificate cannot be varied.

Solicitors, *Scott, Spalding, Bell, & Co.*, for *William Lees*, Oldham; *Bower, Cotton, & Bower*, for *Longbotham & Sons*, Halifax.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) Oct. 25.

KEENE v. THOMAS. (a.)

Contract—Hire-purchase—Agreement by hirer to keep in repair—Lien—Authority of hirer to give lien to repairer.

By a hire-purchase agreement the plaintiff let a dog-cart; one of the terms of the agreement being that the hirer should keep and preserve the said dog-cart from injury, damage by fire included. During the currency of the agreement the dog-cart was sent by the hirer to the defendant for repair. The defendant claimed a lien on the dog-cart for the cost of the repairs. In an action by the plaintiff to recover the dog-cart or its value,

Held, that the terms of the agreement gave authority to the hirer to create a lien as against the plaintiff in favour of the defendant for the amount of his charges.

Appeal from his Honour Judge Gye, sitting at the Newport County Court.

It appeared that in June, 1903, the plaintiff let a dog-cart, the value of which was stated to be £10, to one Robertson, and by the terms of the agreement the cart was to remain the property of the plaintiff unless and until the sum of £15 should have been paid to the plaintiff in monthly instalments of £1, and if Robertson failed to pay the instalments as and when they became due the plaintiff was to be at liberty to take possession of the cart.

Robertson agreed to pay the instalments and, *inter alia*, "to keep and preserve the said dog-cart from injury (damage by fire included)."

In November, 1903, Robertson became in arrear with his instalments, and notice to terminate the agreement was sent in May, 1904.

Between November, 1904, and May, 1905, the cart was sent by Robertson to the defendant for certain repairs, and as Robertson failed to pay for these repairs the defendant refused to give up the cart until he had been paid for them. In an action by the plaintiff to recover the dog-cart or its value, the county court judge held that the agreement between the parties contemplated repairs being done, and that there must be taken to be an implied agreement between Robertson and the plaintiff that Robertson should have reasonable repairs done to the cart by a coachbuilder if necessary, and that under the circumstances the defendant had a lien for his charges against the plaintiff, and he gave judgment for the defendant accordingly.

S. H. Emanuel, for the plaintiff.—The county court judge was wrong. No lien can be created except by express authority: *Buxton* v. *Baughan*, 6 C. & P. 674.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Grimwood Mears, for the defendant.—The agreement between the plaintiff and Robertson binds him to keep the cart repaired. He is therefore entitled to have reasonable repairs executed by a coachbuilder, to give a lien for the cost of the work so executed: *Seager Manufacturing Co.* v. *London and South-Western Railway*, 42 W. R. 774, [1894] 1 Q. B. 833.

S. H. Emanuel replied.

Lord ALVERSTONE, C.J.—This case raises an important point, and one on which there is little direct authority, but, in my opinion, the county court judge has come to a right conclusion.

The question which we have to decide is whether there was authority from the plaintiff to the defendant to make the bargain he did with the repairer. Now there is no doubt that under this hire-purchase agreement Robertson was to keep the dog-cart in repair, and that, in my opinion, implies an authority on the plaintiff's behalf to get the trap repaired if it needed repair, as it cannot be contended that Robertson was bound to do the work with his own hands. The case of *Buxton* v. *Baughan* is not in favour of the plaintiff. The facts there were not the same. In that case Alderson, B., said: "If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain, and may reclaim the goods. A man has no right to keep my property and charge for the standing of it unless there was a previous bargain between him and me, or between him and some agent authorized by me"; and he held on the facts in that case, there was no such authority. The principle laid down by Collins, J., in the case of *Seager Manufacturing Co.* v. *London and South-Western Railway Co.* goes a long way to support the proposition that the hirer is entitled to use the chattel for all reasonable purposes; and in my opinion in this case, the hirer of the chattel having undertaken to keep it in repair, and having at any rate a duty to take care of it, and having employed the defendant to repair it, has created a lien in respect of the proper cost of the repairs, not only against himself, but also against the plaintiff, the owner of the trap.

The appeal must therefore be dismissed.

KENNEDY and RIDLEY, JJ., concurred.

Appeal dismissed.

Solicitors for appellant, *P. J. Nicholls*, for *Hallett & Martin*, Southampton.

Solicitors for respondent, *Speechly, Mumford, Rodgers, & Craig*, for *Lamport, Bassitt, & Hiscock*, Newport, Isle of Wight.

Privy Council.

(*From the Supreme Court of New South Wales.*)

Dec. 19.

COMMONWEALTH PORTLAND CEMENT CO. v. WEBER, LOHMANN, & CO. (*a.*)

Principal and agent—Delivery of goods—Duty at custom house—Delay—Obligation undertaken.

Apart from express provision, it is no part of a shipping agent's duty to expedite the passing of goods through the custom house so as to escape a contemplated duty, where such duty is equally in the knowledge of his principal, and no wilful misconduct is imputed to the agent.

Appeal from a judgment of the Supreme Court of New South Wales.

The facts are given in their lordships' judgment.

Cohen, K.C., and *Tyrrell T. Payne*, for the appellants.

Charles C. Scott (*Lawson Walton, K.C.*, with him), for the respondents.

The judgment of their lordships (Lords MACNAGHTEN and LINDLEY, Sir FORD NORTH, and Sir ARTHUR WILSON) was delivered by

Lord LINDLEY.—This is an appeal from a judgment of the Supreme Court of New South Wales affirming a judgment of non-suit in an action brought by the appellants against the respondents.

The appellants are manufacturers of cement. Their head office and works are at Portland, New South Wales. They had ordered machinery from abroad, and it was to arrive at Sydney in a steamer named *The Karlsruhe*, consigned to the care of the respondents, who were shipping agents there. The ship arrived on Sunday, the 6th of October, 1901. Monday was a holiday. The ship was reported early on Tuesday, the 8th of October. When the ship arrived no customs duty was payable in New South Wales on machinery imported from abroad; but like other duty-free goods it had to be entered and cleared at the Customs House at Sydney, and (as will be more fully explained presently) the respondents had undertaken to pass it through the customs house for the appellants.

By the New South Wales Customs Regulation Act, 1879 (42 Vict. No. 19), twenty-four hours from the date of the report of the ship were allowed for entering and clearing duty-free goods, Sundays and holidays not being counted.

Before twenty-four hours for entering and clearing the machinery had expired, and before it had been cleared—viz., in the afternoon of the 8th of October, the machinery became liable to a heavy duty of £900 odd, and it could not be afterwards cleared or landed until this duty was paid.

It was proved at the trial that there was ample time to enter and clear the machinery on the 8th of October before the duty became chargeable. It was also proved that on the morning of the 8th of October the defendants did enter and clear some goods of their own brought by *The Karlsruhe*. It was further proved that it had been for some time common knowledge in Sydney that the Government of New South Wales was contemplating the publication of an ordinance bringing into operation in New South Wales the Customs Act, 1901, passed on the 3rd of October by the Commonwealth Parliament of Australia. Such an ordinance was, in fact, published in the afternoon of the 8th of October.

These being the admitted facts, the question arises whether the appellants who had to pay the duty to get their goods landed are entitled to recover the amount from the respondents as damages for their negligence. This question really turns on the duty of the respondents; and this depends on their contract with the appellants. The contract is to be found in a series of letters passing between the two companies, commencing on the 24th of April and ending on the 3rd of October, 1901. The short effect of these letters was that the respondents undertook to lighter and load on railway trucks the machinery of the appellants brought by *The Karlsruhe* for certain fixed charges, and they also agreed to pass the machinery though the customs without extra

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

charge. It is clear from the correspondence that the payment of customs duties was not contemplated by either party. To enter and clear duty-free goods involved no difficulty or trouble worth mentioning to the respondents, who were to receive and lighter them; and it was very natural that the respondents should further undertake to pass them through the customs house without extra charge.

The appellants contend that the obligation contracted by the respondents included the duty to exercise reasonable diligence in entering and clearing the goods; and that this involved the duty to protect the appellants' goods from loss which was known to the respondents to be imminent or at least probable. The appellants further contend that it should have been left to the jury to say whether such diligence was exercised or not.

The respondents, on the other hand, contend that all they agreed to do was to enter and clear the goods in the usual way in the time fixed by the Customs Regulations. They contend that the appellants are seeking to throw upon them a duty which they never undertook and which was never contemplated by either party.

There is no doubt that all agents are bound to take reasonable care in doing what they have undertaken to do; but it appears to their lordships that the appellants cannot succeed unless they can show that it was the duty of the respondents to attend to taxation by the government and to take reasonable care to protect the appellants' goods from taxation. Their lordships are of opinion that the contract between the parties did not impose upon the respondents any legal obligation to pay attention to what the government might or might not do as regards altering customs duties; and that there was no evidence to go to the jury of any breach by the respondents of any duty which they owed to their employers.

This was the view taken by the judge who tried the case and by the Supreme Court. In coming to the same conclusion, their lordships have assumed that all the questions put, and successfully objected to, had been answered favourably to the appellants. No wilful misconduct was imputed to the respondents. The appellants knew quite as well as the respondents that the imposition of customs duties was to be feared, and they knew that the goods were arriving; but the appellants did not request the respondents to expedite the clearing under the peculiar circumstances which had arisen, and which had never been contemplated by either party.

Under these circumstances their lordships are of opinion that the non-suit was correct, and that there was no misdirection or improper rejection of evidence. The case was one in which a jury would be very likely to go wrong by reason of the fact that the respondents cleared their own goods early on the 8th of October, and that the respondents might have cleared the appellants' goods at the same time. But what they might have done and what they legally were bound to do are two very different questions.

The lordships will humbly advise his Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors, *Paines, Blyth, & Huxtable; Snow, Fox, & Higginson.*

Court of Appeal.

From P. D. & Ad. Div.
Vaughan Williams, Romer, and Cozens-Hardy, L.JJ. } Dec. 10, 20, 21.

TOWNSEND *v.* MOORE. (*a.*)

Will—Codicils of even date—Inconsistency—Simultaneous execution—Admissibility to probate—Function of a Court of Probate—Limit of parol evidence—Person entitled to administration.

Where a testator leaves two varying testamentary documents of even date or undated, and it is not known which was executed last, both are primâ facie *admissible to probate. In such a case a Court of Probate must act as a court of construction so far as to ascertain whether the documents can stand together. If one of them purports wholly to revoke the other, or they be wholly irreconcilable, then neither document can be proved; but if they can be reconciled in part, they should both be admitted to probate and their effect afterwards determined by a court of construction.*

Testatrix, by will in 1863, *executed in favour of her husband a power of appointment in the marriage settlement, and bequeathed to him all her property, appointing him sole executor. On the 6th of October,* 1891, *she executed two holograph codicils, each commencing "Whereas I have bequeathed all my property to my husband, now in case I survive him I hereby appoint A. and B. to be executors. At the decease of my husband and myself . . . " here followed in each codicil a number of legacies and a gift of residue. These provisions were in great measure identical in both documents, but there were some important differences, and there was no evidence as to which had been executed last. Testatrix died in* 1892, *and her husband in* 1902 *without having obtained probate. On the residuary legatees seeking to establish the will and codicils,*

Held, that the codicils were not conditional on the wife surviving her husband, and that the condition only affected the appointment of executors.

Held, further (dissentiente Cozens-Hardy, L.J.), *that the codicils were not so inconsistent as to be incapable of standing together, and that both must be admitted to probate as simultaneously executed, and their effect afterwards determined by a court of construction.*

And held, that since the husband, as executor, had not obtained probate, though he had intermeddled in the estate, his executor was not entitled to administration.

Lemage *v.* Goodban, *L. R.* 1 *P. & D.* 57, 14 *W. R. Prob. Dig.* 21; In the Goods of Petchell, 22 *W. R.* 353, *L. R.* 3 *P. & D.* 153; *and* Jenner *v.* Ffinch, 28 *W. R.* 520, 5 *P. D.* 106, *approved and followed.*

Appeal from a judgment of Barnes, J., refusing to grant probate of two testamentary papers of even date purporting to have been executed in the presence of two witnesses by Mrs. Emily Donald as codicils to her will.

Testatrix was the wife of Captain Thomas Donald, to whom she was married in 1862. Both husband and wife brought money into the settlement, the wife's fund being nearly £26,000. The settlement was in the usual form, giving to the husband a life interest in the wife's fund after her death, subject to which there was a power to the wife to appoint in default of children. The only child of the marriage died at birth. By her will dated in 1863, Mrs. Donald exercised her power of appointment in favour of her husband absolutely, and also bequeathed to him her other property (which amounted only to about £400), and appointed him sole executor; but by a codicil in 1886 she made a disposition of £3,000 (payable at her husband's death) in favour of her sister, Mrs. Bigge.

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

who, after testatrix's death, by deed assigned that sum to Captain Donald.

The codicils now in question both bore date the 6th of October, 1891. They were in the handwriting of the testatrix, and were understood to have been prepared, without legal advice, at the instigation of Captain Donald, who was much given to making testamentary dispositions for himself and other people. They contained many erasures, interlineations, and other alterations, and, though in some respects identical, they differed in several important particulars. There was no indication as to which had been executed first, but for the purpose of this action they had been marked respectively A and B, by which letters they will be referred to in this report. The following were the contents of the documents as altered, the variations between A and B being given in separate columns. The punctuation, being doubtful, has been omitted, but the capital letters, and also the division of paragraphs where not doubtful, have been retained:

"Whereas I Emily Donald have bequeathed all my Property to my husband Thomas Donald now in case I survive him I hereby appoint the following persons to be executors Capt Reginald Fullerton R N A D C and the Revd William Norman Ramsay

"At the decease of my husband and myself £3000 to my sister Mrs Arthur Bigge

A	B
"and £2000 to my sister Miss Julia Townsend Payable at my death with my husband's consent or optional the following legacies £300 each to my sisters Miss Julia Townsend and Mrs Arthur Bigge in addition to the above £300" [? £3000]	"but *not* in addition to the £3000 already bequeathed to the said Mrs A Bigge"

[In both documents there followed thirteen legacies aggregating £1,950 and practically identical. The documents continued:]

"Should my husband sell the Reversion to the Marriage C ntract Trust property then I leave to his Executors the sum of Five Thousand Pounds

A	B
"in Trust for his Estate to make up for the loss and to go to his niece Miss F G C E Somerset	"to be paid to them for his Estate to make up for the loss" [here several words had been obliterated]

"The rest of my Property at my husband's decease

"The rest of my Property

to be divided in equal shares between my two sisters Miss Julia Townsend and Mrs Arthur Bigge and to the survivor for life."

[Then followed an ul imate gift of residue, which was identical in both documents, except that in A there was an uncertainty as to the shares into which it was to be divided. The documents respectively ended as follows:]

A	B
"This is subject to any Legacies I may after this bequeath Also as to legacies of Jewels Furniture Pictures China &c mentioned in enclosed list"	"This is subject to any Legacies I may after this bequeath. Also as to Legacies of Jewels Furniture Pictures &c mentioned in enclosed Lists signed by me In addition to above I bequeath to my two sisters Mrs A Bigge and Miss Julia Townsend the sum of £300 each payable at my decease"

The testimonium was practically the same in each, and expressed the document to have been signed by the testatrix in the presence of two witnesses present at the same time; these witnesses were the same in both cases. The lists of chattels referred to were never found. There was a note in B following the testimonium. It was in testatrix's handwriting and purported to explain a point in her will, but being enigmatical and unsigned it is here omitted.

The testatrix died in 1892, and Captain Donald made several efforts to prove her will, with the codicil of 1886, and the document A, which had been found with her papers. Difficulties, however, arose in consequence of an alteration occurring in the earlier codicil (which had also been mutilated) and the impossibility of obtaining evidence regarding it, neither of the witnesses to its execution being producible. The document B was in Captain Donald's own custody, but he appeared to have regarded it as a draft or duplicate of A, and never submitted it to probate. He died in 1902 without having obtained probate of any of his wife's testamentary papers.

The present was a friendly action brought by the residuary legatees under codicils A and B, who sought to establish the will and all three codicils. The defendant was the executor of Captain Donald's will, and he opposed probate of A and B on the ground that they were conditional on the testatrix surviving her husband. About seventy persons who were interested in Captain Donald's estate had had notice of the proceedings, and two of them intervened, making the same defence as the executor, and further pleading that the said two documents were not executed in accordance with the Wills Act, that one was a rough draft of the other, and that only one was intended to be operative, or in the alternative that one revoked the other. One of the attesting witnesses was dead, but the other, formerly butler to Captain Donald, was called at the trial. He remembered witnessing the execution of A, but not of B, nor could he recollect that more than one document was produced or executed on the 6th of October, 1891. He, however, identified the signatures of Mrs. Donald and of both witnesses on each of the documents, and also swore to the majority of the alterations in A as having been made before it was executed.

J. Eldon Bankes, K.C., and *W. T. Barnard*, for the plaintiffs.

Priestley, K.C. (*Willock* with him), for the defendant, pointed out that the effect of codicils A and B, containing as they did a gift of residue, would be to take away from the husband all interest in his wife's property except his life interest under the settlement, and that this was clearly contrary to the intention of the testatrix as expressed in her will, which she had impliedly confirmed by the recitals in codicils A and B. If the condition of surviving her husband was intended, as the plaintiffs maintained, to govern only the appointment of executors in her husband's place, the part of the will that would have been recited was that appointing him executor, and not that bequeathing him all her property. The documents were conditional on an event which had not happened, and consequently ought not to be admitted to probate. Besides, they were too inconsistent to stand together, and being of even date it could not be ascertained which revoked the other, therefore neither ought to be proved.

He cited Williams on Executors (9th ed.), p. 144; *Phipps* v. *Lord Anglesea*, 7 Bro. P. C. 443.

Beddall, for the interveners, argued that the court should refuse probate of a document appearing on the face of it to be conditional and would construe

its provisions for the purpose of ascertaining whether they were contingent on the happening of some event. A grant of probate was a recognition of the validity of a document, and he was anxious, if the court did grant probate to one or both of these documents, that it should be made clear the matter was not thereby made *res judicata* so as to preclude the parties from raising the question of construction before another court having the administration of the estate.

He cited *Edmondson* v. *Edmondson*, 17 Times L. R. 397; *In the Goods of Porter*, 18 W. R. 231, L. R. 2 P. & D. 22; *Parsons* v. *Lanoe*, 1 Ves. sen. 189, Amb. 557, 1 Wils. 243; *Sinclair* v. *Hone*, 6 Ves. 607; *In the Goods of Tharp*, 26 W. R. 770, 3 P. D. 76, 81 (followed in *In re Lambert's Estate*, 39 Ch. D. 626).

Eldon Bankes, K.C., and *W. T. Barnard*, in reply, argued that the documents were sufficiently consistent to be both admitted to probate, it being left to the proper court to decide on their construction. As to their being conditional, the wording of A at least showed that the dispositions of property were to take effect if the testatrix's husband survived her.

BARNES, J., held that the documents were conditional on the testatrix surviving her husband, an event which had not happened, and were therefore not entitled to probate.

The plaintiffs appealed.

The same attesting witness was called, and gave evidence similar to that given in the court below. He also said he had never witnessed testamentary papers for Mrs. Donald except on the 6th of October, 1891, and described an alteration in a document he then witnessed as having been pointed out to him before execution. This alteration was found to exist in B but not in A.

Captain Donald's solicitor was also called and said that his client, when first sending him codicil A after testatrix's death, stated that he considered it valueless, his wife having to his certain knowledge only intended it to take effect in case she survived him.

J. Eldon Bankes, K.C., and *W. T. Barnard*, for the plaintiffs.—The testatrix clearly contemplated her husband surviving her, for in A she gives legacies payable at her death with his consent. Moreover, the rest of her property is made divisible at his decease, which could not mean in her lifetime. She in fact disposed of her property subject to his life interest. In every operative clause she refers to his death. The proper course is to admit both papers to probate, and their construction can be afterwards determined in the proper court, such provisions as are inconsistent being disregarded.

They referred to *Phipps* v. *Lord Anglesea*.

Bargrave Deane, K.C. (*Willock* with him), for the defendant, cited *Leonard* v. *Leonard*, [1902] P. 243, 51 W. R. Dig. 131; *Willock* v. *Noble*, 23 W. R. 809, L. R. 7 H. L. 580.

Beddall, for the interveners, cited *In the Goods of Cadge*, 16 W. R. 406, L. R. 1 P. & D. 543. [COZENS-HARDY, L.J., pointed out that, being before the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3, neither the will nor the codicils would take effect without re-execution in case the testatrix survived her husband.]

W. T. Barnard, in reply.—The codicils were executed as duplicates, or one was only a draft of the other, so the question of one revoking the other does not really arise. The court would give effect to the longer one.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J.—In this case the question we have to decide is whether two codicils executed by Mrs. Emily Donald, and bearing date the 6th of October, 1891, ought both or either of them to be admitted to probate. The first point made was that neither ought to be admitted, because when you come to look at the words of the respective codicils you find in each of them that which ought to have induced the court to come to the conclusion that these codicils are conditional and only intended to take effect upon the contingency of Mrs. Donald, the testatrix, surviving her husband. The words which are said to support this contention are at the beginning of the codicils and are identical in both: "Whereas I, Emily Donald, have bequeathed all my property to my husband, Thomas Donald, now in case I survive him I hereby appoint the following persons to be executors, Captain Reginald Fullerton and the Rev. William Norman Ramsay." It is said that that condition is a condition which does not apply only to the appointment, in a certain contingency, of new executors other than the executor (the husband) appointed under the will, but that the condition overrides the whole of the codicils—that is, that they are only intended to take effect in the contingency of the testatrix surviving her husband. In my judgment that contention ought not to prevail. I think that if one reads through these codicils and takes note of their provisions as to what is to happen in case of the death of the husband, and looks also at the words which appear in the second paragraph, "at the decease of my husband and myself," it is impossible to come to the conclusion that the condition at the head of these documents was a condition intended to override the whole of the dispositions. I am of opinion therefore that they are not conditional or contingent codicils intended to take effect in case of the wife surviving the husband.

Having disposed of that part of the case, I now propose to deal with the other point which is made. It is said that these two codicils, bearing the same date, cannot either of them be admitted to probate having regard to the frame of the codicils themselves respectively, and also having regard to the fact that they bear the same date, and that there is nothing upon the face of them which enables one to say that one of them has priority in time over the other. I am of opinion that this contention also fails, and that both these codicils ought to be admitted to probate.

The facts proved are, in my opinion, the following: Mrs. Donald made a will, dated the 22nd of June, 1863, which was duly executed. She also made a codicil dated the 18th of January, 1886, which purports to be duly executed, and can, I understand, be now proved to have been duly executed. She also made and duly executed two codicils dated the 6th of October, 1891. These two codicils were witnessed by two witnesses, Prosper Greenwood and Alfred Vickers. Alfred Vickers, who at the time of the execution of these codicils was the butler in the service of Captain Donald, the husband of the testatrix, and of the testatrix, has proved the due execution, by signature, of these two codicils (called in this litigation A and B respectively) by the testatrix. Vickers has no distinct recollection in respect of codicil B, but, recognizing his own signature, he has no doubt that he did witness its execution. He also is certain that there was only that one occasion on which he witnessed any document executed by Mrs. Donald. Moreover, he testifies to the fact that Captain Donald, who was present on the occasion of the execution, called his attention to an alteration in respect of the legacy of £3,000. Inasmuch as there appears to be no alteration in this respect in codicil A, but only in codicil B, I infer that both documents were

dealt with on this occasion. Examination of the two codicils, which are both in the handwriting of the testatrix, has led me to the conclusion that they were both written in 1889, and were brought into the room, for the purpose of being executed and witnessed, in the state in which they now are, except as to dates, signature, and attestation. After their execution, codicil A seems to have been placed in an escritoire, whereas codicil B was found, after the death of the testatrix, in a box belonging to Captain Donald, which had been sent from Bournemouth, where he and Mrs. Donald lived, to Brighton, where he lived after her death. I think (but in stating this opinion I am not stating anything which is essential to the judgment which I am going to deliver) that when the two codicils were prepared in 1889 probably codicil B was the corrected draft, and codicil A a later copy based on the draft as corrected, but containing modifications; but be this as it may, I think that the testatrix executed A and B in the belief that they were in substance duplicates, and retained A in her possession, allowing her husband to take possession of B as a duplicate, which, by way of precaution, she executed in conformity with the requirements of the Wills Act.

The question now arises whether either or both of these codicils ought to be admitted to probate. I am of opinion that both ought to be admitted. *Primâ facie* every document purporting to be testamentary, and signed and witnessed in accordance with the provisions of the Wills Act, ought to be admitted to probate. Where, however, you have more testamentary documents than one, the presumptive admissibility to probate may be displaced, because it may be that there is a sequence in the dates of execution of such documents, which, coupled with the words of the later document, or the inferences to be drawn from such words, leads to the conclusion that the later document was intended as a revocation of the earlier; or it may be that the later document is intended to partially revoke and modify an earlier document; or lastly, it may be that, quite apart from any question of revocation, the court has to deal with documents which are proved to have been executed on the same date and occasion, or which are undated, and as to which it is impossible to affirm that one has any priority in time of execution over the other. In this last case, in my opinion, if the documents are so inconsistent that they cannot stand together, probate becomes impossible, because the presumption of admissibility to probate of testamentary documents executed in accordance with the Wills Act is displaced.

In my judgment the authorities on this point are reasonably clear. In dealing with them I propose first to read a passage which appears on p. 162 of the 7th edition of Williams on Executors (p. 138 of 9th edition), because in its entirety, and in particular in respect of the final clause of it, it has been three times most emphatically affirmed—namely, by Lord Penzance (then Sir J. Wilde) in *Lemage* v. *Goodban*, L. R. 1 P. & D. 57, 62, and by Sir J. Hannen in *In the Goods of Petchell*, 22 W. R. 353, L. R. 3, P. & D. 153, 156, and *Jenner* v. *Ffinch*, 28 W. R. 520, 5 P. D. 106. [His lordship read the passage commencing "But the mere fact of making a subsequent testamentary paper" and ending "those parts only where they are inconsistent," and also read (from the reports named below) the first part of the judgment in *Lemage* v. *Goodban*, 35 L. J. P. & M. 28, 30, down to the quotation from Williams on Executors; the head-note of *In the Goods of Petchell*, 43 L. J. P. & M. 22, and the judgment therein, from "Now where there are two wills," on p. 23, to "I am entitled to act in the present case," on p. 24, and from "acting upon the authority" on p. 24 to the end; and the head-note of *Jenner* v. *Ffinch*, 42 L. T. 327, and continued:] With regard to the latter case the importance of it (I do not propose to read it at length) is that one gets at what is really the question which the court ought to ask itself in a case where you have two testamentary documents, as one has in this case. Sir James Hannen arrived at the conclusion that you must not in the first instance ask yourself the question, How many testamentary documents did the testatrix intend should constitute her will? but what you have to do is this—look, in the case of documents prior and subsequent in point of date, at the later document, see what are its provisions, and having construed its words, ask yourself the question, aye or no, Did the testatrix intend that the later document should be a revocation of the first, or that the two should be read together? Then he goes on to point out this: That if the second document is ambiguous, then parol evidence of the surrounding circumstances will be admissible in order to enable the court to determine the intention of the second document. But speaking for myself, I should hesitate to say that that *dictum* as to parol evidence extends to evidence of the intention of the testatrix according to the view of those who were present with the testatrix at the time of the execution of the testamentary document. I think that the principle which is laid down plainly enough by Sir J. Wilde in the first case I have cited—namely, that where there is this question to be solved, as between two documents properly executed in accordance with the Wills Act, as to how far the one affects the other, the Court of Probate must act to that extent and for this purpose as a court of construction—is based upon what I have already mentioned, that if you have a document that purports to be testamentary, and it is executed in accordance with the provisions of the Wills Act, *primâ facie* that document is one which ought to be admitted to probate. You have to displace that proposition in order to reject such a document, and I think that this principle applies not only to documents as to which there is a sequence of execution, so that you can speak of one as the prior document and the other as the subsequent document, but also when you get undated documents or documents of even date. If the words are looked at which I have read from Williams on Executors, they will be seen to deal not only with the case of prior and subsequent documents, but with undated documents and documents of even date.

That being the case, I think that the court ought now to apply itself to the question whether or not these two documents are so inconsistent that they cannot stand together. I have arrived at the conclusion that they can stand together, and I wish to say, though it is the sort of principle one is reluctant *primâ facie* to apply, that I think the authorities show that where there are two properly executed documents, and it is submitted that both ought to be admitted to probate, the principle applied by the court in construing those documents is to read the words in such a way as to support the admissibility of both—even though the effect may be to override a construction which is not only a possible construction of one or both, but may even be one that the court would feel bound to adopt were it not overmastered by the consideration that a testator ought not easily to be held to have intended to override a properly executed testamentary document where there are no express words of revocation and where the inference can only be arrived at from construction of its provisions. His lordship discussed the variations in the two documents and observed that the beneficiaries were in the main the same in both—as were also the conditions attached to the various provisions, though not

expressed in the same manner. He thought that in A a new sentence began with the words "Payable at my death," but the absence of those words in B did not make it impossible to read the two documents together. He laid stress on the occurrence in both of the phrase "At the decease of my husband and myself." The *primâ facie* presumption that where two legacies were given to the same person, either in one document or, as here, in two, they were cumulative was, he said, rebutted by the wording and by the fact that the two documents were simultaneously executed—a fact of which the decision in *In the Goods of Petchell* showed that the court could take notice. The very alteration in the order of some identical bequests was, to his lordship's mind, an indication that the documents were intended to be duplicates and to be read together, and if that were so no difficulty could arise as to the legacies being cumulative. The residuary clauses offered the greatest difficulty, but there was not such inconsistency in them as would, in the case of documents of different dates, have warranted the inference of revocation. The question to be asked, where one document was of later date than another—namely, does it revoke the other?—was not, it was true, the question that had to be asked where the two were simultaneously executed, but in both cases the underlying question was the same, and that question was, can the two be so read as to stand together? His lordship continued as follows:] I have come to the conclusion on the authorities that if on any reasonable construction the documents can stand together it is the duty of a Court of Probate to admit both to probate, and I think, therefore, that this appeal should be allowed.

ROMER, L.J.—From the evidence, I come to the conclusion that these two codicils were duly executed on the same day, and on the same occasion, and practically simultaneously, and that when they were executed they were in the condition in which they now appear—that is to say, with the present erasures and interlineations. That being so, from the circumstances of their execution, and from a consideration of the contents of the documents themselves, I come to the conclusion that the two were intended to be, and must be, read together as if executed simultaneously, and that neither was intended to revoke the other, and that they are to be taken together as containing the expression of the testatrix's testamentary intentions at the time of the execution. That being so, the question as to which, as a matter of accident, happened to be first executed, is immaterial, for in my opinion, no importance was intended to be, or can be, attributed to one document over the other by reason of the order of execution.

That being the position of affairs, the question arises, what, as a matter of law, ought to be done in regard to probate? Now, of course if there are two testamentary documents, and it is to be gathered that one was intended to revoke the other altogether, but it cannot be ascertained which was intended to be the revoked document, then neither can be proved—as, for example, if you find two wills, each purporting to revoke all prior testamentary documents, and it cannot be ascertained which was executed last. But where there are two testamentary documents, and the court is able to gather that one was not intended to wholly revoke the other, but that both were intended to be effective, at any rate to some extent, then I think, on authority and on principle, that the two documents must be admitted to probate, so that effect can be given to them, at any rate so far as circumstances will permit. To what extent that can be done would be left, to a great extent at least, to a court of construction to determine. The authorities which my lord has gone into show, I think, that what I have stated to be the law is the correct view, and I need not further refer to them. I certainly think that those authorities ought to be adhered to, for in such a case as we are considering it would to my mind have been a lamentable result if the court had been obliged to hold that, because some parts of the two documents cannot be given effect to, therefore both documents must be set aside, and neither admitted to probate, or be allowed any validity whatever. In a case such as I have been referring to both documents then should be admitted to probate, and the effect of the two together be determined by a consideration of their contents, and of the circumstances under which they were executed. So far as they can stand together, effect should be given to them. The cases show how far courts of construction have gone in the direction of reconciling documents which they felt it their duty to try and reconcile, and how the courts struggle, if I may use the expression, to see if they cannot reconcile dispositions which on the face of them might possibly appear to be somewhat irreconcilable. But, of course, if, after doing its best, the court finds that there are dispositions perfectly inconsistent, which it is impossible to reconcile or to determine, that one in particular is to have effect at the expense of the other, then effect cannot be given to them so far as concerns those inconsistent dispositions. And in particular if there be two inconsistent dispositions which cannot be reconciled, and the court cannot say which was intended to override the other without knowing in what order the two documents were executed—and that fact cannot be ascertained—then the court would be driven to hold both dispositions invalid.

Now I apply these general considerations to the circumstances of the present case, and, having regard to the findings with which I first started my judgment, I see no difficulty in holding that both these codicils can be admitted to probate, and ought to be admitted. Regarding them as dispositions executed simultaneously, and both intended to take effect, I may say that in the first place I have no doubt myself that the documents cannot be held to be contingent on the wife surviving. I should come to that conclusion even if I looked at the document B alone. But when I look at document A all difficulty to my mind disappears. It is true the codicils commence by a reference to the fact that she, the testatrix, had bequeathed all her property to her husband, and they then go on "now in case I survive him I hereby appoint the following persons to be executors," and she names two persons. In the first place it is to be noticed that grammatically the only effect of her surviving him, the only limitation of the expression of her intentions in case she survives him, refers to the appointment of these two executors. There is nothing grammatically to show that she intended that hypothetical case to extend to the rest of the documents. And when you see the rest of the documents it is to my mind impossible to hold that it is made clear that these documents as a whole were intended to be contingent on the wife surviving.

I will now deal with document A, which goes on: "At the decease of my husband and myself." That in itself is a curious thing if the whole codicil was intended to be contingent on her surviving her husband. It is difficult to see why in such case she should make legacies payable at the decease of both her husband and herself, which would mean payable at the decease of the survivor of the two. But later on I find a provision of a gift to the executors of the husband, and when I look at that it appears to me

that I cannot gather that it was not intended to cover a disposition, by the husband, of his reversion after the wife's death, and therefore it was contemplating something to be done by him after her death—though it might also contemplate something done during her lifetime, and then a gift after his death to his executors. But then there follows something which to my mind renders it almost impossible to hold that these documents as a whole were intended to be contingent on the wife surviving. For in A she says "the rest of my property at my husband's decease to be divided in equal shares" in the manner she mentions. She could not have meant her property to be divided in her lifetime. She must have meant what she says—to be divided at her husband's decease, presuming he survived her. At any rate it is impossible to hold, and the onus would be on those who contended it, that these documents are to be treated as contingent.

That being so, as I have said, I see no difficulty in holding that they should be admitted to probate, for certainly the two documents can be reconciled, at any rate in part, and that is sufficient to determine that they should be admitted to probate. But without trespassing on the province of a court of construction, I must say for myself, if it be necessary to go into the point, that I see no difficulty in wholly reconciling the two documents. For example, I will deal shortly with the main features of the two documents about which doubt might otherwise arise. Bearing in mind that the documents are to be treated as being executed simultaneously, I, in the first place, see no difficulty in holding that the pecuniary legacies common to both were intended for one and the same legacy, and are not to be duplicated, though I may point out that, even if this had not been the correct view, it would not have prevented both documents from being admitted to probate, for then the legacies might be held cumulative. Take next the gift of £3,000 to Mrs. Arthur Bigge. Taking the documents together I have no hesitation in saying that the condition in B, that that gift was not to be in addition to the £3,000 already bequeathed to that lady, is to affect the bequest of that £3,000. The legacy of £2,000 to the sister, Miss Julia Townsend, is in document A and not in B. I have no hesitation in reconciling those two. The one in A is not contradicted by anything in B, and therefore takes effect. As to the residue, as my lord has said, I gather they are to be read together as meaning the same thing, and I see no difficulty whatever in holding that the residue was intended to go in thirds, and that the difficulty which might arise if you look at B is wholly removed when you look at both documents together. And I may also say that I see no difficulty in reconciling the times of payment of the residue. They do not conflict, but the time of payment is mentioned in one and not in the other. Those can be reconciled.

Perhaps I have to some extent gone beyond my province and discussed matters which ought, strictly speaking, to be left to a court of construction. I need scarcely say that so far as I have made observations with regard to questions which may properly be said to be questions of construction, I do not wish or intend to bind in any way the court before whom those questions may ultimately come for final consideration and determination. All I say is that in the present case I see no difficulty in holding that the two documents stand, and were intended to stand together, and can stand together, and as such should be admitted to probate as documents executed simultaneously. Therefore I think the appeal should be allowed.

COZENS-HARDY, L.J.—In this case Barnes, J., declined to admit the two documents called A and B to probate on the ground that they were both conditional or contingent testamentary documents intended to operate only in an event which has not happened. I entirely agree with my learned brothers that that view cannot be supported. On the construction of the documents it seems to me reasonably plain that they were not intended to take effect only in that event. If A is the governing document, for reasons which have been pointed out, the conclusion seems to me to be irresistible, and although if B alone is to be looked at there might be more doubt, I think I should arrive at the same conclusion even if I looked at B alone.

That being so, it becomes necessary to consider the second point, which Barnes, J., did not think it necessary to deal with—namely, whether these two documents, A and B, are so inconsistent that they ought to be treated as void, and not to be admitted to probate. Now, on this second point, my learned brothers are clear that both A and B ought to be proved. I feel so much doubt that if the decision of this appeal had rested with me I should desire further time for reflection. But my doubt is of no practical moment, and I will therefore only state, in a very few words, what my difficulties are. To me it is almost incredible that Mrs. Donald intended both these documents to be effective. They are not duplicates; there are very important differences between them. They are not consistent; they contain dispositions of residue which, taken separately, have different meanings. In A the residue is divided into four parts, in B into three parts. I feel the greatest possible doubt in knowing which of these two was intended to be operative. If I had to guess from internal evidence, I should be rather driven to the conclusion that it was document B, and not document A. But then it is said that, according to the evidence of Vickers, they were executed simultaneously, on one occasion, and they ought really to be regarded as one single document, or to be construed as though they had been one single document. Even so, ought not the court of construction to be told by the Court of Probate which part of the single document came first, and which second? We all know that in construing a testamentary document it is very important to know which part comes first, and which comes second. These doubts, which I have very briefly indicated, have not been removed after such consideration as I have been able to devote to this particular case.

Appeal allowed; costs of all parties, as between solicitor and client, to come out of the estate; the two codicils to be admitted to probate as executed simultaneously, it being left to the parties to agree as to the court by which their construction should be decided.

[A discussion took place as to the person to whom administration should be granted, and it was held that, as Captain Donald, the executor named in the will, had not proved (though he had intermeddled), his executor was not entitled. Eventually the grant (with the will and codicils annexed) was made to Admiral Fullerton, one of the residuary legatees named in the codicils.]

Solicitors, *Frere, Cholmeley, & Co.; Wilde, Moore, & Wigston; Booth & Smee*, for *Fitzhugh, Woolley, Baines, & Woolley*, Brighton.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) Nov. 16, 17.

JONES v. HUGHES. (a.)

Local Government—Education—School teacher—Dismissal—Notice given before Education Act, 1902, *came into force—Expiration of notice after Act came into force—Education Act,* 1902 (2 *Ed.* 7, *c.* 42), *s.* 7 (1) (c).

The plaintiff was, in 1899, *appointed head master of a national school by the then managers, who were appointed under a trust deed. The appointment was terminable on three months' notice. On the 6th of May,* 1904, *the then managers gave the plaintiff notice to determine his appointment on the 9th of August. Before that day arrived the Education Act,* 1902, *had come into operation in the district, and the county council, the local education authority, desired that the plaintiff should continue in office, and insisted that under section* 7 (1) (c) *of the Education Act,* 1902, *he could not be dismissed without their consent.*

Held, that at the date when the Education Act, 1902, *came into operation the only contract in existence was one to employ the plaintiff up to the 9th of August. On that date the contract came to an end by effluxion of time, and there was no dismissal of the plaintiff within section* 7 (1) (c) *of the Education Act,* 1902.

This was an appeal from a decision of Kekewich, J.

The plaintiff was appointed head master of the Gwaenysgor National School by a written agreement on the 3rd of July, 1899. One of the terms of this agreement was that his engagement should be terminable at three months' notice.

The site of the school was by deed-poll dated the 31st of May, 1875, under the School Sites Act, 1841, and the School Sites Act, 1844, conveyed unto and to the use of the minister and churchwardens of the parish of Gwaenysgor for the purposes of the Acts. The trusts were to permit the premises and all buildings thereon to be appropriated and used as and for a school for the education of children and adults, or children only of the labouring, manufacturing, and other poorer classes in the parish, and as a residence for the teacher or teachers of the school, and for no other purpose whatever, such school to be always in communication with, and conducted upon, the principles and in furtherance of the ends and designs of the National Society; and it was provided that the management of the school and the appointment and dismissal of the school teachers should be vested in a committee, consisting of the incumbent for the time being, his licensed curate (if the incumbent should appoint him a member), and of the churchwardens, and three other persons, being members of the Established Church and subscribers to the funds of the school of not less than 10*s.* annually; and that any vacancy on the committee should be filled up by the appointment of a subscriber qualified as aforesaid, such appointment to be vested in the incumbent for the time being.

On the 6th of May, 1904, the then rector and churchwardens, who composed the managing body, gave the plaintiff notice that they would not require his services after the 9th of August, 1904. The managers who gave this notice were not identical with the managers who appointed the plaintiff in 1899.

On the 1st of July, 1904, the Education Act, 1902 came into operation in Flintshire, that being the appointed day in that county, and the Flint County Council thereupon became the local education authority for the county. After the Act came into force the managing body, under section 6, sub-section 2, and section 11 of the Act, consisted of four "foundation managers," who were the rector and churchwardens of the parish and one other person, and two other persons appointed by the local education authority.

The plaintiff applied to the county education committee that the county council, as the local education authority, should not give the consent to his dismissal which was required by section 7 (1) (c) of the Act. An inquiry was held by a committee of the county council, with the result that the committee passed a resolution recommending the local education authority not to give their statutory consent to the dismissal of the plaintiff. The foundation managers did not attend this inquiry. As the foundation managers were taking steps to appoint a fresh master in the place of the plaintiff, he, on the 24th of August, 1904, issued the writ in the present action against the foundation managers without adding the two managers appointed by the county council, as they had taken no part in the proceedings. He claimed an injunction to restrain the defendants from preventing him from exercising his duty as master, and also a declaration that the plaintiff was master until his engagement had been duly terminated by a properly-constituted authority. On the 31st of August the plaintiff moved for an *interim* injunction in the above terms before Bigham, J., as vacation judge, who made an *interim* order until over the second motion day in the Michaelmas sittings.

On the 28th of October, 1904, the motion came before Kekewich, J., who refused to continue the injunction.

The plaintiff appealed.

By section 7 (1) of the Education Act, 1902: "The local authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:

". . . (c) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds, and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school."

Low, K.C., and *Lynn*, for the appellant.—Before the notice to leave became operative the "appointed day" had arrived. After that date the consent of the local education authority became necessary to the dismissal of any teacher under section 7 (1) (c) of the Education Act, 1902. The dismissal of this teacher took place in August, after the appointed day, and therefore the consent of the county council must be obtained.

P. O. Lawrence, K.C., and *Nutter*, for the respondents.—The plaintiff entered into a contract with the managers *quâ* managers, and this contract is not affected by a change in the personnel of the managing body. Nor is its validity affected by the Act of 1902. The dismissal was really the work of the old managing body, and the new managers have nothing at all to do with it. We also submit that this action is irregularly constituted, as the defendants are neither the managers with whom the plaintiff actually contracted, nor are they the whole body of managers.

Low, K.C., replied.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

VAUGHAN WILLIAMS, L.J.—Whatever the rights may be under the statute, it seems to me that this action, brought as it is against the four persons who are members of the board of management as it exists under the Act of 1902, is an action which ought not to have been brought. These gentlemen are not the original contracting parties and they are not the whole board of management as it exists under the Act of 1902. I think, therefore, that the action should be dismissed on this ground. Counsel for the appellant say that we ought to give leave to amend. In my judgment the case which it is said would be presented if the amendment were allowed would fail equally, and therefore there is nothing to be gained by amendment. I thought when this case was first presented to us that, inasmuch as it was a case arising with respect to a teacher of a school governed by the Education Act, 1902, it was desirable in the case of an Act of that importance that, before we delivered our judgment, we should have called to our minds the frame of the Act and the provisions which chiefly affect the relation of the management to the teachers; but I agree that a great deal of the information that we asked for, or rather that I personally asked for, does not affect this case at all. The plaintiff's claim is based upon contract, and he says that the notice given on the 6th of May, that is, two months before the Act came into force, is ineffective. It is admitted that at the moment when the notice was given it was a good notice, and that the effect of it was that at the termination of the three months therein mentioned the contract would come to an end by effluxion of time. We, unfortunately, have not the written contract before us, but the plaintiff in his affidavit tells us what the contract was, and as against him that is sufficient. We learn from the affidavit that this was a contract which could be terminated by three months' notice on either side. The three months' notice was given, and, therefore, it would seem to follow that if the plaintiff bases his claim upon the the contract he must take it as a whole and take it that the contract was determined at the end of the three months. But he says that that is not so because of section 7 (1) (c) of the Act of 1902. It is said here that the board of management are dismissing the plaintiff, and dismissing him since the appointed day without the consent of the local authority. I think that the answer to that is, that the plaintiff's term of service as a teacher came to an end on the day on which the time limited by the notice ran out by reason of a previous notice having been given for the termination of the contract in accordance with the terms of the contract. That being so, it seems to me that clause (c) of section 7 (1) has no application at all. I wish to guard myself against being supposed in this judgment to express any opinion as to what is the position of managers in respect of contracts made by the management before the Act came into force. I say nothing as to how far managers under the Act of 1902 are or are not bound by such contracts or are or are not entitled to enforce such contracts. I say nothing as to who would be the proper parties in litigation, either as plaintiffs or defendants, if a question arose as to the enforcement of a contract made by the managers before the arrival of the appointed day when the Act came into force. I wish also to say that I express no opinion as to what would be the position of a new board of management who continue to employ a schoolmaster who had been the schoolmaster before the appointed day, and continued to pay him with moneys provided by the county council, the county council knowing at the time when they provided the moneys who was the schoolmaster in fact, and that he was paid out of these moneys. As to what the effect of that might be I say nothing; I do not know. That is not the case which is presented to us. The case presented to us is based entirely upon the assumption that the contract made by the old management is the only contract which is material. That being so, it seems to me that the term of service under that contract is determined by the effluxion of time under a proper notice, and that the case of a contract so determined does not fall within the operation of clause (c) of sub-section 7 of the Act of 1902, I think that this appeal must be dismissed, and dismissed with costs.

ROMER, L.J.—Apart from the question of parties, with which my lord has dealt, I also am of opinion that the grounds upon which this application is based are insufficient, and that the plaintiff's claim fails. The plaintiff was employed under a contract made between him and the old managers of the school. Those managers while still managers, and before the Act of 1902 came into operation, gave him notice determining his services at the end of a certain period. It is not disputed that that was a valid notice rightly given. The result was that when the Act came into operation the plaintiff was employed for a term which would end at the expiration of the notice. Now, whatever be the effect of the Act upon the contract, it appears to me that the plaintiff's case must fail. Take, first, the view that by the operation of the Act the contract was rendered binding upon the new managers, and that the new managers took over the existing contracts as they stood. The only contract in that case which they took over here was a contract to employ the plaintiff till the expiration of the notice. On the expiration of the notice his term ceased. In that case the new managers had to give no further notice; they had to do nothing which could be held to be a dismissal within the meaning of the phrase as used in the Act of 1902; all that they had to do was, when the term of office came to an end according to the notice, to appoint some person whom they thought fit to fill up the vacancy. In that they would be doing nothing which was wrong, nothing of which either the county council or the plaintiff could complain. Now take the other view of the Act of Parliament, that upon the Act coming into operation the original contract terminated. It is common ground that no fresh contract was made between the new managing body and the plaintiff. Assuming, then, that matters went on as they did, and that we are to imply some contract with the assent of the county council if that be necessary, the only contract that should be implied is a contract to continue to employ the plaintiff to the end of his term. When that term came to an end he ceased to be teacher, and the managers had to employ a new master in his place. Again, they had to do nothing which would amount to a dismissal within the meaning of the Act. Again, there would be nothing of which either the plaintiff or the county council had any right to complain. Whichever view, therefore, is taken of this Act of Parliament, it is clear to my mind that the plaintiff in this case has no right whatever as against the new managing body, and that this action, even if the defect as to parties were cured, wholly fails.

COZENS-HARDY, L.J.—I am of the same opinion, and I should not add anything except for the circumstance that I desire to state my view that it is not necessary to express any opinion upon many of the points which have been argued before us. The question whether contracts entered into before the appointed day by the old managers are enforceable by and against the new managing body created by the Act is one upon which we have heard a great deal said. I desire to keep an

entirely open mind on that question if and when it comes before the court, but in my view it is wholly unnecessary to deal with the matter now. If his rights under the old contract can be enforced by the plaintiff against the new body of managers, it is in my opinion plain that they can be only the rights which were in existence on the 1st of July when the Act came into operation; but on the 1st of July the only contract which was in existence was a contract for a term expiring on the 9th of August. If, however, the rights under the old contract cannot be enforced against the new managers, still less can the plaintiff have any relief in this action. There is the further ground to which I am not able to see any answer, that the plaintiff has brought the wrong defendants before the court, and on that ground also he cannot obtain any relief.

Solicitors, *Baker & Nairne; Crawley, Arnold, & Co.*

High Court of Justice.

Chan. Div. } Farwell, J. } Feb. 7.

Ex parte THAVIE'S ESTATE. (*a.*)

Lands Clauses Act—Compulsory purchase—Reinvestment of purchase-moneys in land—Granting lease as part of purchase agreement—Expenses of reinvestment—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 81.

Where land has to be bought for the reinvestment of purchase-moneys obtained by a compulsory sale, the costs of granting a lease to the vendors of such land will not be held to be expenses incidental to reinvestment within the meaning of section 81 *of the Lands Clauses Consolidation Act,* 1845, *even where the agreement to grant such lease is a part of the agreement to purchase the land.*

Adjourned summons.

The Corporation of the City of London, under the powers conferred upon them by the Holborn Valley Improvement Act, 1864, and the Holborn Valley Improvement Amendment Act, 1867, acquired land by compulsory purchase from the trustees of the Thavie Estate, a charity established under the will of John Thavie and holding land for the purposes of its trusts. The money which represented the purchase price was in court. A summons was issued by the trustee of the charity asking for the approval by the court of an agreement whereby it was proposed to reinvest the purchase-moneys in the purchase, by the charity trustees, of freehold lands on the east side of Leather-lane in the City of London, and for payment out of court to complete the purchase. The agreement, for which approval was desired, provided that the purchasers (the charity trustees) should grant to the vendors a lease of the said land, at a ground-rent, for a term of years, and a question arose in chambers as to the costs of granting this lease.

For the trustees of the Thavie Estate it was contended that section 81 of the Land Clauses Consolidation Act, 1845, applied to the costs of granting a lease to the vendors of the property bought with the money in court when reinvested. It was admitted that the costs of the conveyance in fee of such property fell within the section; and that the costs of such leases as the present one had been paid in some previous cases as being costs incidental to conveyance.

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

The master decided that the costs of granting a lease to the vendors of the property in Leather-lane should be paid for by the city corporation as part of the costs of the conveyance to the Thavie trustees.

Owen Thompson, for the plaintiffs, the Thavie trustees, cited *Ex parte The Governors of Christ's Hospital*, L. R. 20 Eq. 605; and *Ex parte The Vicar of Sawston*, 6 W. R. 492, 27 L. J. Ch. 755.

Baker, for the respondents, the Corporation of London.

FARWELL, J., in giving judgment, said: This is a question arising on the intepretation of the Lands Clauses Consolidation Act, which I think has already been settled. In spite of cases where these costs are said to have been allowed, I should never, apart from the decision of the master, have had any doubt that the costs of granting a lease to the vendors of the property in this instance could not be construed as an expense incidental to the reinvestment of the purchase-moneys obtained from the Corporation of the City of London.

Master's decision reversed.

Solicitors for the plaintiffs, *Pontifex, Hewitt, & Pitt.*

Solicitor for the defendants, *The City Solicitor.*

Chan. Div. } Swinfen Eady, J. } Jan. 21, 23, 24, 25, 26; Feb. 18.

SIRDAR RUBBER CO. (LIMITED) v. WALLINGTON, WESTON, & CO. (*a.*)

Patent—Infringement—Combination—Subject-matter—Repair.

The defendants made by way of repair a new rubber tyre for an old patent rim of the plaintiffs and fitted it into the rim to replace the previous rubber tyre, which was worn out. This was done bonâ fide *by way of repair. The plaintiffs admitted that anyone was entitled to make and sell rubber tyres to fit the rims. The infringement alleged was placing the tyre in the rim.*

Held, it is a question of fact in each case whether the work which has been done may fairly be termed a "repair," regard being had in each case to the exact nature of the invention.

Where a subordinate integer is specified and claimed, and a larger combination, of which this integer is part, is also claimed, the patentee is at the peril of justifying the combination, as matter which ought properly to form the subject of a patent of invention; and he does not discharge this burden where there is no novelty or invention in the larger claim, but the combination is merely an obvious one if the subordinate integer is to be used at all.

Action for infringement of a patent.

Moulton, K.C., and *Walter*, for the plaintiffs.

Bousfield, K.C., and *W. Neill*, for the defendants.

SWINFEN EADY, J., in giving judgment, said: The plaintiffs claim an injunction to restrain the infringement of a patent, and damages. The patent in question is No. 11,686 of 1900, granted to the plaintiff, James Mecredy MacLulich, for "Improvements relating to rims and tires for vehicle wheels." The patentee claims to have invented a wheel-rim of a particular shape, intended to receive a solid india-rubber tyre. The width of the mouth of the rim, or the space between the inner edges of the flanges, is

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

approximately the same as the width of the base; the flanges project outwardly from the base, and then return the same distance inwardly; the inner sides of the flanges are flat, and of equal length; or, as the patentee says, resemble in cross-section the two equal sides of an isosceles triangle. The rubber, to fit the tyre, is of such a shape in cross-section that under ordinary pressure it will not over-hang or project laterally beyond the edges of the flanges, and accordingly the patentee claims that when under pressure it will not be cut or injured by being pressed against the unyielding metal edge, but will have free access within the rim; and, moreover, the tire will not be pinched by the edges of the flanges of the rim as in Clincher tyres. The patentee also claims that with a tyre so shaped inextensible wires or bands for securing the tyres to the rims are unnecessary, and he is thus able to dispense with what is frequently a cause of injury to, or destruction of, the rubber.

The defendants, who are rubber manufacturers, denied infringement, and disputed the validity of the patent on the usual grounds. The defendants have not made or supplied any rim. They have made by way of repair a new rubber tyre for an old patent rim of the plaintiffs, and they have fitted it into the rim to replace the previous rubber tyre, which was worn out. It appears that this work was in fact actually done for the plaintiffs, although the person sent with the old rim did not disclose the plaintiffs' name. The plaintiffs admit that the defendants are entitled to make and sell rubber tyres of any suitable section to fit their rims; but they contend that the defendants cannot fit them into the rims, even by way of repair, as by so doing they make the combination claimed in the second claiming clause of the patent and infringe the patent.

The specification does not particularly describe and ascertain the nature of the invention, and the manner in which it is to be performed.

In substance, the plaintiffs' claim is for a rim of a new shape and in combination with a tyre to fit. No claim is made to the tyre except in combination with the rim. Solid rubber tyres have been made of very numerous patterns, and it is obvious that a slight variation of the section of rubber could not form subject-matter of a patent. In my opinion, the same may be said with regard to rims.

The plaintiffs' patent is invalid for want of novelty. If the patent is invalid there is an end of infringement; but, assuming the patent to be valid, have the defendants infringed it, and do they threaten and intend to infringe it in the future? The defendants have supplied a new rubber tyre and inserted it into an old rim of the plaintiffs' to replace the old tyre worn out. This was done *bonâ fide*, by way of repair. The plaintiffs contend that this is an infringement of their patent, although they concede that any one is entitled to make and sell rubber tyres to fit the rims. The infringement alleged is placing the tyre in the rim. This is done in a way which is old, and by use of machinery which is old, and by which all solid tyres of this kind are placed in metal rims. Have the defendants infringed the patent? In the recent case of *Dunlop Pneumatic Tyre Co. (Limited)* v. *David Moseley & Sons (Limited)*, 52 W. R. 454, [1904] 1 Ch. 612, 621, Cozens-Hardy, L.J., said: "I think, speaking for myself, that there may be a third class of cases in which the supply by the defendants might be perfectly lawful—I mean for the purpose of repair. The word 'repair' is no doubt a difficult one to construe, but I do not think that *Dunlop Pneumatic Tyre Co. (Limited)* v. *Neal*, 47 W. R. 632, [1899] 1 Ch. 807, justifies the construction which was put upon it by the appellant's counsel. I certainly doubt—I will not say any more than that—whether the holder of a licensed tyre may not replace a worn-out cover without being guilty of an infringement of the patent. It is not necessary to decide that point now, and I only desire to keep that point open for future consideration." I fully appreciate the difficulty felt by Cozens-Hardy, L.J., in construing the word "repair," but, in my opinion, it is a question of fact in each case whether the work which has been done may fairly be termed a "repair," regard being had in each case to the exact nature of the invention. The purchaser of a patented article has a right to prolong its life by fair repair, but he has not any right to obtain, without licence from the patentee, a substantially new article, made in accordance with the invention, retaining some subordinate part of the old article, so that it may be said that the combination is not entirely new. Such a retention of an old part would be colourable only, and would not prevent the article from being substantially a new article, instead of being substantially a repair of the old one. This was the case of *Dunlop Pneumatic Co. (Limited)* v. *Neal*, where North, J., held that the tyre was really a new tyre; nothing was left of the old tyre but the wires, and one of these had been broken and was mended by the defendants.

In the present case, assuming validity, the plaintiffs' real invention is a metal rim of a particular shape, to receive a rubber tyre; the soft wearing part is the rubber tyre, and in the nature of things the rim is calculated to wear out several tyres. Unless the purchaser is able to have new rubbers placed in the rim, he cannot obtain the use of the patented article for the fair period of its life. This is not a repair amounting to reconstruction, and a new article, but a fair repair; the old metal rim, the distinguishing feature of the invention, being retained not colourably but because essential and practically as good as new, and a fresh rubber put to replace the old one worn out. In my opinion, there has not been any infringement.

It may, however, be further urged that in the present case the patent also claims as new "a wheel rim and solid rubber tyre constructed substantially as described, and that the defendants, by fixing the tyre in the rim, have assembled the parts, and made the plaintiffs' combination." But I cannot in any case regard this claim as valid, even if the patent were otherwise valid as regards the rim. No doubt there may be a valid patent for a combination, even though all the parts be old, but there must be novelty, invention, and merit in the combination to support validity. Where the only invention is in the form of one part of an article or machine, which part is separately claimed as an invention, the scope of the patent cannot be enlarged by claiming that part in every combination in which it can be used, however obvious. The patentee, having claimed the rim, cannot extend the scope of the patent by claiming the rim in combination with a rubber tyre, as that is the only and obvious manner in which the rim is intended to be used, and there is no invention or merit in the combination apart from the novelty in the shape of the rim itself. If the patent be restricted to the form of the rim, it is obvious that the defendants have not infringed, and as that is all that the plaintiffs can claim to have invented they cannot extend the ambit of the patent by an additional claim for a combination and so bring within it something as an infringement which would not have been an infringement if the patent had been for the rim alone. It was pointed out by Lord Cairns in *Clark* v. *Adie*, 26 W. R. 45, [1877] 2 App. Cas. 315, 321, that a patent may be granted for a larger invention and also for certain subordinate integers properly specified and claimed; but then the patentee "is, as

was said by the Lords Justices, at the peril of justifying those subordinate integers as themselves matters which ought properly to form the subject of a patent of invention." I apprehend that the converse of this proposition also holds true, that, where a subordinate integer is specified and claimed and a larger combination of which this integer is part is also claimed, the patentee is at the peril of justifying the combination, as matter which ought properly to form the subject of a patent of invention; and he does not discharge this burden where there is no novelty or invention in the larger claim, but the combination is merely an obvious one, if the subordinate integer is to be used at all. The result is that the action fails and must be dismissed with costs, except that the plaintiffs must have the cost of the issue of the true and first inventor, and there will be a set-off.

Solicitors, *Shaen, Roscoe, Massey, & Co.; Collyer-Bristow, Hill, Curtis, Booth, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) Jan. 20.

TURNER & SON *v.* WILLIS. (*a.*)

Solicitor and client—Past costs—Oral agreement to pay lump sum—Account stated—Bill of costs.

Where a solicitor has a bill of costs against his client on the one hand, and the client on the other hand has a claim against the solicitor for work done not of a professional nature, then if the solicitor and client meet and strike a balance, in favour of the solicitor, that is not an agreement by the client to pay his solicitor a lump sum which would require to be in writing within the meaning of the Solicitors' Remuneration Acts.

This was an appeal from a decision of his Honour Judge Bacon in an action tried at the Whitechapel County Court, Middlesex, to recover the sum of £35 due on an account stated.

The plaintiff firm of solicitors, of which Mr. Alfred Turner was the surviving partner, had executed legal work for the defendant over a period of years extending from 1881 to 1895. No bill of costs was rendered until the 23rd of August, 1900, when an unsigned bill of costs was sent with a letter to the defendant. The amount of the said bill was £50 0s. 7d.

On the 24th of August, 1900, the defendant called upon the plaintiffs, and at the trial of the action Mr. Alfred Turner alleged that the items in the bill were gone into by both parties, and after making deductions for moneys owed by the plaintiffs to the defendant for work done not of a professional character, the account was settled at £35; in accordance with this settlement Alfred Turner, sen., since deceased, in the presence of the witness, marked the bill as follows: "£35 in settlement." The bill was produced. The plaintiffs addressed several letters to the defendant requesting payment, and in a letter of the 9th of April, 1901, the defendant admitted indebtedness.

At the trial the defendant's counsel upon the conclusion of the plaintiffs' case submitted that there was no case for him to answer, and, the learned county court judge concurring, no evidence was called for the defence. The judge non-suited the plaintiffs on the following grounds: (1) "That the letter of the 9th of April, 1901, was not such an acknowledgment as implied a promise to pay, and that the defence under the Statute of Limitations prevailed." (2) "That the agreement sued upon was a verbal agreement by a client to pay his solicitor a lump sum in discharge of past costs, and that such agreement was not binding on the client, not being in writing."

The plaintiffs appealed.

Nield, for the appellants.—I admit that the letter of the 9th of April, 1901, does not take the debt out of the statute, but the time must be held to run from the 24th of August, 1900, when the defendant admitted that £35 was due on an account stated: *Ashby* v. *James*, 11 M. & W. 542. A bill of costs, although not signed (Solicitors Act, 1843, s. 37), and an agreement to pay a solicitor a lump sum, although not in writing within the requirements of section 8 of the Solicitors' Remuneration Act, 1881, may nevertheless be judicially noticed for other purposes than to found an action (*vide In re Pender*, 16 L. J. Ch. 25; *In re Russell, Son, & Scott*, 30 Ch. D. 114); thus courts have recognized an unsigned bill of costs to constitute a good set-off.

Counsel also referred to *In re Billings*, 5 Dowlings Prac. Cas. 126.

Warde, for the respondent.—No bill of costs has been delivered, because this summary of work done cannot be termed a bill of costs, and, therefore, the plaintiffs cannot sue on an account stated. *Eicke* v. *Nokes*, 1 M. & R. 359; *Brooks* v. *Bockett*, 9 Q. B. D. 847; *In re West, King, & Adams*, 40 W. R. 644, [1892] 2 Q. B. 102; and *In re Russell, Son, & Scott* are in my favour. The whole object of the Solicitors Acts would be null and void if a solicitor could mark on this bill of costs, assuming it to be a bill of costs at all, "£35 in settlement." There is nothing to show that the account was actually settled at £35.

Lord ALVERSTONE, L.C.J.—There must be a new trial. I do not propose to express a final opinion as to what the rights of the parties may be when the facts are ascertained, because it seems to me that a good deal is to be said on both sides as to what, as a matter of fact, the alleged account stated actually is. If this is only a claim made by the solicitors, it is not a bill of costs at all. If on the other hand it is a good account stated, the authorities which have been cited to us would seem to show that an agreement, where the claim litigated on consists on the one side of solicitors' costs and on the other of costs incurred by the solicitor for work done by the client, need not be in writing. The learned county court judge in dealing with this matter of an account stated practically decided this particular case on the second ground set out in the notice of appeal—viz., "that the agreement sued upon was a verbal agreement by a client to pay his solicitor a lump sum in discharge of past costs, and that such an agreement was not binding on the client, not being in writing." As at present advised, if this bargain was a bargain with respect to a claim of £50 by the solicitor on the one hand, and on the other a cross-claim by the client for a sum of money, and the parties agreed to settle for £35, that would not be the kind of bargain required to be in writing within the meaning of the section with which the learned county court judge has been concerned. The only other point is that the letter of the 9th of April, 1901, did not take the original claim out of the Statute of Limitations; this is now admitted. That being so, I think there ought to be a new trial, because in my opinion the real rights of the plaintiffs cannot be ascertained until the true facts have been dealt with. It cannot be taken that the true state of facts was such as was deposed to by the one witness who was called. I do not think we can deal with this case on the facts as proved. We

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

think there must be a new trial. Costs will abide the event.

KENNEDY, J.—I agree. No point arises on the first question. The second ground was that the agreement sued upon was a verbal agreement by a client to pay his solicitor a lump sum in discharge of past costs, and that such agreement was not binding on the client, not being in writing. I think that the objections to the claim would have been good objections if, as a matter of fact, the learned county court judge had decided the question of fact—viz., that the account stated consisted solely of solicitors' claims purported to be settled on that bill. It seems to me the reason of there being a new trial is this—in the evidence as it stood, after hearing one witness the learned county court judge non-suited the plaintiffs. On that evidence it may be argued that the account was not constituted solely of this solicitors' bill, but consisted of a *contrà* account which was taken into consideration, and the account alleged to be stated was the result not only of a claim by the plaintiffs settled by the agreement, but of claims which had nothing to do with a solicitor's bill at all. And I think for the distinction there is ground in the decision which is cited by Bullen and Leake under the head of "Account Stated"—viz., the case of *Scadding v. Eyles*, 9 Q. B. 858. The declaration claimed for work done, and, secondly, on an account stated. To the account stated it was pleaded "that the account therein mentioned to have been stated was so stated solely of and concerning the said debt (*i.e.*, on account of work done as solicitor), and not otherwise." And what the court held was that under those circumstances the plea was a perfectly good plea. The plaintiffs' counsel seemed to have assumed from something that fell from the learned judge that the defendant might reopen the account if some only of the items related to law proceedings, for he says: "It cannot be said if, in point of fact, the accounts had been cast up and a balance struck, a defendant might reopen them if one item related to law proceedings." The question of fact remains to be tried, and to be tried on the basis of my lord's decision.

RIDLEY, J.—I am of the same opinion.

New trial ordered.

Solicitors for appellant, *Metcalfe & Storr.*

Solicitor for respondent, *Geo. Vandamm.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) Nov. 3, 18.

IMPERIAL AND GRAND HOTELS CO. *v.* CHRISTCHURCH GUARDIANS. (*a.*)

Poor law—Rating—Appeal—Time—Poor Relief Act, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Act Amendment Act,* 1864 (27 *&* 28 *Vict. c.* 39), *s.* 1.

During the currency of a rate certain ratepayers appealed against an assessment, and their appeal was dismissed by the valuation committee. They further appealed to quarter sessions, when their appeal was allowed.

Held, that quarter sessions had jurisdiction to entertain the appeal, notwithstanding that two meetings of the committee and one of quarter sessions had been held before the notice of objection was given, as it was not shown that the appellants had been guilty of unreasonable delay.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Case stated by the Recorder of Bournemouth on an appeal from the Christchurch Assessment Committee by the Imperial and Grand Hotels Co. (Limited) against a poor rate.

The recorder allowed the appeal and reduced the assessment.

The case set out the following facts: The rate was made on the 21st of April, 1903, to provide for expenses incurred before the 31st of March, 1904, and was made payable in two instalments on the 1st of May and the 1st of November, 1903. The assessment committee held a meeting for the purpose of hearing objections to the valuation list on the 15th of May, 1903, and at this meeting no objection was made by the appellants.

On the 26th of October, having previously in August paid the instalment due on the 1st of May, the appellants, the hotel company, gave notice of objection to the list, which objection was duly heard by the assessment committee on the 12th of November, when the appellants failed to get relief.

Due notice of appeal to quarter sessions was given, and the appeal was heard on the 2nd of January, 1904. It was objected on behalf of the respondents that there was no jurisdiction to hear the appeal, inasmuch as the appellants had not appealed to the next quarter sessions as required by section 4 of the Poor Relief Act, 1743 (17 Geo. 2, c. 38).

The recorder overruled the objection, and after hearing the appeal reduced the assessment, but inasmuch as the appellants had not taken steps, as they might have done, to appeal against the rate, refused to order the return of the first instalment.

Ryde and *Francke*, for the appellant guardians.

Clavell Salter, K.C., and *Haydon*, for the respondents.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Lord ALVERSTONE, L.C.J., read the judgment of the court.—This is an appeal on a case stated from a decision of Mr. Kinglake, the Recorder of Bournemouth, and raises a question of some difficulty under the Poor Relief Act, 1743, and the Union Assessment Act, 1862, and the Amendment Act, 1864. The rate appealed against was made on the 21st of April, 1903, to provide for expenses up to the 31st of March, 1904, and was payable by two instalments, one on the 1st of May, and the other on the 1st of November, 1903. Meetings of the assessment committee were held on the 15th of May, the 15th of August, and the 12th of November. Courts of quarter sessions were held on the 27th of June and the 27th of October. The first notice of objection was given by the appellants to the assessment committee on the 26th of October; the objection was heard and determined on the 12th of November, and the notice of appeal to the sessions held on the 2nd of January, 1904, was given on the 5th of December, 1903. The appellants in the month of August, 1903, paid the first instalment due on the 1st of May.

Objection was taken to the jurisdiction of the recorder upon the ground that the appeal to the January quarter sessions was too late, not having been brought to the next quarter sessions within the meaning of section 4 of 17 Geo. 2, c. 38. It is clear from the authorities, and in fact it is not disputed, that up to the passing of the Union Assessment Committee Act Amendment Act, 1864, the appeal would have been too late. There are numerous authorities which establish that an appeal against a rate must be brought at the next practicable sessions

at which an appeal could be lodged: *Rex* v. *Sussex Justices*, 15 East 206; *Reg.* v. *West Riding Justices*, E. B. & E. 73; and numerous other cases. Section 1 of the Union Assessment Committee Act Amendment Act, 1864, provides that no person shall be allowed to appeal against a poor rate unless he shall have given to the assessment committee notice of objection against the valuation list, and shall have failed to obtain such relief in the matter as he deems just. And the section further provided that "After notice given at any time in the manner provided by the said Act with respect to objections, the committee shall hear [such objections] with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly." It was contended on behalf of the respondents that the proviso to this section which makes it a condition precedent to an appeal that an appellant shall have given notice of objection to the assessment committee and shall have failed to obtain relief, had not affected the duty of the appellants under section 4 of the Act of 1743 of bringing his appeal at the next practicable sessions after the publication of the rate, and that inasmuch as the appellants had taken no steps until the 26th of October, and had allowed the meetings of the assessment committee of May and August to go by, and that no explanation was given to account for the delay, the appellants had failed to comply with the provisions of the Act of 1743. It was further contended that, inasmuch as the recorder had found the appellants had not taken steps which they might have taken to object at an earlier date, he had, in effect, decided that the delay in going to the assessment committee and the consequent postponement of the appeal showed that the appellants had not brought the appeal to the next practicable sessions. There is a great deal of force in these contentions, and there is no doubt that the language in some of the judgments which have been given shows that an appellant ought to be prompt in raising objections. For instance, Bovill, C.J., in *Reg.* v. *Biggleswade Union*, 21 L. T. 494, in deciding in favour of an appellant, said there was nothing to show that the appellant took more than a reasonable time before taking any step. But we are dealing with a question of jurisdiction. Whatever the true view may be in a case in which it could be proved that as a matter of fact the appellants had unreasonably delayed going before the assessment committee, and had thereby exceeded the time allowed for appealing, we are unable to say that the recorder had no jurisdiction to entertain this appeal. The Act of 1743 provided that the appellant should appeal to the next general or quarter sessions. These words, as we have already said, have been construed to mean the next practicable sessions. Section 1 of the Act of 1864 contains no similar direction or limitation. Reliance was placed by the appellants, the Imperial and Grand Hotels Co., upon the words in section 1 of the Act of 1864, "at any time," following the words "after the notice given," but we doubt whether that argument is entitled to much weight because these words were undoubtedly necessary to extend the limit of twenty-eight days during which, under section 18 of the Union Assessment Act, 1862, a person could object to the valuation list, and also to give the committee power to alter the list notwithstanding approval under the same Act. But apart from this argument the section contains no direction or limitation similar to that contained in the Act of 1743, that the appellant shall lodge his objection before the next or any particular meeting of the assessment committee; and looking to the practical working of the matter we think it quite possible that the Legislature recognized that these objections could not be dealt with as speedily as appeals against poor rates under the old law, especially having regard to the extended powers of objection which were conferred by the Union Assessment Committee Acts of 1862 and 1864. Further, the power of the committee to alter a current rate would seem indirectly to limit the time within which objections can be effectively taken. We express no opinion as to what may be the true view to be taken in a case in which the whole period for which the rate was made was allowed to go by, or where, as we have said, persons have been guilty of unreasonable delay in giving notice of their objections. But we are unable to say, in this case, in which the objection was lodged and determined and the appeal brought within the period of the current rate, that the jurisdiction of the court of quarter sessions was ousted because the appellant might have lodged his objection at one of two earlier meetings of the assessment committee. Upon the whole, therefore, we are of opinion that the recorder was right in hearing the appeal and in declining to give effect to the preliminary objection.

The other point raised in the case must, in our opinion, be answered in favour of the hotel companies. The recorder, having reduced the rateable value from £1 500 to £1,325 in the one case and from £2,050 to £1,530 in the other, ordered that the order for the repayment of the excess should only operate in respect of the second instalment of the rate, and should not apply to the first instalment which the hotel companies had paid in August. Assuming that he could entertain the appeal as we have already decided, he was bound, having regard to the provisions of section 8 of the Poor Rate Act (41 Geo. 3, c. 23), to order repayment in respect of the whole rate. We therefore think that the appeal of the assessment committee must be dismissed, with costs, and the order varied as above directed, and the appeal of the Imperial and Grand Hotels Co. should be allowed, with costs.

Solicitors for respondents, *Lovell, Son, & Pitfield*, for *Druitt & Druitt*, Christchurch.

Solicitors for appellants, *C. F. Ingram*, for *C. J. Lacey*, Bournemouth.

Prob. Div. & Adm. Div. / Admiralty. — Nov. 22, 23, 24.

"THE GUSTAFSBERG." (*a.*)

Ship—Collision—Regulations for Preventing Collisions at Sea, 1897, *art.* 25—"*Narrow channel.*"

Four red conical lighted buoys having been placed approximately in the central line of Sea Reach, in the River Thames, to mark the northern side of the deepest water, a collision occurred between the plaintiffs' vessel, which was proceeding up, and the defendants' vessel, which was coming down the river, the collision occurring on the plaintiffs' starboard side of the channel thus marked.

The Court held that the defendants were in fault, inasmuch as the four red conical lighted buoys indicated a "narrow channel" between them and the buoys to the south of them, within the meaning of article 25 of the Regulations for Preventing Collisions at Sea.

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Action.

The facts fully appear from the judgment.

Laing, K.C., and *Dawson Miller*, for the plaintiffs, the owners of *The Rubis*.

Aspinall, K.C., and *Stubbs*, for the defendants, the owners of *The Gustafsberg*.

GORELL BARNES, J.—On the 3rd of August, 1904, about 10 p.m., the twin-screw steamship *The Rubis*, of 633 tons gross register, manned by a crew of sixteen hands, was proceeding on a course of N.W. by W. magnetic, up Sea Reach of the river Thames to the south of, and above, No. 1 and below No. 2, red conical gas buoys, on a voyage from Ostend to Tilbury with general cargo and one passenger. *The Gustafsberg* is a Swedish steamer of 1,155 tons gross, and she was on a voyage, with a crew of twenty hands and a coasting pilot or waterman, from the Surrey Commercial Docks to Blyth, in ballast. These two vessels met in collision at about the place mentioned by the plaintiffs in their preliminary act, the contact being between the stem of *The Rubis* and the port side about amidships of *The Gustafsberg*, at an angle which has been in dispute in this case.

Now, the broad feature of the plaintiffs' case is that they had the masthead and green lights of *The Gustafsberg* a little on their port bow at first, and that the masthead and green lights of *The Gustafsberg* drew ahead and on to the starboard bow, and that after they had done so *The Rubis*, having arrived off No. 2 buoy, and when the vessels were starboard to starboard, altered her course from N.W. by W. ½ W. to W.N.W., for the purpose of bringing herself on to the slightly altered course necessitated by the different line of the buoys, and gave two short blasts at the time with her whistle, and steadied on the changed course. Then the case is shortly this: that when the vessels had continued to approach and were green to green *The Gustafsberg* ported across the bows of *The Rubis*, and the moment that was seen the engines of *The Rubis* were reversed full speed, and three short blasts were blown twice with the whistle. The short point, therefore, of their case is that the vessels were at the material time green to green, and that the fault lay with the defendants in porting into the plaintiffs' vessel.

On the other hand, the defendants' case as pleaded is a little more complicated in statement, but the substance of it is that when first they made out from *The Gustafsberg* the lights of *The Rubis* she was a little on their starboard bow and showing all her lights; in other words, that she, *The Gustafsberg*, was ahead of *The Rubis*. The defendants' case then is that *The Rubis* shut in her green light, and that thereupon *The Gustafsberg's* helm was ported slightly, and the vessels became port to port for a short time; and that afterwards *The Rubis* starboarded, and by starboarding brought about this collision, opening her green light on the port bow of *The Gustafsberg*. The evidence from *The Gustafsberg* is that various steps were taken by porting, and porting more, and slightly altering her speed, but that this collision took place. There is a point made in the pleadings about *The Rubis* being hailed to stand by, and proceeding on her way without ascertaining whether *The Gustafsberg* required assistance, but nothing has come of that and nothing was said about it in the addresses of counsel to the court. To go back for a moment to what those cases substantially mean—in short they mean, from the plaintiffs' point of view, that the vessels were green to green and *The Gustafsberg* ported into *The Rubis*, and from the defendants' point of view that they became red to red and *The Rubis* starboarded improperly.

Now, there is no doubt that the defendants' vessel, *The Gustafsberg*, ported and ported more and hard a-ported, and that that was going on for some time. There is no doubt about that part of the case, and therefore as far as the helm action is concerned the only question in the case appears to be whether the plaintiffs' vessel's helm was starboarded. I have come to the conclusion that it was not. I think there are one or two points which lead me to that conclusion, and that the first is that the plaintiffs' master gave his evidence in a most excellent manner, and I see no reason for doubting his version of the matter. In addition to that the plaintiffs' vessel's course and the defendants' vessel's course were slightly crossing—not much, it is true, but slightly—and taking the account given by the defendants as to the seeing of all the lights of *The Rubis* on the starboard bow, and also the evidence given by the defendants as to there being an intention on the part of *The Gustafsberg* to pass out of the channel which is between the lights and the south shore at a lower point than where this collision happened, it seems to me that these considerations fortify the view which has been taken in this case by the master of the plaintiffs' vessel. Then there is a question as to the damage. The plaintiffs' say, and a surveyor is called for that purpose, that the blow was a blow leading aft on *The Gustafsberg*, at an angle of five or six points, and the defendants maintain, and a surveyor is called for that purpose, that was a blow leading forward at an angle of something like seven points forward. There has been a good deal of conflict about it. I have examined, and the elder brethren have examined, the photographs, and I have heard the evidence. Upon the photographs themselves it is extremely difficult to arrive at any definite conclusion, but my own impression is that the evidence given by Mr. Dudgeon was entitled to greater weight, in the circumstances, than that given by the surveyor called by the defendants; and I can see nothing in that damage which is inconsistent with the view that this was a blow leading from forward to aft. Mr. Dudgeon's notebook contains an expression of opinion that the angle of the blow was about a right angle, leading from forward, when he first made an examination, but afterwards, on further inspection, he modified that somewhat, maintaining that the blow led slightly more from forward than his first impression had led him to think. The result seems to be that the porting of the defendants' vessel admits of a conclusion that that was sufficient alone to produce the collision, and that the defendants' vessel must be held to blame for porting in the circumstances. In addition to that it is quite clear to my mind and the Elder Brethren, too, that the defendants' vessel, having regard to the danger that existed, was not justified in keeping on as she did, and ought to have stopped and reversed her engines as soon as any danger became manifest. On both those grounds that vessel must be held to blame.

This leaves for consideration one point under the 25th article of the sea rules, because it has been agreed on both sides that the collision in this case took place at a spot where the sea rules became applicable, being a little lower down than the line across where the Thames rules cease to apply. Now, the merits of the case, to my mind, do not depend upon the application of these rules at all, because it is quite clear that on this fine, clear night, when these vessels saw each other for a long distance, they each were navigating, in fact, for the other, whatever view you take of the rules, just as if they were in the open sea. So, on the merits of the case the rule has no practical application; but at the

same time there it is, and if it is broken I suppose it would be difficult to say that the vessel which broke it was not by any possibility in fault, because if she had not been in the position where she was there would have been no collision. Still, it is clear that on the merits there is very little application. However, it has to be dealt with, and the only point necessary for my decision is how far the rule affects the plaintiffs' vessel. I say that for this reason: Whether the defendants are right or wrong with regard to their vessel the starboard hand or narrow channel rule does not matter, because I have found that they were to blame for another reason. It is necessary to see, however, how far that rule affects the position of the plaintiffs. Now, the 25th article provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel; and of course it is necessary in this case to see what the navigation at the place of this collision is. It is in a wide part of Sea Reach. Speaking, of course, generally, it is opposite Southend, and before the alteration made by the Trinity House—before the placing of the lighted gas buoys—there were buoys on the south side, one of these being the Jenkyn Buoy, which is now also a gas buoy. There were on the north side of the channel the black buoys—the West River Middle and the River Middle—and there was also the buoy known as the East River Middle, which, as I understand, was a spherical gas buoy; and between the rows of buoys on the north side and the south side the traffic passed; but a short time before this collision the Trinity House placed four gas buoys known as 1, 2, 3, and 4, which are now shown on the chart, and took away the light from the buoy called the East River Middle. Those gas buoys were placed in the position shown on the chart, and a notice was published on the 6th of May as follows: "It is intended on or about the 7th of July next to place four red conical lighted buoys to mark the northern side of the deepest water through Sea Reach. The width of the deepest water is at present about 650 feet. The buoys will be named Sea Reach, numbered from seaward one to four, and will lie in about twenty-six feet at low water spring tides." Then follows approximately the situation of the buoys, and the notice further says: "The light on the East River Middle buoy will at the same date be discontinued, and the spherical buoy thereat (painted in black and white horizontal bands) will be surmounted by a diamond top mark. Further notice will be given when the above changes have been made." I understand those changes were made on or about the 7th of July, some time before this collision took place. Now, the buoys that are so put are not only lighted buoys, but they are conical buoys of uniform colour; and that appears to be done in accordance with the uniform system of buoyage on the coast of England, particulars of which are set out in the Channel Pilot at p. 29. The second of the statements of information—I avoid saying rules—as to this system is that "the term 'starboard hand' shall denote that side which would be on the right hand of the mariner either going with the main stream of flood or entering a harbour, river, or estuary, from seaward; the term 'port hand' shall denote the left hand of the mariner under the same circumstances. (3) Buoys showing the pointed top of a cone above water shall be called Conical, and shall always be Starboard Hand buoys as above defined. (4) Buoys showing a flat top above water shall be called Can, and shall always be Port Hand buoys as above defined." I need not refer to 5 and 6—they refer to another class of buoy—but No. 8 says: "Starboard Hand buoys shall always be painted in one colour only. (9) Port Hand buoys shall be painted of another characteristic colour, either single or parti-colour." So that, apart from any legal considerations for the moment we have four lighted conical buoys of uniform colour on the right-hand side as vessels go up between those buoys and the south side, and we have on the south side several buoys which are can-shaped—for instance, there is the black and white Chequer, the East Blyth, the Yantlet, &c., all can buoys and parti-colour—and anybody seeing those buoys with knowledge of the locality, guided by the uniform system of buoyage adopted on the coast of England, would at once treat the passage between those two sets of buoys as being a passage on the north of which are starboard hand buoys and on the south port hand buoys, within the meaning of the terms to which I have just referred in that state-of the buoyage system. It seems to me that the effect of what has been done is that, in accordance with the recognized practice of buoyage, there is indication by means of the buoys of a narrow channel, within the meaning of the 25th article, to the southward of the red conical buoys, and this is acted upon. We have had evidence to show to what extent already it has been thoroughly acted upon, and it seems to me that it would not be at all reasonable, at night at any rate—I am dealing with a night collision, and it is not necessary to go beyond the particular case, so far as my decision is concerned, though my observations may be more general—that it is not at all necessary to hold that a vessel with those distinct starboard hand buoys is to be held to be wrong for treating the southern part of the river between those buoys and the buoys on the southern side as a narrow channel. The cases of *The Correnie*, [1894] P. 336, notes at p. 338; *The Minnie*, [1894] P. 336; and *The Oporto*, [1897] P. 249, are not directly in point, in a case of this character, because there are differences which have been pointed out in argument, and to which I need not again refer: but they do go to this extent, that, physical conditions remaining the same, the alteration in lights and other marks which affect the usual way of navigating a particular part does have the effect of making what may be termed a large piece of water a narrow channel all over it—a narrow channel because of the convenience which the marking and lights give for the purpose of navigation. What the precise effect of this is upon the northern piece which still remains between those lighted buoys which are at present on the northern side of the deepest channel and the black buoys—namely, the West and East River Middle, I do not at present feel quite clear; and it is not necessary I should decide whether that is a separate narrow channel or not. There is however, this difficulty, which I pointed out to Mr. Laing in the course of his argument, and which induced him, I think, to maintain that his real case was that his vessel was rightly treating the part of the river to the southward of the buoys as a narrow channel, if used by vessels coming down or going up it. There is this difficulty—that having two sets of starboard hand buoys going up river, if vessels going up river acted in accordance with the recognized practice they would treat those buoys as starboard hand buoys; but vessels coming down should not treat them as being other than they are shown by their form to be, and would require to keep right away to the south side of the river, acting for the port hand buoys. There is that difficulty, and it may well be—I am not sure whether it is or not—that this has the effect of leaving the greater part of the navigable water for vessels going up, and the smaller part of the navigable water for vessels going down. I am not so sure at the moment what

the exact position is, and it is not necessary I should determine that; but what I think is clear is that if vessels bound by the practice and by the reason of the thing do use the south channel, guided by the starboard hand buoys on the one hand and by the port hand buoys on the other, they do treat, and are right in treating, that as a narrow channel. I have asked the Elder Brethren who assist me what their view about that point is, and they consider that as matters stand, and as they stood at the time of this collision, vessels using this channel to the southward of the lighted red buoys do treat, and are right in treating, it as a narrow channel. It may be that the central part of this navigable water of the Thames might have been indicated by buoys of a description which were neither starboard hand nor port hand buoys. It is not a matter upon which I feel competent to express an opinion, but it may possibly be that, having regard to certain difficulties which the facts of this case have brought out, the Elder Brethren of the Trinity House may consider whether matters should remain as they are, or whether they should be buoys which merely indicate that the, so to speak, central line of the river there is its central line, and not a line which has a starboard hand character. I have no doubt if there is any point which they think worth considering in connection with this matter, the Trinity Masters will consider it. I must hold that the plaintiffs cannot be held to blame for proceeding as they did, and as the great bulk of the traffic appears to have proceeded, treating these buoys as marking the starboard hand of the narrow channel. The result must be that *The Gustafsberg* is held alone to blame for this collision.

Solicitor for plaintiffs, the owners of *The Rubis*, *Charles E. Harvey*.

Solicitors for defendants, the owners of *The Gustafsberg*, *Stokes & Stokes*.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Feb. 27.

DRESEL *v.* ELLIS. (*a.*)

Married woman — Restraint on anticipation — Costs — Appeal — Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 65), *s.* 2.

Where a married woman applies unsuccessfully for a new trial of an action in which she is the plaintiff, the Court of Appeal has jurisdiction, under section 2 *of the Married Women's Property Act*, 1893, *to order payment of the defendant's costs of the application out of separate property of the married woman which she is restrained from anticipating.*

Hood Barrs *v.* Cathcart, [1894] 3 *Ch.* 376, *and* Hood Barrs *v.* Heriot, 45 *W. R.* 507 [1897] *A. C.* 177, *considered.*

Application for a new trial or judgment in an action tried before Lawrance, J., and a jury.

The action was brought by a married woman to recover damages for trespass.

At the trial a verdict and judgment were entered for the defendants.

The plaintiff applied for a new trial or judgment.

The court having dismissed the application, a question arose as to whether the defendants were entitled to an order for the payment of their costs of the appeal out of the separate property of the plaintiff subject to a restraint on anticipation.

By section 2 of the Married Women's Property Act, 1893, "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Woodfin (*T. R. Kemp, K.C.*, with him), for the defendants.—The defendants are entitled to an order under section 2 of the Married Women's Property Act, 1893. This action was brought or instituted by a married woman, and this application for a new trial is a step in the action which is still pending. Under the section the court has power from time to time—as, for example, on dismissing this application—to order the defendant's costs to be paid out of property of the plaintiff subject to a restraint on anticipation. In *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376, and *Hood Barrs* v. *Heriot*, 45 W. R. 507, [1897] A. C. 177, the married women were defendants.

Firminger (*Hugo Young, K.C.*, with him), for the plaintiff.—The section is not applicable to this case. No doubt the action was instituted by a married woman, but the action came to an end when judgment was signed. The bringing of this appeal by the married woman is not the instituting of an action or proceeding within the meaning of the section. In *Hood Barrs* v. *Cathcart* Davey, L.J., said: "I take it that the words 'action or proceeding' must mean some action, or some proceeding in the nature of an action—that is to say, a proceeding in which a *lis* is initiated. . . . I have never myself heard of an appeal being 'instituted,' and I do not suppose anyone ever heard of such an expression being applied to an appeal."

COLLINS, M.R.—This case seems to be quite clear. The effect of section 2 of the Married Women's Property Act, 1893, according to the construction put upon it by the judgments in the two cases which have been referred to, is that, where an action has been commenced by a married woman, the court has jurisdiction to order the costs of the opposite party to be paid out of the married woman's property, notwithstanding any restraint on anticipation. In *Hood Barrs* v. *Cathcart* Davey, L.J., expressly brings within the section such a case as the present. He says: "Wherever a married woman commences an action or litigation as plaintiff, then, if at any stage or proceeding in that action she is ordered to pay the costs, the court may, in such an action or litigation, order those costs to be paid out of her separate estate, notwithstanding any restraint on anticipation." This appeal is a stage or proceeding in an action commenced by a married woman. We have therefore jurisdiction to make the order which the defendants ask for, and I think it ought to be made.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Order for payment of costs out of separate estate.

Solicitor for the plaintiff, *H. W. Henniker Rance.*

Solicitor for the defendant, *W. B. Glasier.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) Feb. 24.

FROST v. AYLESBURY DAIRY CO. (LIMITED). (a.)

Sale of goods— Warranty — Latent or undiscoverable defects—Particular purpose—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-section* 1.

Sale of Goods Act, 1893, *s.* 14, *sub-section* 1, *enacts*: "*Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. . . .*"

Held, that this condition is an absolute condition so as to cover latent or undiscoverable defects.

Held, further, if the article or commodity—e.g., *milk, bears on its face the purpose for which it is intended, then the buyer makes known the particular purpose to the seller by implication, as contemplated by the section.*

Appeal from the judgment of Grantham, J., sitting with a special jury.

The grounds for the appeal were (i.) various misdirections to the jury by the learned judge of which paragraph G is alone material: That if a purveyor of food provides food which is not fit for human food, but which is injurious to health and causes a person injury he is liable to damages; or alternatively omitting to direct the jury that such rule does not apply in the case of milk infected with germs of typhoid. (ii.) The verdict was against the weight of evidence.

The defendants carried on business as vendors of milk at Ealing and other places. The plaintiff and his wife, now deceased, had obtained their milk from the defendants for some years. In July, 1903, the plaintiff's wife contracted typhoid fever, as alleged, from the milk supplied by the defendant company. In August, 1903, she died from the effects thereof, and the plaintiff brought this action. In his statement of claim the plaintiff set up the contract between himself and the defendant company for the purchase and sale of milk, which contract he alleged included terms that the defendant company should take certain precautions to ensure that only pure milk free from all germs of disease should be supplied. The said terms were contained in an account book supplied by the defendant company to the plaintiff. They were of the nature of advertisements informing the consumer that the company insisted on the farms from which the supply of milk was drawn being frequently visited by medical officers of health, that every sample of milk was carefully analyzed by the company's expert staff, and such like. The plaintiff pleaded breach of the contract, and, further, that the milk was not reasonably fit for the purpose for which it was required.

In July, 1903, there was an epidemic of typhoid fever in the neighbourhood of Ealing, and it was found that a large proportion of the families, in which cases of infection arose, was supplied with milk by the defendant company. At this time the company was drawing its milk for the supply of the Ealing district under contract from Messrs. N. Keevil & Sons, at Bourton, near Shrivenham, in the county of Berks. The contract contained stringent terms with the view of insuring the purity of the milk, and in addition the company took all the precautions which in its account books it held itself out to take. In July, 1903, a boy, whose mother worked on Messrs. Keevil's farm, and who himself helped occasionally in milking the cows, contracted typhoid fever and died.

As this case is not reported on the question of the weight of evidence, the conclusions of expert witnesses are not here set out.

Macmorran, K.C. (*Lawson Walton, K.C.*, and *W. Mackenzie* with him).—The action in so far as it is founded on contract must fail, because all the company undertook to do was to take every precaution, and that it did. Is there an implied warranty? Now, section 14, sub-section 1, of the Sale of Goods Act must be read in its entirety. The buyer must make known the particular purpose, so as to show he relies upon the skill or judgment of the seller. In this case the lady was an invalid, and if the plaintiff had asked the company for milk prepared for invalids then, the implied warranty might have sprung up. The company would have offered its sterilized milk or peptinized milk, not its ordinary milk. Sub-section 2 does not apply, because milk is not bought here by description. That is, "beer" is not bought by description, but Bass's beer is: see *Wren* v. *Holt*, 51 W. R. 435, [1903] 1 K. B. 610. It is on this distinction that *Preist* v. *Last*, 51 W. R. 678, [1903] 2 K. B. 148, is to be supported. There you had a hot-water bottle—*i.e.*, not an ordinary bottle. The strongest case against me is *Wallis* v. *Russell*, [1902] 2 I. R. 585, where the illness was caused from eating crabs. But in that case the buyer relied upon the seller's skill and judgment. She asked for crabs, at first chose one herself, but, then upon the suggestion of the seller, finally bought a couple pointed out to her as being exceptionally good. Now it is admitted that it is impossible to trace without a prolonged bacteriological examination whether a sample of milk contains the baculli of typhoid. In fact before the examination were completed the milk would be of no use as milk. Now, how can the buyer be said to rely upon the skill of the seller when the seller by no means in his power could himself discover the defect.

Mackenzie addressed the court on the question of evidence.

Duke, K.C., and *Holman Gregory*, were not called upon.

COLLINS, M.R.—This is an appeal by the defendants from the decision of a special jury under the direction of Grantham, J. The action was brought by the plaintiff for damages sustained by the loss of his wife, caused, as he said, by typhoid fever, the infection of which was carried from milk supplied to the plaintiff and his wife. The jury found that the cause of the typhoid fever was the milk supplied to them by the defendants, and they held that under the circumstances the defendants were liable to the plaintiff in damages. The appeal is brought by the defendants. They say the learned judge misdirected the jury, and they say the verdict was against the weight of evidence.

The first point taken, and the one most pressed upon us in argument, was whether, in point of law, on the facts as ascertained, there could be any liability on the defendants, even if admitted that the milk sold by the defendants was the cause of the typhoid fever which occasioned the lady's death. It was strenuously argued by Mr. Macmorran that on these facts there was no actionable wrong done by the defendants. The main point is, then, whether the circumstances under which this milk was bought from the defendants bring the case within what was once a well-known principle of the common law, but is now

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

crystalized into a statutory enactment. It is enacted by the Sale of Goods Act, 1893, s. 14, as follows: [His lordship read the section as set out above to the end of sub-section 1.] Consider this section by steps. I do not think it necessary to deal with the alternative section, although cases may arise under it. It is said here: "It is true that this milk was bought by the plaintiff from the defendants, but was it bought under such circumstances 'as to show that the buyer relies on the seller's skill or judgment'?" It cannot be denied that "the goods are of a description which it is in the course of the seller's business to supply." The point is that it does not appear that the goods were bought "so as to show that the buyer relies on the seller's skill and judgment." We have not had elaborate evidence as to the inception of the contractual relations between these persons, the buyer and seller, because, as a matter of fact, people do not enter into elaborate negotiations with a vendor of milk. We begin the discussion at this state of things where the practice is established of obtaining the supply of milk for household consumption from the defendants. That involves a contract for the supply of food. What were the circumstances under which that contract was made? As for the "purpose," I do not suppose that anybody in their senses would question that the purpose for which the milk was bought was for the supply of milk for family use, not for, say, dyeing purposes, but for an article of consumption. It would be absurd to call evidence to prove the purpose. It would be assumed by everybody. The purpose being known, was the milk bought "so as to show that the buyer relies on the seller's skill or judgment"? If any seller did inform the mind of a buyer of his particular skill and care as an inducement to deal with him and not another, the Aylesbury Dairy Co. did here. Here is their book with information interlarded so as you may in no manner pass over their special knowledge in the matter of milk. You have on the first pink page the method of inspection of the milk described, the precautions taken in every particular. Then again you get another pink page pointing to the analysis of the milk—how it is taken—the bacteriological examination. Then comes details as to their staff, their chemists, their veterinary surgeons, and so on. You cannot escape being permeated with a sense of their extraordinary capacity to safe guard those who buy milk from them. Now, under what circumstances, could any buyer be said to put reliance on the "skill or judgment" of the seller if not under these circumstances. Now we come to the point of law pressed upon us by Mr. Macmorran. He says, how can you be said to rely upon the skill or judgment of the seller, when that seller, by any amount of skill or judgment, could not find out the fault? That means that though the goods be supplied for a particular purpose, you cannot become liable for latent defects unless under a special contract. That argument has not been addressed to us for the first time. It was employed before this Act was passed. It was employed when the law stood without the Act of Parliament which consolidated and crystallized it. The law is the same now under the statute as in the old days, and that very point has been dealt with in *Randall* v. *Newsom*, 25 W. R. 313, 2 Q. B. D. 102, a case of the greatest authority. In that case the Court of Appeal, consisting of Kelly, C.B., Mellish, L.J., and Brett and Amphlett, JJ.A., gave a considered judgment, which was delivered by Brett, J.A., who deals with this very point. He is questioning whether—in a sale made under circumstances where the buyer makes known the particular purpose for which he requires the article, a pole for his carriage—that sale does or does not include a warranty against defects which cannot be discovered by reason of the skill and judgment of the seller. "Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?" That is really Mr. Macmorran's point. At p. 109, Brett, J.A., says: "If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description—that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in the words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale." That concludes the argument upon that part of the case. I may shortly refer to what was said in the case of the water-bottle: *Preist* v. *Last*, 51 W. R. 678, [1903] 2 K. B. 148. A great deal of difficulty arises in some of the cases where the question is whether the article was sold for a particular purpose or not, the article being one capable of being used for an indefinite number of purposes. But when you are dealing with an article which carries on its face the purpose for which it is used, that difficulty is cut out of the discussion. In this case we begin with a purchase of milk, and when we get to that we have excluded the 999 other purposes, because the article carries with it its special limitation for food. So the hot-water bottle described its purpose, and that was the principle upon which we decided that case. The same principle applies to milk, but in a higher degree. It was sold for a special purpose, and claimed and received the merit which was asserted for it in these advertisements. There is, therefore, no difficulty whatever in upholding this verdict. All this, however, assumes that the effects followed from the consumption of milk. [His lordship then discussed the facts as set out above, which he held constituted ample evidence upon which the jury could find a verdict for the plaintiff.] Then Mr. Macmorran questions to some extent the learned judge's direction as to the law. The learned judge directed the jury that "if a purveyor of food provides food which is not fit for human food . . ." I do not think I should quarrel with that on broad principle. It is not so much wrong as it is not a specific direction on the words of the section. It may have been desirable if the learned judge had addressed himself to the details of that section. But what has that to do with what we have to decide? Unless we think the specific words would have made any difference we ought not to interfere. It seems to me that we should be wrong, having the facts of this case clearly before us, if we found fault with the direction given by the learned judge on the point of law. Therefore, although with the greatest possible respect to the learned judge, I think his direction is capable of improvement in point of law, yet I think in this case we should be requiring a pedantic compliance if by reason of a technical inaccuracy we sent this case down again for trial. In my opinion, this judgment must stand, and the appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The

terms of section 14 are: "Where the buyer expressly or by implication makes known the particular purpose for which the goods are required . . ." The purchase is clearly made here by implication. "So as to show the buyer relies in the skill . . ." Skill is quite sufficient for this purpose. In the ordinary course milk is supplied without the inspection of the buyer, so there is no question that discretion would be exercised by the buyer. And the buyer here reasonably relies upon the skill of the seller. Every effort had been made on the part of the sellers to give assurance to the buyer of their skill. Every precaution appears to have been taken which could have been taken to secure that the milk should be free from contamination or adulteration. [His lordship concurred with the view taken by Collins, M.R., as to the weight of evidence.]

STIRLING, L.J.—I agree with what has been said.

Appeal dismissed with costs.

Solicitors for the appellants, *Harries, Wilkinson, & Raikes.*

Solicitors for the respondent, *Skipper & Tucker.*

From K. B. Div.
(Collins, M.R., and Cozens-Hardy, L.J.) } Jan. 23.

BARRATT v. KEARNS. (a)

Defamation—Slander—Privilege—Ecclesiastical commission of inquiry—Absolute immunity—Pluralities Act, 1838 (1 & 2 *Vict. c.* 106), *s.* 77—*Pluralities Acts Amendment Act,* 1885 (48 & 49 *Vict. c.* 54), *s.* 3—*Practice—Interrogatories—Right to refuse to answer—Alternative defences.*

Where a bishop issues a commission under section 77 *of the Pluralities Act,* 1838, *as amended by section* 3 *of the Pluralities Acts Amendment Act,* 1885, *to inquire as to whether the incumbent of a benefice has inadequately performed his ecclesiastical duties, evidence given before the commissioners comes within the rule under which evidence given in a court of justice is exempt from being made the subject-matter of an action of slander. Therefore in an action of slander, in which the plaintiff complains of such evidence, the defendant cannot be interrogated as to whether he spoke the words complained of.*

In an action of slander the defendant pleaded that he did not speak the alleged words, and in the alternative that if he spoke them he did so upon the invitation of the plaintiff. The plaintiff administered interrogatories to the defendant asking whether he did not speak the alleged words, and how and when the plaintiff invited him to speak them. The defendant answered that he did not speak the alleged words, but that he did speak certain other words which he set out, and further that, as the alleged words were not the words he spoke, he was not called upon to answer the interrogatory as to how and when the plaintiff invited him to speak the alleged words.

Held, that the defendant must answer the last-mentioned interrogatory.

Appeal from an order of Jelf, J., at chambers, directing that the defendant should make further and better answers to certain interrogatories administered to him by the plaintiff. The action was brought to recover damages for slander.

The plaintiff was a clerk in holy orders and was the vicar of the Church of Holy Trinity, in the parish of Claygate, in the diocese of Winchester. The defendant was a resident in the parish of Claygate.

The plaintiff by his statement of claim alleged two separate slanders. The first slander was alleged to have been spoken by the defendant at a meeting of the vestry of the parish of Claygate, and was to the effect that the plaintiff had told the defendant that he, the plaintiff, had taken money collected for the poor and put it into his own pocket. The second slander was alleged to have been spoken by the defendant during the course of an inquiry which was not open to the public, held before a private ecclesiastical commission appointed by the Bishop of Winchester, and was to the effect that the plaintiff had been guilty of dishonourable conduct by cheating at golf and in other ways.

The defendant, by his defence, denied that he spoke any of the words complained of. Alternatively, he pleaded, with regard to the first alleged slander, that, if he spoke the words complained of, he did so on a privileged occasion and without malice, and, further, that he did so upon the invitation of the plaintiff. With regard to the second alleged slander, he pleaded alternatively that, if he spoke the words complained of, he did so as a witness upon a judicial inquiry held before an ecclesiastical commission duly appointed by the Bishop of Winchester, which commission had been appointed at the request of the plaintiff to inquire as to his conduct, and he said he would contend that no action lay in respect of any evidence given before such commission.

It appeared that, the plaintiff having become bankrupt, a writ of sequestration was issued against the benefice of Claygate. After the sequestration had remained in force for six months, the Bishop of Winchester, having been informed that the ecclesiastical duties of the benefice had been inadequately performed by the plaintiff, and that scandal and inconvenience might be likely to arise if the plaintiff was permitted to continue to perform the services of the church and to have pastoral cure of souls within the parish, issued a commission to inquire into the facts of the case and to report thereon to him. The commissioners were five in number, one of them, the Rev. William Tringham, being the rural dean of the deanery within which the benefice of Claygate was situate, and another, the Rev. Philip Richard Pipon Braithwaite, being a canon of Winchester. The commissioners heard evidence, but it did not appear to have been given on oath.

The words constituting the second slander were alleged to have been spoken by the defendant in giving evidence before the commissioners. The commissioners made a report unfavourable to the plaintiff, and the bishop inhibited the plaintiff from performing duty within the diocese.

The plaintiff administered certain interrogatories for the examination of the defendant on oath. The first and fourth interrogatories related to the words alleged to have been spoken at the vestry meeting. The first interrogatory asked whether the defendant did not speak the alleged words. The defendant's answer was that he did not speak the alleged words, but that he did speak certain other words, which he set out. The fourth interrogatory asked how and when the defendant said the plaintiff invited him to speak the alleged words. The defendant's answer was that, as the alleged words were not the words he spoke, he was not called upon to answer this interrogatory. The second interrogatory asked whether the defendant did not speak the words alleged to have been spoken by him at the court of inquiry. The defendant's answer to this was that he objected to answer this interrogatory on the grounds stated in his defence with regard to the second alleged slander.

On the application of the plaintiff, Jelf, J., ordered the defendant to make further and better answers to the second and fourth interrogatories.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The defendant appealed.

Hohler, for the defendant.—As to the fourth interrogatory, the defendant is not bound to answer it. By his answer to the first interrogatory he has denied that he spoke the alleged words. In his defence, besides the plea of denial, there is an alternative plea that if he spoke the alleged words, he did so upon the invitation of the plaintiff. He is now asked how and when the plaintiff invited him to speak the alleged words. He is not bound to answer a question with regard to words which he denies he ever spoke. [COLLINS, M.R.—The defence that he spoke the words on the invitation of the plaintiff is a separate defence from that of denial. Under the old system of pleading there would have been two entirely distinct pleas. The fact that the second plea is now introduced with an "if" does not make it any the less a separate defence. The defendant is asked how he was invited by the plaintiff to speak the words. He cannot resist answering that by falling back on his denial that he ever spoke the words.] As to the second interrogatory, the words to which it relates were spoken as evidence before a judicial tribunal. The commission was appointed by the bishop under statutory powers conferred by section 77 of the Pluralities Act, 1838 (1 & 2 Vict. c. 106), as amended by section 3 of the Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), and sections 1 and 5 of the Sequestration Act, 1871. The Pluralities Acts are not referred to by name in the document appointing the commission, but in a letter from the bishop's secretary to the chairman of the commission the statute 48 & 49 Vict. c. 54 is referred to. Evidence given before such a tribunal is absolutely privileged, and no action can be brought upon it. And because no action can be brought upon it, any interrogatory based on it is wholly irrelevant and inadmissible.

He referred to *Bonaker* v. *Evans*, 16 Q. B. 162; *Dawkins* v. *Lord Rokeby*, 21 W. R. 544; *Marks* v. *Frogley*, 46 W. R. 548, [1898] 1 Q. B. 888.

Hugh Fraser, for the plaintiff.—The defendant ought to answer the second interrogatory unless he can establish a clear case of privilege. The burden is on the defendant to show that the commission was properly constituted under section 3 of the Pluralities Acts Amendment Act, 1885. The section is very precise in its terms as to the description of the persons who may be named as commissioners. There is no conclusive evidence to show that the requirements of that statute have been complied with. Further, no oath was administered to the witnesses before the commission, nor were any witnesses compelled to attend. Absolute privilege ought not to be extended beyond those cases in which the courts have recognized its existence: *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, 40 W. R. 450, [1892] 1 Q. B. 431.

COLLINS, M.R.—This is an appeal from an order of Jelf, J., that the defendant in an action of slander should give further answers to two of a set of interrogatories delivered by the plaintiff

The fourth interrogatory asks how and when the defendant said the plaintiff invited him to speak the words constituting the first slander complained of. The defendant had pleaded alternatively that he did not speak the words complained of, that he spoke the words on a privileged occasion and without malice, and also that he spoke them upon the invitation of the plaintiff. The defendant's answer to this interrogatory is that, as the words complained of are not the words he spoke, he is not called upon to answer it. But the plea that he spoke them upon the invitation of the plaintiff is a separate defence, and there is no reason why he should not answer this interrogatory. As to that, therefore, the appeal fails.

A more important question arises with regard to an earlier interrogatory—viz., the second of the set. This interrogatory asks the defendant whether he did not speak the words constituting the other slander complained of. The defendant objects to answer this on the ground, broadly stated, that the words, if spoken at all, were spoken on an occasion which conferred absolute privilege with regard to them. The privilege thus claimed is peculiar to statements made in the course of a judicial inquiry. The question is whether the occasion on which these words were spoken was a judicial inquiry. It is well settled that evidence given in a court of law is privileged, not merely *sub modo* in the absence of malice, but absolutely. In this case the occasion was an inquiry instituted by the Bishop of Winchester in accordance with certain statutes. The plaintiff, who was a clergyman, had become bankrupt, and his benefice had been sequestered, and it had remained under sequestration for more than six months. This state of things is provided for by section 77 of the Pluralities Act, 1838. That section enacts as follows: "Whenever the bishop shall see reason to believe that the ecclesiastical duties of any benefice are inadequately performed, it shall be lawful for him to issue a commission to four beneficed clergymen of his diocese . . . one whereof shall be the rural dean, if any, of the rural deanery or district wherein such benefice is situated, directing them to inquire into the facts of the case; and it shall be lawful for the incumbent of the said benefice to add to such commissioners one other incumbent of a benefice within the same diocese; and if the said commissioners or the major part of them report in writing under their hands to the said bishop that, in their opinion, the duties of such benefice are inadequately performed, it shall be lawful for such bishop, if he shall see fit, by writing under his hand, to require the spiritual person holding such benefice, though he may actually reside or be engaged in performing the duties thereof, to nominate to him a fit person or persons, with sufficient stipend or stipends, to be licensed by him to perform or to assist in performing such duties, specifying therein the grounds of such requisition." By section 3 of the Pluralities Acts Amendment Act, 1885, so much of the above section as relates to the persons to act as commissioners on inquiries as to inadequate performance of ecclesiastical duties is repealed, and it is provided instead thereof that such commission shall be issued to four commissioners, one of whom shall be the archdeacon or rural dean of the archdeaconry or rural deanery wherein the benefice is situated, one other shall be a canon of the cathedral of the diocese, one other shall be a beneficed clergyman to the archdeaconry, one other shall be a layman in the commission of the peace for the county, and one other may be added by the incumbent. In the present case the bishop issued a commission to five persons, some of whom certainly fill the position of persons designated by the Act, one of them being the rural dean and another being a canon of Winchester. The commission is to the following effect: "Whereas the said benefice of Claygate is under sequestration, and by virtue of the Sequestration Act, 1871, if a sequestration issues and remains in force for a period of six months, the bishop of the diocese is required from and after the expiration of such period of six months and as long as the sequestration remains in force to take order for the due performance of the services of the church of the benefice with power to appoint such curate or curates or additional curate or curates as the case may require with such stipend in each case as the bishop thinks fit,

and in such case the bishop, if it appears to him that scandal or inconvenience is likely to arise from the incumbent continuing to perform the services of the church while the sequestration remains in force, may from and after the expiration of such period inhibit the incumbent from performing any services of the church within the diocese so long as the sequestration shall remain in force and may at any time withdraw such inhibition, and whereas we the said Bishop of Winchester have been informed that the ecclesiastical duties of the said benefice of Claygate have been inadequately performed by the Rev. Alfred Allen Barratt and that scandal and inconvenience may be likely to arise if the said Alfred Allen Barratt is permitted to continue to perform the services of the church and to have pastoral cure of souls within the parish, and whereas we have given to the said Alfred Allen Barratt notice in writing of our intention to issue our commission of inquiry in this respect, Now we the said Bishop of Winchester do by these presents commission and direct you the said Rev. William Tringham, Rev. Cyril Fletcher Grant, Rev. Philip Richard Pipon Braithwaite, Frank Eastwood, and Ramsay Nares, to inquire into the facts of the case, you first giving the said Alfred Allen Barratt due notice of this commission (by forwarding to him a copy of the same) and of the time and place appointed by you to meet for the purpose of the said inquiry, and we do further direct and require you or the major part of you to report to us in writing under your hands whether or not you find upon such inqury that the duties of the said benefice have been and are, in your opinion, inadequately performed, and whether or not, in your opinion, scandal or inconvenience is likely to arise from the said Alfred Allen Barratt continuing to perform the services of the church and to have the pastoral cure of souls within the parish, and to transmit to us with such report this commission and the evidence or statements taken by you in the execution thereof." This seems to be most distinctly a constitution by the bishop of a judicial tribunal in accordance with the powers conferred on him by statute. It is to be noticed that he uses the words which occur in the Pluralities Acts as to the duties of the benefice being inadequately performed, as well as the words "scandal and inconvenience" which occur in the Sequestration Act. It follows that the evidence given before the commissioners comes within the rule which I have stated. It has been argued on the part of the plaintiff that it is not clear that all conditions precedent have been satisfied, that the defendant has failed to show that the persons named as commissioners are such persons as are required by the Act of 1885. But I think this is a case to which we ought to apply the maxim *Omnia presumuntur rite esse acta*. In my opinion the onus is on the objector to show that any condition has not been complied with. Having all the materials for coming to a conclusion before me, including a letter from the bishop referring to the statute 48 & 49 Vict. c. 54, I have no doubt that this commission was a tribunal of which it must be held that evidence given before it was entitled to privilege, and that privilege an absolute privilege. The case of *Royal Aquarium Society* v. *Parkinson* is a strong authority for this view. There Lord Esher, M.R., said: "It is true that in respect of statements made in the course of proceedings before a court of justice, whether by judge, counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins* v. *Lord Rokeby* the doctrine was extended to a military court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially—that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act." That describes the tribunal in this case, and it follows that the evidence given before it was absolutely privileged. The defendant therefore ought not to be ordered to answer the second interrogatory, and this part of the appeal must be allowed.

COZENS-HARDY, L.J., concurred.

Appeal allowed in part.

Solicitors for the plaintiff, *Richards & Barnett.*

Solicitors for the defendant, *F. J. Abbott*, for *F. J. Bell*, Kingston-on-Thames.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Jan. 18.

PLANT v. WRIGHT & CO. (a.)

Master and servant—Employers' liability—Accident—Compensation — Building "being constructed" — Measuring up plumbing work—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A contractor for the construction of a factory subcontracted with another contractor whereby the latter agreed for a lump sum to do the plumbing work in the factory. The plumbing work was a part of the work of construction, and under the contract with the plumbing contractor it was necessary that the plumbing work should be measured up. A firm of engineers had entered into an independent contract with the owner to erect and fix the necessary machinery and steam-pipes. After the building contractor had finished the work of building, and after the plumbing work had been finished, the plumbing contractor sent one of his workmen, who had been employed on the plumbing work, to measure up the work. While measuring it up he was injured by an accident. At this time the contractors for the erection of the machinery and steam-pipes were engaged upon their work, which was part of the work of construction of the building, and for that purpose they had erected a scaffolding. The building was over thirty feet high. In proceedings against the plumbing contractor to have compensation assessed under the Workmen's Compensation Act, 1897,

Held, that, as the measuring up of the plumbing work was incidental to and a necessary part of that work, which was itself part of the work of construction, the measuring up of the work was part of the work of construction, and that therefore the injured workman was at time of the accident employed by the undertakers on, in, or about a building which was being constructed by means of a scaffolding, and was therefore entitled to compensation.

Appeal from an award of compensation by Judge Whitehorne at the Birmingham County Court under the Workmen's Compensation Act, 1897.

Messrs. Withall & Co., who were builders, agreed with Messrs. Rawlings & Co. to build a factory for them. The contract with Withall & Co. did not

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

include the erection of the necessary machinery and steam-pipes, an independent contract for that purpose being made by Rawlings & Co. with a firm of engineers named Danks & Co. Withall & Co. sub-contracted with Wright & Co. for the execution by the latter of the plumbing work in the factory for a lump sum. In settling the contract price for the plumbing work, the men's time in measuring up the work when finished was included, and under the contract it was necessary that the work should be measured up. The plumbing work was admittedly part of the construction. A fortnight after the plumbing work had been finished, the applicant, who was a plumber in the employment of Wright & Co., and had been employed by them on the plumbing work of the factory, was sent by them with an assistant to the factory to measure up the work, when he stumbled over a furnace rake and fell and broke his arm. At the time of the accident Withall & Co. had finished their work, and the factory had been formally handed over by them to Rawlings & Co., but Danks & Co. were still engaged in fixing the machinery and steam-pipes in the factory, and for this purpose they had erected a scaffolding. The factory at the time exceeded thirty feet in height.

In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge, in giving his decision, said that it was plain that at the time of the accident the building, which exceeded thirty feet in height, was still being constructed by means of the scaffolding which Danks & Co. were using to complete it. That being so, the question was whether the applicant was at the time "employed by the undertakers" on, in, or about the building. In his opinion those words meant in some sense employed in or about the construction. If the undertakers merely sent a man who had been formerly employed on work, then finished, on some message or for some purpose wholly unconnected with the work, it would not be reasonable to hold them liable to compensate him if an accident happened to him while so employed by them. Employed could not mean employed for any purpose or for any time. That brought him to the question whether measuring up was part of the work itself. Was the man, who was employed by the undertakers to measure up constructive work when finished, employed by the undertakers on, in, or about the construction of the building? The undertakers' work was finished and for that very reason it had to be measured up. The question turned on the meaning of the word "construction." The nearest case seemed to him to be *Frid* v. *Fenton*, 69 L. J. Q. B. 436, 48 W. R. Dig. 110, where it was held that a building which had been constructed by means of a scaffolding was still in course of construction until the scaffolding was removed, the removal of the scaffolding being part of the work of construction. In his opinion the necessary measuring up of constructive work was an integral part of the construction, and therefore the applicant was entitled to compensation under the Act.

The employers appealed.

H. A. McCardie, for the employers.—The county court judge was wrong in holding that the construction of the building was still going on when the accident happened. The building was finished, and Danks & Co., who were the contractors for fitting up the machinery, and who had put up the scaffolding, were not engaged upon any work of construction at all. The building was therefore not being constructed at the time of the accident. Secondly, if the work being done by Danks was part of the construction of the building, the measuring up of the plumbing work was no part of the work of construction. The plumbing work, which was admittedly part of the work of construction, was finished, and the measuring up of that work formed no part of the work of construction. The employment must be, as the county court judge held, employment by the undertakers, which means in or about the construction. In *Frid* v. *Fenton*, 69 L. J. Q. B. 436, 48 W. R. Dig. 110, this court held that the construction of a building is not complete until the scaffolding is removed. But that is a very different case, because a building cannot be said to be complete as long as it is surrounded by scaffolding. The plumbing work was complete before being measured up, and the measuring up added nothing to its completion. The measuring up was therefore no part of the construction, and the applicant was not entitled to compensation.

Cannot, for the applicant, was not called upon.

COLLINS, M.R.—The short facts of this case are as follows: The workman who was injured was employed by the undertakers upon the plumbing work in a factory, the construction of which had been undertaken by another contractor. The brickwork of the factory was to a great extent completed. The building being a factory, machinery and steam-pipes had to be put in, and for that purpose scaffolding had to be used. At the time of the accident the building exceeded thirty feet in height. The plumbing work had been finished, but had not been measured up, and under the contract between the contractor for the building and the plumbing contractor the latter had undertaken to measure up the plumbing work when finished. That was part of the work for which the plumbing contractor was to be paid, and under the contract it was a necessary step in the completion of the plumbing work. While the workman and his assistant were measuring up the work the former met with an accident. The question is whether, at the time of the accident, the workman was "employed by the undertakers on, in, or about a building which was being constructed by means of scaffolding." It is said that, as the plumbing work was finished, and as the building was completed so far as the building contractor was concerned, and as nothing remained to be done except to measure up the plumbing work and to fit up the machinery and steam-pipes, the workman was not at the time of the accident employed on, in, or about the construction of the building. In *Frid* v. *Fenton* we decided that a building is still "being constructed" until the scaffolding is taken down—that is to say, that the removal of the scaffolding forms part of the work of construction. The principle of that decision seems to me to cover the present case. The work of measuring up is incidental to and part of the main work of plumbing quite as much as the taking down of the scaffolding is incidental to and part of the construction of the building. The plumbing work in the factory was part of the work of the construction of the building, and the measuring it up is incidental to that work and part of it, and is therefore part of the work of construction. The injured workman was therefore, at the time of the accident, employed on, in, or about the construction of the building. That is the main point in the case. A further point has been taken that the scaffolding was put up, not by the undertakers for the construction of the building nor by the plumbing contractor, but by the persons who were fitting the machinery and steam-pipes, and that this latter work was no part of the construction of the building. This point, however, was not taken before the county court judge. He treated the scaffolding as being at the time used for completing the construction of the building—that is, for the construction of a necessary part of the building itself. So far as the

scaffolding was used for the purpose of fitting up the machinery he treated it as being used for the purpose of construction. That was not contested in the county court, and the point was not taken there and is not open now. That being so, it is immaterial that the scaffolding was not put up by the plumbing contractor. For these reasons I think that the decision was right, and that the appeal fails.

MATHEW, L.J.—I am of the same opinion. The question is whether the measuring up of the plumbing work is part of the work of construction of the building. It seems to me, from what we know of the contract between the building contractor and the plumber, that it manifestly is. The plumbing work had to be measured up before payment for it was made, and the time occupied in measuring it up seems to me have been a part of the time occupied in the construction. The case of *Frid* v. *Fenton* as to the removal of the scaffolding seems to me to be in point. The measuring up of the plumbing work was an essential part of that work, which was itself part of the work of construction of the building. With regard to the other point, I agree with the Master of the Rolls upon it.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the applicant, *Judge & Priestley*, for *Philip Baker & Co.*, Birmingham.

Solicitors for the employers, *Ward, Bowie, & Co.*, for *T. W. Walthall*, Birmingham.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Jan. 16.

CASTLE SPINNING CO. (LIMITED) v. ATKINSON. (a.)

Master and servant—Employers' liability—Accident—Compensation — Redemption of weekly payment — Limitation of sum in request for arbitration—Jurisdiction of arbitrator—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., par.* 13.

Where an employer requests an arbitration with respect to the redemption of a weekly payment of compensation under the Workmen's Compensation Act, 1897, *he has no right to limit the jurisdiction of the arbitrator by stating in his request for arbitration the highest sum which he is willing to pay by way of redemption.*

Appeal from an award of the judge of the Ashton-under-Lyne and Stalybridge County Court in an arbitration under the Workmen's Compensation Act, 1897.

On the 17th of July, 1903, Joseph Atkinson, a workman in the employment of the Castle Spinning Co. (Limited), was accidentally injured in the course of his employment.

On the 7th of August the employers and the workman entered into an agreement for the payment by them to him of the weekly sum of 20s. during his incapacity for work resulting from the injury, and a memorandum of the agreement was duly recorded.

After an interval of six months the employers applied to the county court judge, under paragraph 13 of the first schedule to the Workmen's Compensation Act, for redemption of their liability for the weekly payment by the payment of a lump sum.

Paragraph 13 of the first schedule is as follows: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above-mentioned."

The request for arbitration by the employer was as follows: "An arbitration under the Workmen's Compensation Act, 1897, is hereby requested between the Castle Spinning Co. (Limited) and Joseph Atkinson with respect to the review and termination, diminution, or redemption limited to the amount hereinafter set forth of the weekly payment payable to the said Joseph Atkinson under the said Act, in respect of personal injury caused to the said Joseph Atkinson by accident arising out of and in the course of his employment." Certain particulars were annexed in which the relief sought was stated as follows: "The applicants say that the respondent is no longer totally incapacitated for work by the said accident, and they, therefore, ask for an order terminating or reducing the said weekly payment. . . . Alternatively, the applicants seek to have the said weekly payments redeemed by the payment of a sum not exceeding £150, which sum the applicants are willing to pay the respondent by way of redemption."

The county court judge by his award fixed the sum to be paid by way of redemption at £150.

The workman appealed.

C. A. Russell, K.C., and *Adshead Elliott*, for the workman.—The award was made without jurisdiction, for the request for arbitration was made in a form which is not authorized by the Act. The form of request is prescribed in the Workmen's Compensation Rules, 1898, Appendix A, Form 5. The right to apply for redemption of a weekly payment is given by the Act to the employer only, not to the workman. The employer has no right to fetter the jurisdiction of the arbitrator by naming in his request the utmost sum which he is willing to pay. Such a limitation of the arbitrator's jurisdiction is not to be found in the form, neither is it authorized by the Act itself. The proper question to be submitted to the arbitrator is what lump sum he thinks ought to be paid by way of redemption. Here the employers propose to put to him the question whether £150 is enough. If such a limitation were allowed, and if the arbitrator answered that the sum mentioned was not enough, the whole proceedings would be rendered abortive.

Arthur Powell, K.C., and *Wingate-Saul*, for the employers.—The form used in this case is unobjectionable; it does no harm to the workman, and it safeguards the employer. If it is not allowed no employer will be able to avail himself of the right for redemption without taking a leap in the dark, for the arbitrator may order him to pay a sum which he is not able to pay. The forms given in the appendix to the Workmen's Compensation Rules are merely permissive, and parties may use "forms of the like character with such variations as the circumstances may require": see rule 67.

COLLINS, M.R.—This is an appeal from a decision of a county court judge on an application for the termination, diminution, or redemption of a weekly payment of compensation under the Workmen's Compensation Act. The power to redeem a weekly payment depends on paragraph 13 of the first schedule to the Act. [His lordship read the paragraph.] Here, the weekly payment having continued to be made for more than six months, the employers applied to the county court judge. In their request for arbitration they "ask for an order terminating or reducing the said weekly payment"; and in the alternative they

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

seek to have the said weekly payments redeemed by the payment of a sum not exceeding £150, which sum the applicants are willing to pay the respondent by way of redemption. The county court allowed redemption at the sum of £150. It is now contended on the part of the workman that the limitation contained in the request for arbitration of the sum which the employers are willing to pay by way of redemption is something outside the language of the Act, something which was not contemplated by the Act, and that it is an attempt to introduce a new term into the Act. It is suggested that this limitation might have a prejudicial effect on the mind of the arbitrator. In the present case it seems to me to have had no effect whatever on the decision of the county court judge, who has dealt with the case as if no such limitation had been imposed. But the technical question has to be answered whether or not a request in this form is bad because it limits the jurisdiction of the arbitrator. I have come to the conclusion that it is. Having regard to the terms of paragraph 13 of the first schedule, it seems to me that the Act does not contemplate a limited arbitration of this kind. The Act confers a certain privilege on the employer, and on the employer only. The workman has no option but to go on receiving the weekly payments, subject to the right to apply for a review and increase of the weekly payment. He has no right of asking for redemption of the weekly payment by a lump sum. The employer has that right given him, but he must take it on the terms on which it is given. If he avails himself of it, and asks for leave to redeem, he must pay such lump sum as the arbitrator may determine. In my opinion there is no power to fetter the discretion of the arbitrator, or to force the workman to waste time or incur expense in investigating a proposal which may prove abortive. If this were allowed, and if the arbitrator should be of opinion that the sum named was not enough, he would have no power to award what he thought was enough. It seems to me that the Legislature has not conferred on the employer the right of making an experiment as to whether the sum which he is prepared to pay is sufficient. The objection, though a technical one, is one which goes to the jurisdiction, and therefore this award cannot be treated as binding, though, as I have said, there is no reason to suppose the award would have been different if the limitation had not been inserted in the request for arbitration. The appeal must therefore be allowed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors for the workman, *Bower, Cotton, & Bower*, for *J. B. Pownall*, Ashton-under-Lyne.

Solicitors for the employers, *William Hurd & Son*, for *Chapman & Brooks*, Manchester.

High Court of Justice.

Chan. Div. }
Buckley, J. } Feb. 7, 15.

In re NELSON & CO. (LIMITED). (*a*.)

Company—Winding up—Life assurance—Scheme for reduction of contracts — Other business — Separate accounts—Mixed payments—Pension tea—Inequality of reduction—Life Assurance Companies Act, 1870 (34 & 35 *Vict. c.* 61), *ss.* 4 *and* 22.

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

A company sold tea to women at a price above the market price upon the terms that it would grant to various classes of customers in certain events weekly sums as pensions for life so long as the customers bought the tea of the company and remained widows. The company became insolvent, and a petition was presented to have it wound up. The company proposed to continue business, and put forward a scheme for reduction of their contracts to pay the pensions, by which a new company was to be formed, which would sell the tea and pay 75 per cent. of the extra price to the old company, which should insure the payment of the pensions. The reduction proposed was unequal as between the various classes of customers.

Held, that such a scheme of reduction would not be approved, because (1) *it involved the pensioners making new contracts with a new company, and therefore was not within section* 22 *of the Life Assurance Companies Act*, 1870; (2) *the business of life insurance could not be carried out in compliance with section* 4 *of the same Act, as the premiums to be taken could not be dealt with as separate sums and be carried to a separate account; and* (3) *the proposed reduction being unequal as between the various classes of pensioners was not authorized by section* 22 *of the Act.*

Petition.

This was a petition that the above company might be wound up by the court on the ground of insolvency.

The company was formed in July, 1901, with a capital of £101,000 in £1 shares. All the shares had been issued and were fully paid up.

Another company, the Nelson Share Syndicate (Limited), at the date of the petition, held all the shares except the seven held by the subscribers.

The objects of the company were (amongst others) (*a*) To acquire the business of Rasmus Jansen, trading as Nelson & Co., of Louth, tea dealers, and to take over the contracts entered into by Jansen in the business, and to enter into an agreement already prepared between Jansen and the company; and (*b*) to effect insurances for life, to issue pensions, and carry on the business of insurance generally.

In carrying on his business, Jansen had issued cards by which he offered to grant pensions to widows of a similar description to those subsequently mentioned in connection with the company.

The company adopted the said agreement and took over the liabilities of Jansen, to whom, as vendor, 100,000 fully paid-up shares were issued.

The company deposited a sum of £20,000 in court as required by the Life Assurance Companies Act, 1870, it having been decided in a previous action that Jansen's business came within that Act.

In carrying on their business of tea dealers the company issued cards to their customers which stated that they would pay 10s. per week to every woman who had purchased not less than half a pound of their pension tea for fifty weeks before becoming a widow, such payments to continue as long as she remained a widow and bought the the same amount of tea from the company, and also 10s. per week to every woman becoming a widow before buying from the company, if she bought half a pound of tea per week for ten years, so long as she remained a widow and continued buying the tea. And those who bought only a quarter of a pound of tea were to receive 5s. instead of 10s. The cards further stated that the rights of the widows would be limited to receiving those sums rateably out of 75 per cent. of the net profits on the tea, and that they should have no other rights against the company. The chief difference between the cards of Jansen and those of the company was that the former contained

no limitation of the pensions to any particular fund. The number of customers of the company increased rapidly, and ultimately reached something like 500,000 or 600,000, while at the date of the petition there were over 19,000 widows entitled to pensions which amounted in the aggregate to a sum of between £8,000 and £9,000 a week. According to the actuarial evidence, which was not controverted, the reserve which the company should have had to meet the pensions thus payable, and the prospective liability, was nearly £30,000,000. The amount, however, could not be accurately determined, and making large deductions, for instance, for 75 per. cent of the persons then buying ceasing to do so, his lordship thought £10,000,000 would be about the lowest proper reserve. To meet this liability the company had available for the annuitants a sum of less than £20,000, the amount deposited being liable to some deductions.

The petition was presented by Mrs. Bower, a widow entitled to 10s. a week under the terms mentioned, and by two other women who were purchasing tea upon the terms of the cards with the view of obtaining pensions. The petition was opposed upon the ground that if the company continued its business, and had the pensions reduced under the Life Assurance Companies Act, 1870, according to a scheme which will be found sufficiently described in the judgment, it would be advantageous to all parties.

Eve, K.C., and *Ward Coldridge*, for the petitioners.

Astbury, K.C., and *E. O. Simpson, W. Finlay, Frank Dodd*, and *Eldridge*, for parties supporting petition.

Buckmaster, K.C., and *R. Rowlands*, for the company.

R. J. Parker, for the Board of Trade.

[His lordship made a winding-up order upon the conclusion of the arguments, and on a subsequent day stated his reasons.]

Feb. 15.—BUCKLEY, J.—This is a petition to wind up Nelson & Co. (Limited) on the ground of its insolvency The insolvency is not, and cannot be, disputed. The only defence has been that, in the interests of the unfortunate persons who are the policy-holders of or entitled to the benefit of annuity contracts in the company, the court should adopt, with or without modification, a scheme which has been put forward, and which is said to be a scheme for the reduction of the company's contracts under section 22 of the Life Assurance Companies Act, 1870. The business of Nelson & Co. (Limited) may be described as that of attracting married women to become customers of the company and purchasers of the company's tea, at prices largely above its fair market value by the promise of impossible pensions to be paid to them if and when they became widows. The pension scheme rested upon no actuarial basis of any kind. It ignored the age of the husband on whose death the pension would commence. It ignored the age of the wife during whose widowhood it would be payable. It ignored with some exceptions the health and expectation of life of the husband. The loading which was added to the price of the tea, and which may in a sense be regarded as the premium paid for the annuity contract, bore no actuarial relation whatever to the liability which the company was undertaking. Under no circumstances could it have justified a pension of anything approaching 10s. a week. Even the 8d. a pound overcharged for tea did not go to provide for the annuity contracts; it went into the general business; and under the company's contracts, the policy-holders could look only to 75 per cent. of the profits realized by its employment with the company's other funds in the business.

The result has been to bring the company to a state of insolvency. Upon every ground a stop ought to be put to such a company. In the interest of the pensioners, however, the court is asked to consider a scheme of reduction of contracts under the Life Assurance Companies Acts. A scheme has been brought in. It is, in my opinion, open to insuperable objections upon several grounds. In the first place, it involves that this company shall continue business—a course to which, in the absence of overpowering reasons in the interest of the customers, I should not accede. Secondly, it proceeds upon a footing that a system of business shall be continued by which customers shall be attracted to become purchasers of tea at a price loaded with a sum to represent the premium on the insurance benefit, such sum, however, not being payable as a premium capable of being dealt with in the manner required by section 4 of the Life Assurance Companies Act, 1870, but included in a lump sum which is to be dealt with in the manner indicated in the scheme. Stating it in figures, the matter would stand somewhat thus: The tea purchased by the company costs, it is said, 1s. 3d. to 1s. 5d. per pound, and would fairly be retailed at 1s. 8d. per pound. Sale of the tea was made, and would under the scheme continue to be made, at 2s. 4d. per pound, thus providing a loading of 8d. per pound to form the premium income to support the annuity contracts. The scheme involves that a new company called the Nelson Trading Co. (Limited) shall sell the tea and shall pay 75 per cent. of the loading (6d. a pound) to this company (Nelson & Co. (Limited)), which shall, as between the two companies, be the insurer of what is called the insured customer of the Nelson Trading Co. (Limited). A scheme of that kind is, to my mind, not a reduction of contracts of Nelson & Co. (Limited). It is a scheme under which the customer, if he is minded to make a new contract with the Nelson Trading Co. (Limited), is to be entitled to a reduced benefit out of his previously existing contract with Nelson & Co. (Limited). This is not, in my opinion, within section 22 of the Life Assurance Companies Act, 1870. That section authorizes a reduction of the contract between A. and the company, but not a provision by which A. shall enter into a new contract with a new company, and as the result of that shall be entitled to a reduced benefit from his contract with the old company. Again, section 4 of the Life Assurance Companies Act, 1870, requires that a separate account shall be kept of all receipts in respect of the annuity contracts, and that the receipts shall be carried to and form a separate fund absolutely the security of the annuity-holders. The scheme of business which I am now asked to wind up, and the scheme of reduction which I am asked to approve, is one under which the payment which the assured makes by way of premium is not a separate sum capable of being kept separate and appropriated, as required by section 4. The 2s. 4d. per pound which she pays is what I may call a contributory sum for securing two benefits—the present receipt of one pound of tea, and the expectation of a future sum of money contingent upon widowhood. I do not think that this is consistent with the Act of Parliament. Another fatal objection is that, as counsel for the company conceded, the reduction of the contracts which they propose is a reduction of inequality as between the policy-holders. That which the Act allows is the reduction of all contracts to the relief of the common debtor, but not a reduction which operates in inequality as between the common creditors. I do not mean that absolute arithmetical equality must be ensured, but a scheme which proceeds upon a principle of inequality of reduction is

not, I think, within the Act. Again, no sort of benefit is granted to the existing customers of the company which is not granted to new customers, unless it may be a trifling advantage in admitting the old customers to benefits within the first year. Other objections there are of a commercial rather than a legal character. Thus, as a matter of business, it is, I think, idle to anticipate that the new trading company could as a trading company ever legitimately get capital for its undertaking upon the terms proposed—namely, that 95 per cent. of its profits should be handed over under the scheme, and 5 per cent. of its profits should be the only fund for expectation of dividend. Again, there is no practical means of ensuring that the trading company shall not so work its business, or so prepare its accounts, as that its net profits shall be whittled down to practically nothing. A suggestion was made by counsel for the company that some machinery should be provided by which this court, or some authority, should retain control over the price which the company should charge for its tea, and to insure that the present system should not continue, under which the tea dealing company should be bound to buy all its stock from particular persons, of course to their profit. Such suggestions, to my mind, are illusory. Another objection which weighs strongly with me is that the effect of this scheme is to create what I may call a tied insurance business, a system under which customers are to pay too much for their tea upon the terms that the excess shall be taken by them, not to such insurance office as they like, to insure an annuity, but that they shall be tied to Nelson & Co. (Limited), being such a company as I have described, as their insurers. I see no advantage, but every disadvantage, to the customer in this provision. It is said, on the other hand, that to reject any such scheme is to throw away the value of what is called—using a term singularly inappropriate to the facts of this case—the "goodwill" of the company, and that the widows, being confined to 75 per cent. of the profits, can get nothing in the winding up beyond the £20,000. As to the latter, I am not sure that this is so; but I say no more upon the point, for it may well have to be considered in the course of the winding up. I am clear, however, that, even if this be so, it is more to the interest of the policy-holders to put an end at once to this concern, even if that which they get out of the wreck be but a small sum. For these reasons I think that the scheme for reduction of contracts is impossible and cannot be approved, and I therefore, at the conclusion of the argument, pronounced a winding-up order.

Solicitors, *L. Weatherley*, for *Alfred Pearson*, Manchester; *Helder, Roberts, & Co.*, for *Simpson & Co.*, Leeds; *Baker, Baker, & Co.; Smiles & Litchfield; Oswald Bird & Co.; R. R. Norman; Solicitor of Board of Trade.*

Chan. Div. Joyce, J. } Jan. 11; Feb. 4.

MARSHALL v. JAMES. (a.)

Practice—Judgment creditor—Garnishee order absolute—Money paid under it—Order obtained on erroneous allegation of material facts—Setting aside order.

A garnishee order obtained upon an allegation of material facts, which turns out to be erroneous, can be set aside, notwithstanding it has been made absolute.

Moore *v.* Peachey, 66 *L. T.* 198, *followed.*

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

This was a motion to discharge a garnishee order absolute.

The plaintiff Marshall entered into partnership with the present applicant, Witham, on the 9th of December, 1903, and carried on business under the name of Marshall & Co.

The defendant James recovered judgment against Marshall on the 9th of March, 1903, in the above action.

Upon an allegation, supported by affidavit, but afterwards found to be mistaken, that Cullen and Teetgen & Co. owed debts to Marshall, the usual garnishee order *nisi* was made, on the 11th of October, 1904, upon the application of James, and served on the debtors.

It was made absolute on the 14th of November and served upon Cullen's solicitors, Teetgen & Co. having been served with the order *nisi*, but not appearing. By the order it was ordered that Cullen should pay James the sum of £13 9s. owed by Cullen to the plaintiff, and that Teetgen & Co. should pay James the sum of £21 8s. 4d. owed by Teetgen & Co. to the plaintiff.

Upon the present applicant, Witham, discovering this, he applied to set aside the garnishee order upon the ground that at its date no debt was due from either of the garnishees to Marshall, but that such debts were due and owing to the firm of Marshall & Co., in which he was a partner. It then appeared that Marshall and Witham carried on business as Marshall & Co. and that the debts were really contracted with the firm of Marshall & Co., and so were not payable to Marshall alone. Cullen had not paid anything under the order, but Teetgen & Co. had paid £21 8s. 4d. to James, the judgment creditor. They had not filed any evidence as to mistake upon this motion.

Lincoln Reed, for the applicant.—A garnishee order absolute can be set aside (*Moore* v. *Peachey*, 66 L. T. 198, 40 W. R. Dig. 184), the court having an inherent jurisdiction to set aside an order which it has been induced to make by fraud or the suppression, however innocent, of material facts.

R. Nevill, for the respondent James.—*Moore* v. *Peachey* was a case where the application was made by the garnishee on the ground of a mutual mistake partially caused by the judgment creditor, and is therefore distinguishable. When the court has made a garnishee order absolute and money has been paid under it the court has no jurisdiction to set the order aside.

He also referred to *Burrell & Sons* v. *Read*, 11 T. L. R. 36.

Reed, in reply.—The court can correct a miscarriage of justice and any person injured can come *ex debito* for relief.

Cur. adv. vult.

Feb. 4.—JOYCE, J.—[After stating the facts set out above, continued:] On the authority of *Moore* v. *Peachey* and on general principles I have come to the conclusion that I must do what I can to remedy the injustice done by the garnishee order. There is no particular sanctity about a garnishee order, although it may have been made absolute and is so termed. I think the order as to Cullen must be set aside, but with no order as to costs. As to Teetgen & Co., who have paid £21 8s. 4d. to James, the judgment creditor, who has thus obtained an amount which does not belong to him, the evidence is not quite complete. If they have made a mistake I cannot help them; but if it were proved that they have made a mistake like the bank in *Moore* v. *Peachey* I should be disposed to help them. I certainly think that the

defendant James is innocent, and I will give no costs against him. [At his lordship's suggestion the applicant Witham agreed with James to receive in full satisfaction half the sum of £21 8s. 4d which James had received from Teetgen & Co.] I therefore discharge the order as against Cullen, and by consent discharge it also as regards Teetgen & Co. on James undertaking to pay £10 14s. 2d. to Witham. There will be no order as to costs. I entirely dissent from the notion that a garnishee order cannot be set aside.

Solicitors for the applicant Witham, *Hyman, Isaacs, & Lewis.*

Solicitors for judgment creditor James, *Mulkin & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) Dec. 19.

REX *v.* KETTLE.
Ex parte ELLIS. (*a.*)

*Justices—Recognizance entered into on application to state case—Refusal of case—*Mandamus*—Death of surety—Fresh recognizance—Summary Jurisdiction Act,* 1857 (20 & 21 *Vict. c.* 43), *ss.* 3, 5.

Where on an application to justices to state a case the appellant had duly entered into the recognizances required by section 3 *of the Summary Jurisdiction Act,* 1857, *and the justices refused to state a case but were afterwards ordered by* mandamus *to do so, the appellant is not bound under section* 5 *of that Act to enter into fresh recognizances even although his surety has died in the meantime.*

Rule calling on the metropolitan police magistrate sitting at the Woolwich police-court, and the London County Council, to show cause why the magistrate should not forthwith deliver to Mr. James Ellis, the applicant, a certain case stated and signed by the magistrate in an information by the London County Council against Mr. Ellis.

The facts as stated in the affidavits were as follows:

On the 1st of August, 1903, an information in writing was preferred on behalf of the London County Council against Mr. Ellis, the applicant for the rule, for erecting a building in Cedar-grove, Charlton, beyond the general line of buildings, contrary to the London Building Act, 1894, and upon that information he was convicted and ordered to demolish a part of the building and to pay a fine of 40s.

The applicant applied to the magistrate to state and sign a case for the opinion of the High Court, but the magistrate refused to state a case.

On the 17th of August, 1903, some two or three days after the refusal of the magistrate to state the case, the applicant attended personally before the magistrate and stated to him that he desired to enter into recognizances such as the magistrate should require. The magistrate informed him that he should require his own recognizance and that of a surety for the sum of £50. The applicant thereupon on the same day entered into a recognizance for £50 in the form and for the amount required by the magistrate for the prosecution of the special case to be stated by the magistrate, and on the 22nd of August, 1903, the surety, one Mr. Leaver, duly entered into his recognizance as surety for the applicant for the amount of £50 as required by the magistrate.

The magistrate having refused to state a case, the applicant, on the 20th of August, 1903, obtained in chambers a rule for a *mandamus* to the magistrate to state a case, and this rule was made absolute on the 17th of December, 1903. Meantime, on the 10th of September, 1903, the surety, Mr. Leaver, died, and probate of his will was granted to his executrix, the estate of the surety being sworn at between £9,000 and £10,000; and on the 13th of October, 1903, Mr. Ellis, the applicant, was adjudicated bankrupt.

When the order for a *mandamus* of the 17th of December, 1903, was served upon the magistrate he intimated that fresh recognizances must be entered into on the ground that the surety was dead. The case was then prepared by the magistrate, and on the 28th of April, 1904, the magistrate said that the case was ready but that it could not be handed over until fresh recognizances were entered into, and he refused to deliver out the case.

The above rule for a *mandamus* was then obtained to compel the magistrate to deliver the case which had been already stated and signed by him.

The affidavit of the magistrate filed in answer to the rule was as follows:

"I have been served with notice of an order of this honourable court dated the 22nd of July, 1904, giving me a day to show cause why I should not forthwith deliver to James Ellis the case stated and signed by me pursuant to a previous order of this honourable court dated the 17th of December, 1903. . . .

"Two or three days after I had refused to state a case upon the information, Mr. Ellis attended before me and stated that he desired to enter into a recognizance and asked me what security I should require. I told him I should require a recognizance by himself and one surety in the sum of £50. I further told him that he might enter into the recognisance for what it was worth. The recognizance of the said James Ellis was then taken, and a day or two afterwards the recognizance of Mr. Josiah Leaver was also taken. The said recognizances were then annexed to the security book kept at the Woolwich police-court.

"If I had acceded to the application of the said James Ellis to me to state a case I should no doubt have been satisfied to accept the said Josiah Leaver as a sufficient security, but as I refused to state a case it was not in my view necessary or proper that any recognizance should then be taken, and I did not apply myself to the question whether the said Josiah Leaver was a sufficient surety or accept him as a sufficient security.

"Having regard to section 5 of the Act 20 & 21 Vict. c. 43, it appeared to me that before delivering the case which I had stated and signed pursuant to the said order of the 17th of December, 1903, I must require a recognizance to be entered into upon that case and sufficient at the time of its delivery.

"I had also great doubt (1) Whether the previous recognizance could be construed as applying to the costs of the case stated by order of this honourable court; (2) whether the said Josiah Leaver's estate could be made liable upon a recognizance which did not come into operation (if at all) until after his decease; (3) whether this kind of recognizance could be enforced against the estate of a deceased surety.

"I offered to deliver the said case to the appellant's solicitors upon a fresh recognizance in the sum of £50 being entered into. As the said James Ellis has been adjudicated bankrupt I consider that such fresh recognizance ought to be entered into by two sureties in addition to the said James Ellis."

"The above are respectively submitted to the court as my reasons for refusing to deliver the said case to the said James Ellis."

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), provides:

Section 3.—"The appellant, at the time of making such application—that is, the application under section 2 to the justice or justices to state a case—and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognizance, before such justice or justices, or any one or more of them, or any other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior court, and pay such costs as may be awarded by the same. . . ."

Section 5.—"Where the justice or justices shall refuse to state a case as aforesaid, it shall be lawful for the appellant to apply to the Court of Queen's Bench upon an affidavit of the facts for a rule calling upon such justice or justices, and also upon the respondent, to show cause why such case should not be stated; and the said court may make the same absolute or discharge it, with or without payment of costs, as to the court shall seem meet, and the justice or justices, upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as is hereinbefore provided."

Daldy, for the London County Council, showed cause.—The magistrate was right in holding that fresh recognizances were necessary, and in refusing to deliver the case until such fresh recognizances were entered into. Two questions arise—first, upon the construction of the words at the end of section 5 of the Summary Jurisdiction Act, 1857; and secondly, whether the recognizance on the face of it can be held—having regard to the fact of the death of the surety—to bind the surety so as to apply to a different person than the surety himself. There are two ways of entering into recognizances on cases stated—namely, under section 3 and under section 5. It has been held that on a recognizance under section 3 the recognizance can be entered into at any time during the three days allowed for applying for a case. If the magistrate refuses to state a case, and if the court by *mandamus* orders him to state a case, then section 5 applies; and taking sections 3 and 5 together it was not in any way contemplated that the magistrate, on refusing to state a case, should take a recognizance on the mere chance of the court ordering him to state a case. If the magistrate takes the recognizance, and it afterwards turns out that it never ought to have been taken, then the recognizance comes to nothing. Section 5 deals with the case where the court orders the justice to state a case, and it provides that the justices, on being served with the rule absolute, shall state a case "upon the appellant entering into such recognizance as is hereinbefore provided." The meaning of that is that when the court orders the justices to state a case they are really giving the justices a new jurisdiction, and when a case is stated by order of the court the jurisdiction of the justices to take the recognizances only arises when the rule has been made absolute. In that case both the stating of the case and the entering into the recognizance are to be done after the rule is made absolute. The result is that under section 5 the time when the recognizances are to be taken and the event on which they are to be taken are distinct from what they are under section 3. The recognizances entered into before the magistrate was ordered to state a case were of no avail, and fresh recognizances were required under section 5.

Frank Gover, for the applicant, in support of the rule.—[Lord ALVERSTONE, L.C.J.—We wish you to deal with the point whether these recognizances were available to you under section 5.] It is submitted that the recognizances entered into under section 3 were sufficient. Section 5 ought not to be read as saying that the language of section 3 prevents the applicant for a case from entering into recognizances at the time of making the application, though such application is refused. The concluding words of section 5 were intended to apply to the case where the magistrate had refused to state a case, and where no recognizances had been entered into; and if the words "upon the appellant entering into such recognizance as is hereinbefore provided" had not been inserted there would in such a case have been no recognizances at all entered into. It was to guard against a case being stated without any recognizances being entered into; but if recognizances have already been entered into under section 3, then it becomes unnecessary to have any further recognizances under section 5, and the section as to that point does not apply. By rule 15 of the Summary Jurisdiction Rules, 1886, a security book is to be kept, and the full particulars of the securities given are to be duly entered in this book. In the present case these recognizances, which the magistrate had duly taken, had been entered in the records of the court. [He was stopped.]

Lord ALVERSTONE, L.C.J.—In this case, which is certainly one of difficulty, it must be taken, in favour of the person who moved the rule, that security had been given in accordance with section 3 of the Act. I agree with what Mr. Daldy has said, and I can see how material it is, that the security is one which can be enforced. If counsel could have said either that no security was given under section 3, or that the magistrate had no power to take security at that stage because he had not made up his mind whether he would grant a case or not, or because he thought he was going to refuse a case, then I think he would have gone a long way to convince us that this rule should be discharged. It seems to me impossible to say that it was not within the power of the magistrate to take the recognizance at that time. Section 3 says that the appellant, at the time of making such application—that is, the application for a case, and before the case shall be stated and delivered to him by the magistrate, shall in every instance enter into recognizances.

That being so, I think the later cases have put a construction on that section. In the case of *Chapman* v. *Robinson*, 7 W. R. 12, 1 E. & E. 25, it was decided that the security was good if it were given within the three days allowed for applying for a case, although not entered into at the time of making the application. The second case, that of *Stanhope* v. *Thorsby*, 14 W. R. 651, L. R. 1 C. P. 423, goes further and says that the security need not be given within the three days, but is good if given before the case is issued by the justices, if the application has been made within the three days. But none of those cases throw any doubt on the right and the jurisdiction of the magistrate to take the recognizances at the time of the making of the application. Therefore, as I have said, even taking the magistrate's very fair statement in his affidavit supplementing what the applicant has said, I think we must take it that there was an application made to the magistrate to take the recognizances at a time when it was within his jurisdiction to take them. The only other point is, aye or no, does the fact that the magistrate afterwards refused to state a case and that this court has since ordered on a rule absolute the case to be stated, create any difference and necessitate further

recognizances? I admit that section 5 affords some ground for the argument of counsel who opposed the rule, because it says: "The justice or justices upon being served with such rule absolute shall state a case accordingly upon the appellant entering into such recognizance as is hereinbefore provided." That provision was obviously necessary in order to prevent the applicant from claiming the case on the rule without having given security; and under the circumstances it seems to me that the words "as is hereinbefore provided" may well be satisfied, not only by the form and nature of the security, but also by saying that it is a security which is to be taken in the way contemplated by section 3. Upon that construction it would rather help the argument of counsel in support of the rule, because he says that section 5 is to be effective if the appellant has fulfilled what is the condition required by section 3. Therefore, it seems to me, taking the facts now before us, that there was a security given in accordance with section 3, and that security is effective for whatever it may be worth against the persons who became either principal debtor or surety for the principal debtor, and the condition is the same—namely, to prosecute the appeal and pay the costs of the application on a case being stated. In those circumstances it seems to me impossible for us to say that the magistrate was right in refusing to deliver out the case without a further security being given by the appellant, whatever might have happened assuming that there had been no security given under section 3. I think, therefore, that this rule should be made absolute.

KENNEDY, J.—I am of the same opinion. Although it has been decided that it is sufficient if the recognizances are in fact entered into before the case is stated and delivered out, it seems to me to be clear—and I do not think counsel in opposition to the rule challenges the contention—that under section 3 it is perfectly correct, if I may say so, to tender, and there is nothing in the section to prevent the magistrate from accepting the entering into recognizances at the time of the application for a case. The application may or may not be granted at the time it is made. Indeed, the application is made within a certain time—three days—and in writing, so that the applicant may very well not know whether the case will be granted, but he has persons who are willing to enter into recognizances. When we look at the form of the recognizance it is conditioned to be liable as bail, if I may say so, to a certain extent, and refers to a case that is to be stated. The magistrate having in this case taken the recognizance afterwards declines to state a case. The recognizance so taken was not taken in the slightest degree in contravention of the statute, but was offered and taken at the time of the application. Is not the recognizance so taken a valid recognizance, having regard to that case, although the magistrate declined to state it at the time, and this court has to be invoked to direct him to state the case in respect of which the recognizance had been offered and taken? When we come to look at section 5, I see nothing in that section which justifies the contrary contention. This court has power under section 5 to decide that the case must be stated. The court makes the rule absolute for the statement of the case, and the magistrate on being served with the rule absolute is to state the case "upon the appellant entering into such recognizance as is hereinbefore provided." That provision is, in my opinion, clearly inserted to meet the case, which is a common case, that where a magistrate has decided and has refused to state a case, no one thinks of offering to enter into recognizances, nor is any recognizance taken; and, but for those words at the end of section 5, it might be that there would be a rule absolute to state a case without any recognizance having ever been entered into at all before the case is delivered and dealt with. Therefore it was necessary to make that provision. Is there anything in this section, when fairly read, that practically vacates the value of the recognizance entered into at the time, or practically at the time, of making the application for the case, because the magistrate ultimately determines not to state a case, and the action of this court has to be invoked? I think there is not. If a recognizance is duly entered into to abide certain consequences in the event of a case terminating unfavourably to the appellant, it seems to me there is no jurisdiction for us to say that that is a recognizance which can only be treated as a nullity.

RIDLEY, J.—I am of the same opinion. I confess the case affords some difficulty, but I agree with the judgments of my learned brethren. It must be remembered that the recognizance that was entered into on the first occasion is as good now as it was then, not having any regard to objections that may arise as to the decease of a surety. As to that, I think it does not relieve the surety, but the surety is under the same obligations now as when the recognizance was entered into. The appellant is to prosecute without delay, to submit to the judgment of the court, and pay such costs as may be ordered. The mere lapse of time, the fact that before the magistrate does state a case an application has to be made to the superior court to obtain a rule to order him to do so, does not relieve the surety who has entered into this recognizance, and the recognizance, therefore, is as good now as it was at the time when it was entered into. That observation may have some bearing on the merits of the decision. I agree that the rule should be made absolute.

Rule absolute, with costs against the county council.

Solicitors in support of the rule, *Henry Gover & Son.*

Solicitor in opposition to the rule, *W. A. Blaxland.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) Dec. 19.

WESTHORPE v. POWLEY. (a.)

Naval reserve—False statement on entering—Naval Enlistment Act, 1853 (16 & 17 *Vict. c.* 69), *s.* 16—*Naval Volunteers Act,* 1853 (16 & 17 *Vict. c.* 73), *s.* 17—*Royal Naval Reserve (Volunteer) Act,* 1859 (22 & 23 *Vict. c.* 40), *ss.* 15, 16.

Section 16 *of the Naval Enlistment Act,* 1853, *does not apply to a person who makes a false statement on entering, or offering to enter, the Royal Naval Reserve, which was created by the Royal Naval Reserve Act,* 1859.

Case stated by justices for the borough of Great Yarmouth, in the county of Norfolk.

On the 21st and 28th April, 1904, the justices when sitting as a court of summary jurisdiction heard and determined an information which charged the respondent with making on the 23rd of February, 1904, a false statement in writing on offering himself to enter the naval service of his Majesty, contrary to section 16 of 16 & 17 Vict. c. 69 (the Naval Enlistment Act, 1853).

The following facts were proved or admitted:

The appellant, Leonard J. Westhorpe, was an

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

officer in his Majesty's Customs, and was authorized by virtue of his appointment under the regulations hereinafter mentioned, to enrol duly qualified applicants in the royal naval reserve. The royal naval reserve was established by the statute 22 & 23 Vict. c. 40 (the Royal Naval Reserve (Volunteer) Act, 1859), and is governed by regulations issued under that statute.

On the 23rd of February, 1904, the respondent Powley applied in person to the appellant to be enrolled in the royal naval reserve, and signed a printed form which was read over to him, and which contained the statements: (1) That the respondent had not already made application to be enrolled in the royal naval reserve at that (Yarmouth) or any other port; and (2) that his age was 30—both of which statements were false.

On behalf of the respondent it was contended upon the above facts that as at the date of the passing of the statute creating the offence (namely, 16 & 17 Vict. c. 69) there was no force of naval reserve in existence, the penal section (section 16) could not apply. Also it was contended that the expression "naval service of her Majesty," in 16 & 17 Vict. c. 69, referred to the royal navy only, and could not be held to include the royal naval reserve, on the grounds that the royal naval reserve was not at the date of the earlier Act and is not now a part of the "naval service."

For the appellant it was contended that inasmuch as the royal naval reserve was under the control of and paid by the Admiralty, and its members when under training were under the command of his Majesty's naval officers, the force must come within the description "naval service"; that the very nature and objects of the force brought it within the words in question and it was within the mischief intended to be met by the section, and that the words "naval service" must be taken to mean the naval force of his Majesty as constituted for the time being.

The justices were of opinion that at the date of the Act (16 & 17 Vict. c. 69) there was no force of naval volunteers in existence, the first body coming under that description being constituted by 16 & 17 Vict. c. 73 (the Naval Volunteers Act, 1853), and that section 16 interpreted as a penal section could not be construed to apply to a non-existent body without further words. That, referring to 16 & 17 Vict. c. 73, which is entitled "an Act for the establishment of a body of naval coast volunteers, and for the temporary transfer to the navy, in case of need, of seafaring men employed in other public services," there is no reference to c. 69, but section 17 extends the laws relating to the government of the navy to volunteers on board ship or otherwise under instruction, training, or exercise.

That an Act, 22 & 23 Vict. c. 40, referred to in the argument, appeared to be in many respects a repetition of c. 73, giving the volunteers an additional name, "Royal Naval Volunteers," but not apparently carrying the case further against the respondent, who, not then being under instruction, training, or exercise, was charged with having attempted to re-enlist for, a second period of service after the completion of the first without mentioning the latter, and not with the offence under section 16 of the Royal Naval Reserve (Volunteer) Act of 1859.

The justices accordingly held that section 16 of 16 & 17 Vict. c. 69, did not extend to persons applying to enter the royal naval reserve, and dismissed the information.

The question for the opinion of the court was whether the decision of the justices was right, and whether the words "naval service" in that section included the royal naval reserve, or persons offering themselves for service in it.

Section 16 of the Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69), an Act to make better provision concerning the entry and service of seamen, and otherwise to amend the laws concerning her Majesty's navy, provides:

"Every person who, upon entering or offering himself to enter the naval service of her Majesty, shall make or give any false statement, whether orally or in writing, with intent to deceive any officer or person authorized to enter or enlist seamen or others in or for such naval service, shall be deemed a rogue and vagabond within the intent and meaning of the Act of the fifth year of King George the Fourth, chapter eighty-three, and shall upon conviction thereof be punished accordingly; and all the provisions of the said Act, and of any Act amending the same, shall take effect and apply as if a person so offending as aforesaid had, by the said Act of the fifth year of King George the Fourth, been declared a rogue and vagabond within the true intent and meaning of that Act."

On the same day, the 15th of August, 1853, the Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73)—"an Act for the establishment of a body of naval coast volunteers, and for the temporary transfer to the navy, in case of need, of seafaring men employed in other public services"—was passed, and under it "the royal naval coast volunteers" were authorized to be raised "by voluntary entry (from among seafaring men and others who may be deemed suitable for the services in which such volunteers may be employed)." Section 7 provides:

"All the laws and customs for the time being in force for the government of her Majesty's ships, vessels, and forces by sea, and applicable to any person in or belonging to the fleet, or to any person being in actual service and full pay, and part of the crew of any of her Majesty's ships or vessels, shall be applicable in like manner to every volunteer during such period as he shall be on board any ship or vessel for the purpose of instruction, training, and exercise, or shall be otherwise under instruction, training, and exercise, and to every such volunteer, and to every officer and man of the coastguard, of her Majesty's revenue cruisers, seaman-rigger, or other person required to serve in the navy under this Act during such time as he shall be in actual service either on board any ship or vessel or otherwise under this Act. . . ."

The Royal Naval Reserve (Volunteer) Act, 1859 (23 & 23 Vict. c. 40)—"an Act for the establishment of a reserve volunteer force of seamen, and for the government of the same"—authorized the raising of "the royal naval volunteers," consisting of "men to be raised by voluntary entry from among seafaring men and others who may be deemed suitable for the services in which such volunteers may be employed."

By section 15—similar in terms to section 17 of 16 & 17 Vict. c. 73—the laws relating to the government of the navy were extended to volunteers while on board ship for the purpose of, or while under instruction, training, and exercise, and to such volunteers and others when in actual service; and by section 16: "If any person shall enter or attempt to enter the royal naval volunteers as a new volunteer more than once during the whole or any part of the same period of service, he shall for every such act forfeit and pay any sum not exceeding twenty pounds."

William Wills, for the appellant.—The information was laid under section 16 of the Naval Enlistment Act, 1853, and the justices were of opinion that that section did not apply as the force called the royal naval reserve, in respect of which the respondent was charged, did not exist at the time of the passing of

that Act in 1853. It is submitted that the justices took too narrow a view of the meaning of the words "naval service" in section 16, and that those words are to be taken in a wider sense than that placed upon them, though the respondent contended that those words "naval service" must be taken in their ordinary meaning. The Act deals principally with the terms of enlistment in the navy, and the preamble states that (amongst other objects) it was to amend the law concerning the "manning" of the navy, which is a very general term. Then section 16, which is the one in question, contains the words "in or for such naval service," that is, to enter persons "in," or enlist them "for" the service, which are very wide words, and section 18 refers to "naval coast volunteers," showing that the Act was not confined to men in the ordinary service of the navy—that is, of the navy and marines. Then comes the Act 16 & 17 Vict. c. 73, passed on the same day, which enabled this force of naval coast volunteers to be raised and which made no provision as to the punishment of persons falsely entering into it, thus leaving such punishment to be dealt with under section 16 of the earlier Act. Section 3 relates to the training of volunteers, and sections 4 and 5 contain the words "actual service," indicating that the antithesis of actual service is potential service. Then by section 8 a volunteer is to be protected from "service in the royal navy," and the fair inference from those words is that the Legislature regarded the volunteer as being in a modified sense in the service of the royal navy. The whole distinction is as to the liability to active service and the liability to be called upon to serve, which the volunteer is at all times under during the term (sections 13, 14, 16, and 17). In that Act we have a force very similar to the one now in question authorized to be raised by an Act passed in the same year and on the same day, and it does not provide for the punishment of a man who makes a false statement in joining it, and it would be very expedient that it should do so if the matter were not provided for in the earlier Act. Then, coming to the Act 22 & 23 Vict. c. 40, under which these naval reserve volunteer forces were raised, by section 4 the Crown can call these reserves into actual service and for active duties. A man who is in the naval reserve is none the less in the "naval service" because he is not at the moment on actual duty. He is liable to be called out for actual duty, and the position of a man in that reserve is like that of a servant of a master who is going abroad and who does not want the services of the servant for the time being, but who keeps the servant in his employment. The words "naval service" are quite capable of covering the service of these men, and there is no reason why the words should be restricted in the way adopted by the justices.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—Counsel for the appellant has most properly brought to our attention everything we ought to consider in dealing with this case. I have, however, come to the conclusion that the decision of the magistrates was right. The respondent was summoned under section 16 of the Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69), the opening words of which are: "Every person who, upon entering or offering himself to enter the naval service of her Majesty, shall make or give any false statement . . . with intent to deceive any officer," and so on, "shall be deemed a rogue and vagabond," and so on. I certainly think that the statement of the proposition as stated in the case, if it meant to say that nothing could be naval service of his Majesty within the meaning of this section which was not naval service at the time the Act was passed, and that therefore the section did not apply, would be going too far. It is quite possible that subsequent legislation, and possibly something other than legislation, would make the naval reserve service naval service of his Majesty. I myself am pressed with the fact that in the same year Parliament passed an Act for the establishment of naval coast volunteers, and counsel for the appellant was obliged to contend that if a person upon joining that body of naval volunteers established under the Act of 1853, c. 73 had made a mis-statement, he would have been liable to penalties under section 16 of the Act of 1853, c. 69. I think that contention goes too far. I think that the Act of 1853, c. 73, by section 17, to which reference has been made, did apply all the law applicable to the navy during the time that the men were serving, and did subject persons to certain penalties, but, inasmuch as we are dealing in this case with a criminal offence, I think it would have been extremely difficult to argue successfully that section 16 of 16 & 17 Vict. c. 69 applied to the force which was created or established under the Act passed in the same session on the ground that the persons entering that force were all to be regarded as in the naval service of his Majesty for the purpose of that section. Then when we come to the Act of 1859 (22 & 23 Vict. c. 40), under which was created this force of the royal naval reserve, which the respondent offered to enter, the Act, in section 1, speaks of the force about to be created as consisting of men to be raised by voluntary entry from among seafaring men. In section 15 it provides that all the laws and customs for the time being in force for the government of his Majesty's ships, vessels, and forces by sea and applicable to persons in the navy, should be extended to volunteers under the Act during such period as they should be on board ship for the purpose of instruction, training, and exercise. There again we have a repetition of the provisions in section 17 of the Act of 1853 (16 & 17 Vict. c. 73), that all the laws and customs for the time being in force with respect to men serving in the navy should be applicable to the volunteers during such period as they should be on board ship. Sections 16, 17, and 18 all impose penalties upon persons in respect of these matters; and section 16 does to a certain extent touch this very subject-matter, because, although counsel contended that it might possibly apply to other cases, it did impose a penalty upon a person entering or attempting to enter the royal naval volunteers as a new volunteer more than once during the same period of service. I quite agree that it does not follow that that shows that exhaustive penalties were being enacted for certain breaches of what was thought to be right on the part of those entering the force. As we have in this section—section 16—to construe the words "naval service," and as the section creates a criminal offence, I think we must be satisfied, there being no express enactment, that by necessary implication the purview of this section has been extended to the case of a volunteer of the naval reserve. Without overlooking what counsel for the appellant has properly urged as to the importance of there being regulations and restrictions in regard to these matters, and quite feeling that regulations might be made which to a certain extent might and would prevent wrong persons from entering this service, and might even subject them to certain consequences, still I am of opinion that we ought not to hold that the effect of section 16 of the Naval Enlistment Act of 1853 (16 & 17 Vict. c. 69), which makes it a criminal offence to make a mis-statement on entering the naval service of his Majesty, is to apply to a man who does not enter the naval service, but who only renders him-

self liable to be called in as a volunteer for that purpose. I think the decision of the justices was right, and that this appeal must be dismissed.

KENNEDY, J.—I agree.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitor for the appellant, *Treasury Solicitor.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) March 13.

WHITE & CO *v.* CREDIT REFORM ASSOCIATION AND CREDIT INDEX (LIMITED). (*a.*)

Practice—Interrogatories—Action for libel—Plea of privilege—Name of informant.

In an action against a trade protection association for libel for having published a statement as to the plaintiffs' solvency, the plaintiffs applied for leave to administer two interrogatories, the first asking whether the defendants before publishing the statement complained of made any and what inquiries as to the truth thereof, and from whom they obtained the information on which they relied in making the statement; and the second asking the defendants to give by reference to their books or otherwise the names of the companies, firms, and persons to whom the book containing the statement complained of was shown by them or their agents. The defendants objected to the last part of the first interrogatory and to the second interrogatory. The judge at chambers having allowed them,

Held, that as the plaintiffs could ask as to the inquiries made by the defendants before publishing the statement complained of, the name of the person giving the information on which they relied in making the statement was material as to the value to be attached to the information, and that therefore the interrogatory was allowable; but that the second interrogatory was oppressive and ought not to be allowed.

Appeal from an order of Bray, J., at chambers, allowing certain interrogatories in an action to recover damages for libel.

The defendants, who were a trade protection association, issued a publication called The Credit Index and a Key Card to be used with it. The credit index contained the names of various traders. Against the name of each trader were placed an alphabetical letter and a number. According to the key card the alphabetical letter indicated the estimated pecuniary strength of the trader against whose name it was placed, and the number indicated the general credit which might be given to the trader in his business. A letter and number were set against the plaintiffs' name, and in respect of that the present action was brought. No special damage was alleged in the statement of claim. The plaintiffs, in their particulars of publication, alleged that the matter complained of was published by the defendants to their canvassers and to numerous persons, firms, and companies who had been solicited or induced to purchase or peruse the book. The defendants, in their statement of defence, denied that the words complained of were libellous, or that they bore the meaning alleged, and in the alternative they pleaded that they published the words complained of in good faith and without malice and under such circumstances as rendered the occasion of such publication privileged. In the particulars delivered by the defendants of the plea of privilege they said that the credit index and key card were issued only to subscribers, being traders and others, to whom the pecuniary strength and general credit of the persons and firms included therein were matters of interest and importance, and upon condition that the subscribers should return the index to the defendants at the expiration of the period for which the same was subscribed.

The plaintiffs, in answer to an interrogatory as to whether they contended that the defendants in publishing the words complained of were actuated by malice towards them, and, if so, upon what facts and circumstances they relied as showing actual malice, said that they contended that the defendants made no proper inquiries and were possessed of no information or particulars concerning the pecuniary strength and credit of the plaintiffs, and, although pretending to have honestly and *bonâ fide* made full, careful, sufficient, and recent inquiries as to the plaintiffs' pecuniary strength and credit, the defendants had in truth and in fact made no such inquiries, and the defendants published the particulars complained of recklessly, indifferent as to whether the same were true or false, and for the purpose of obtaining for themselves large pecuniary profits. The plaintiffs applied for leave to administer certain interrogatories to the defendants, of which the two following, as amended by the learned judge, were in question: (1) "Did the defendants before publishing the said credit index and key card take any and what precautions or make any and what inquiries as to the truth of the said particulars, or make any and what inquiry at all with respect to such particulars? From whom did the defendants obtain the information on which they relied in making the statement complained of?" (2) "Give by reference to your books or otherwise the names of the companies, firms, and persons to whom the same have been supplied, or shown by or through the defendants or their agents?" The defendants took objection to the last part of the first of these two interrogatories—namely, "From whom did the defendants obtain the information," &c.—and to the second interrogatory. The interrogatories, before being amended by the judge, were disallowed by the master, but the learned judge allowed both interrogatories as above, and gave leave to appeal.

Norman Craig, for the defendants.—It is admitted that the decision in *Elliott* v. *Garrett*, 50 W. R. 504, [1902] 1 K. B. 870, covers the first part of the first interrogatory, and that that part of the interrogatory is allowable. The second part, however, ought not to be allowed. Upon an issue of privilege and express malice, it is not allowable to ask the names of the persons from whom the defendants obtained the information upon which they made the statement complained of. It is mere cross-examination for the purpose of discrediting the information. The plaintiffs have no right to interrogate in the hope of discovering a case of which they have no present knowledge. *Hennessy* v. *Wright*, 36 W. R. 879, 24 Q. B. D. 445*n*, was an action for libel to which a plea of fair comment was put on the record. In such a case malice would destroy that defence, as it would a defence of privilege. The court, however, there held that interrogatories asking for the name of the informant could not be given. The last part of the interrogatory is therefore not allowable. [He also referred to *Gibson* v. *Evans*, 23 Q. B. D. 384; *Parnell* v. *Walter*, 38 W. R. 270, 24 Q. B. D. 441; *McColla* v. *Jones*, 4 Times L. R. 12; *McKenzie* v. *Steinkopff*, 6 Times L. R. 141.] The second interrogatory is oppres-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

sive and irrelevant, because it asks the defendants to give the names of all their subscribers. The answer would be of no use to the plaintiffs. The defendants were willing to state the number of their subscribers, and that the publication was issued to none but subscribers. The *dictum* of Lindley, L.J., in *Dalgleish* v. *Lowther*, 48 W. R. 37, [1899] 2 Q. B. 590, at p. 593, is relied upon in support of that interrogatory, but that *dictum* does not support it.

He also referred to *Stern* v. *Sevastopulo*, 11 W. R. 862, 14 C. B. N. S. 737.

H. A. McCardie, for the plaintiffs.—The part of the first interrogatory which is objected to is allowable as tending to support the plaintiffs' allegation that the defendants had no proper information in their possession before they published the matter complained of, and thus to destroy the plea of privilege. The source of the information is vital, because if it came from a notorious liar it would be such that no one ought to rely upon it. [He referred to *Marriott* v. *Chamberlain*, 34 W. R. 783, 17 Q. B. D. 154.] The second interrogatory is not oppressive.

Norman Craig, in reply.—*Gibson* v. *Evans* shows what *Marriott* v. *Chamberlain* really decided.

He also referred to *Blanc* v. *Barrows*, 12 Times L. R. 521.

COLLINS, M.R.—This is an appeal from an order made by Bray, J., at chambers as to two interrogatories, both of which the master disallowed, but which the learned judge allowed with modifications. The action is for libel in respect of a statement in a publication issued by the defendants which, by certain indications, assigned a certain degree of solvency to the plaintiffs, and which the plaintiffs said reflected injuriously upon them. There was a plea of privilege. The first interrogatory is as follows: [His lordship read the interrogatory.] In order to see whether that is a proper interrogatory, it is necessary to consider the position of the parties. The cause of action is the alleged publication of the statement complained of. The answer, so far as material, is that it was published in good faith and without malice and under such circumstances as rendered the occasion of such publication privileged—that is to say, that it was published to persons to whom the pecuniary strength and general credit of the persons named therein were matters of interest and importance. It is contended that it is irrelevant to any issue in the case to inquire as to the names of the persons from whom the information was obtained. To begin with, it is clear law since the decision in *Elliott* v. *Garrett* that the main substance of the information must be given. The interrogatory in that case, which was allowed as being relevant to the issue of malice on a plea of privilege, was: "What information, if any, had you that induced you to believe that the words were true, or what steps, if any, had you taken before speaking the words to ascertain whether they were true or not?" Therefore the state of mind of the person publishing the alleged libel is the legitimate subject-matter for inquiry. If so, why stop short there? The issue is as to the mind of the person publishing the alleged libel. Surely it is an important factor in that inquiry to ascertain, not merely what inquiry in fact that person made, but also who were the persons to whom his inquiry was addressed. In a discussion as to the motive of the person publishing the alleged libel, it is essential to know all the facts, and in order to know all the facts it is obvious that it is necessary to know from whom he obtained the information. If the information was obtained from a person who could have no knowledge upon the subject and the person to whom it was given published it as if it were based upon sufficient information, that might be cogent evidence of malice. To sever the question as to the information from the question as to the position and authority of the person from whom the information was obtained seems to be quite illogical. The two cannot be severed. That is the general principle which is applicable to this case. But it might be that certain countervailing rights would have to be taken into consideration. If there was any suggestion of an illegimate motive in putting the question, that suggestion must be considered. It might be that the party putting the question was really seeking to assert rights against the person who gave the information. If there were any good reason for thinking that the interrogatory was put from such a motive, the law would not allow it to be put as being oppressive and illegitimate. In the absence of any circumstances suggesting such an inference, the state of the person's mind who published the matter complained of is the paramount consideration. There is no suggestion of any countervailing circumstances here, and therefore the interrogatory is legitimate. The learned judge allowed it, and the circumstances not only do not countenance, but really rebut, any suggestion of an inference that the interrogatory is put for the purpose of bringing an action against other persons. Its object is to test whether a ground of privilege exists. The appeal, therefore, as to the first interrogatory fails.

With regard to the second interrogatory, there is one large principle underlying the whole law as to interrogatories—namely, that they must not be either oppressive or outside the legitimate subject-matter of interrogatories. To ask persons conducting a business of this kind to give "the names of the companies, firms, and persons to whom the same have been supplied or shown by, or through the defendants or their agents," in order that by chance some single name of a person may be discovered who has no interest in the matter, is oppressive. This interrogatory, therefore, will not be allowed. The appeal accordingly as to that interrogatory succeeds.

MATHEW, L.J.—I am of the same opinion. With regard to the first interrogatory, the object of it is to discover whether the statement complained of was founded upon information which the defendants obtained, and, if it was, whether it was information of such a kind that the defendants ought to have acted upon it. The best way to test the value of the information is to ascertain the person from whom the information was obtained. I agree with the Master of the Rolls that this interrogatory ought to be allowed. With regard to the second interrogatory, it seems to me to be clearly oppressive. There is no reason to suppose that it would benefit the plaintiffs, and no reason has been shown for allowing it.

Order varied.

Solicitor for the plaintiffs, *A. E. Fenton*, for *T. A. Needham*, Manchester.

Solicitors for the defendants, *Baker, Baker, & Co.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Feb. 9, 10.

KENT COUNTY COUNCIL v. MAYOR AND CORPORATION OF FOLKESTONE. (a.)

Highway — Repairs — Extraordinary traffic — Damages — Limitation of time for action — Statutes — Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23 — *Locomotives Act,* 1898 (61 & 62 *Vict. c.* 29), *s.* 12 — *Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

An action against a public authority to recover damages for an injury to a highway must be brought within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months after the ceasing thereof, by virtue of the Public Authorities Protection Act, 1896, *s.* 1. *This statute is not expressly or impliedly repealed by section* 12, *sub-section* 1 (*b*), *of the Locomotives Act,* 1898, *which provides a limitation of twelve months when an action is brought by a highway authority to recover extraordinary expenses incurred by it in repairing a highway by reason of extraordinary traffic thereon.*

This was an appeal from a judgment of Darling, J., in an action brought by the plaintiffs as the highway authority to recover extraordinary expenses incurred by it in repairing a main road by reason of the damage caused by extraordinary traffic thereon by or in consequence of orders of the defendants.

It appeared that the defendants commenced about December, 1902, to widen a highway within their borough, and that for this purpose traction engines for hauling stone and material were taken along the main roads, to which they caused damage for the repair of which extraordinary expenses were incurred by the plaintiffs. The work was still continuing when action was brought, and the actual damage was done in the early part of 1903 and within the period of twelve months before suit brought in February, 1904.

It also appeared that the hauling was done by a contractor therefor, who had entered into a contract for a year from the 1st of April, 1902, and that he had completed his work by the 23rd of March, 1903.

The amount claimed by the plaintiffs was £520 odd.

The principal defence was that the hauling was finished more than six months prior to action brought, and that the damage was done more than twelve months before action commenced, and that therefore the action was barred either by virtue of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, as amended by the Locomotives Act, 1898 (61 & 62 Vict. c. 29), section 12, sub-section 1 (*b*), which provides that: "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work"; or, by virtue of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, which is as follows: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect (*inter alia*): (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

At the trial Darling, J., found that the traffic was extraordinary and assessed the damages provisionally at £300, but after consideration gave judgment for the defendants, on the ground that the Public Authorities Protection Act, 1893, s. 1, had not been repealed by the Locomotives Act, 1898, and that accordingly the defendants were entitled to six months limitation thereunder. His lordship held, however, that the plaintiffs were entitled to £50 damages as representing the amount of damages done within twelve months if the limitation of time within which action should be brought was twelve months under the later Act.

The plaintiffs appealed.

Dickens, K.C., and *Theobald Mathew*, for the appellants.—The Public Authorities Protection Act does not apply. Hauling was not done in execution of any public duty more than indirectly. The six months run from default in payment, not from act of damage.

They cited *Ambler* v. *Bradford Corporation*, [1902] 2 Ch. 585, 51 W. R. Dig. 43; *Milford Docks Co.* v. *Milford Haven Urban District Council*, (1901) 65 J. P. 483; *Hill* v. *Thomas*, 42 W. R. 85, [1893] 3 Q. B. 333; *Gerard* v. *Kent County Council*, 46 W. R. 111, [1897] A. C. 633.

Hume Williams, K.C., and *Hansell*, for the respondents.—Widening of the road was an act done in pursuance of a public duty. The limit of time for action is six months; but, if for twelve months, the time must run from the date of the last injury in February, 1903.

They cited *Hill* v. *Thomas*; *Midland Railway Co.* v. *Withington Local Board*, (1883) 11 Q. B. D. 788, 32 W. R. Dig. 122; *Egham Urban District Council* v. *London County Council* [1900] 2 Q. B. 751; *Whitebread* v. *Sevenoaks Highway Board*, [1892] 1 Q. B. 8, 40 W. R. Dig. 94.

VAUGHAN WILLIAMS, L.J.—I agree with much of the judgment of Darling, J. Especially do I agree that the Public Authorities Protection Act of 1893 has not been repealed by the Locomotives Act of 1898; and that those Acts do not conflict by reason of the fact that they respectively provide different periods of limitation, the latter Act with regard to the general public, and the former with regard to a special class which the Legislature has thought fit specially to protect. When Darling, J., had decided that the Act of 1893 applied, it was unnecessary for him to deal with the other points which had been raised. But I differ from him, and think the Act of 1893 had no application at all to the facts of the present case, for this reason, that the contractor who did the damage was in no sense the servant of the defendant corporation. Under the Act of 1878 no proceeding could have been taken against the defendants; they required no protection, because the act in question was not done by them. In my judgment the court has nothing to do with the Act of 1893. We, therefore, deal with the points which were not dealt with by Darling, J.—viz., the date from which the limitation runs under section 12 of the Act of 1898. This Act amended the Act of 1878, by which a remedy was given by summary proceeding, the object being the recovery of certain

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

expenses by the road authority. The words in section 12, sub-section 1 (c), of the Act of 1898, "by or in consequence of whose order" were substituted for the words "by whose order," in section 23 of the Act of 1878. The remedy is altered from a summary proceeding to action in the High Court. The action is to be for damages for the injury to the road, and not merely to recover the amount of the expenses of repairing, though a certificate of the expenditure is a condition precedent to the action. I do not accept the view that the time of limitation did not begin to run until the end of all the works for widening the road. Whatever the words "extending over a long period" might potentially include, there must be a unity of the work. In the present case it is my view that the work in respect of the hauling of the stone was not one with the improvement works. I think the limitation was intended to be twelve months from the day of the damage, the subsequent words being inserted merely for the purpose of extending the twelve months in cases in which that period would act oppressively. It would not be right to say that the plaintiffs could recover nothing, and I think they are entitled to recover £50 in respect of the damage done within twelve months. It has been suggested that the latter part of section 12 (b) was intended to apply only when the action was brought against a person "in consequence of whose order" the damage has been done. There is nothing in the words to justify such a reading of them, and I cannot so limit the words. The appellants will recover £50 damages, and have their costs of the appeal, but no costs in the court below.

ROMER and STIRLING, L.JJ., concurred.

Solicitors for appellants, *Church, Adams, & Prior*, for *Charles Turner*, Maidstone

Solicitors for respondents, *Holt, Beever, & Cowdy*, for *A. F. Kidson*, Folkestone.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Jan. 23, 24; Feb. 6.

BOW *v.* HART. (*a.*)

County court — Jurisdiction — Infringement of trade-mark—Franchise—Injunction—County Courts Acts. 1865 (28 & 29 *Vict* c. 99), *s.* 1; *and* 1888 (51 & 52 *Vict.* c. 43), *s.* 56—*Patents, Designs, and Trade-Marks Acts*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 62 69 (4), 71, 72, 75, 76, 77, 81 (5) (12), 90 (1) (2) (3), 92; *and* 1888 (51 & 52 *Vict.* c. 50), *s.* 18.

The county court has no jurisdiction under section 56 of the County Courts Act, 1888, *to try an action to restrain infringement of a trade-mark, such an action not being a personal action within the meaning of that section or of section 58 of the repealed County Courts Act*, 1846. *Nor is such an action included in the equitable jurisdiction conferred by the County Courts (Equitable Jurisdiction) Act*, 1865.

The right obtained by registration of a trade-mark is not a franchise; though it is incorrect to say that a franchise cannot be created by Act of Parliament.

Decision of the Divisional Court (ante, *p.* 218, [1904] 2 *K. B.* 693) *reversed.*

This was an appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Kennedy, J.), which is reported *ante*, p. 218, [1904] 2 K. B. 693, reversing the decision of the county court judge of Kent.

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

The action was brought in the county court at Rochester for an injunction and an account or damages—the latter being laid at £35—in respect of the alleged infringement of the plaintiff's registered trade-mark "Freedom" used in connection with certain articles of food.

The defendant gave notice of objection to the jurisdiction, and also that he intended to contest the validity of the plaintiff's trade-mark and to apply to the High Court for the purpose of having it expunged from the register.

The county court judge held that as by reason of this notice the action became one in which the validity of the trade-mark was in question, he had no jurisdiction to try it, and he refused to make an order.

The Divisional Court reversed the decision, and the defendant appealed.

Beddall and *S. R. Earle*, for the defendant.—The county court judge was right in holding he had no jurisdiction. The right gained by registration of a trade-mark is a franchise, and the action is therefore within the exceptions in section 56 of the County Courts Act, 1888. The intention of the Legislature was to withhold jurisdiction from the county court in cases where something was at stake beyond mere damages—*e.g.*, the right to hold a market, besides the mere amount of the tolls—the good name of the plaintiff in an action for slander, and not only the damages claimed. A trade-mark is *in pari materiâ* with a patent, and the latter was held to be a franchise in *Reg.* v. *County Court Judge of Halifax*, 39 W. R. 492, [1891] 1 Q. B. 793, affirmed 39 W. R. 545, [1891] 2 Q. B. 263. Till the passing of the Patents, &c., Act, 1883, there was no property in a trade-mark, and the only action available was for passing off: *Singer Manufacturing Co.* v. *Loog*, 29 W. R. 699, 18 Ch. D. 395, 412, per James, L.J. The Act of 1883 gave a privilege which did not exist before, the condition of enjoyment being registration, which after five years was conclusive evidence and during that period *primâ facie* evidence of the right (section 76). [STIRLING, L.J.—In 1863 Lord Westbury held there was property in a trade-mark in *Leather Cloth Co.* v. *American &c., Co.*, 12 W. R. 289, 4 De G. J. & S. 137, 142] [ROMER L.J., referred to Lord Cottenham's judgment in *Millington* v. *Fox*, 3 My. & Cr. 338, 352.] [VAUGHAN WILLIAMS, L.J., referred to Lord Langdale's judgment in *Perry* v. *Truefitt*, 6 Beav. 66, 73.] [ROMER, L.J.—What evidence is there of the right during the first five years after registration? Must not the owner rely on his prior user?] The *primâ facie* right to prove a title by registration is itself a franchise. The right accrues during that time and at the end of five years is an exclusive right, which it never was before the statute. The Act of 1883, as extended by later Acts, forms a general code of law relating to patents, designs, and trade-marks, and the "court," wherever referred to therein, is defined by section 117 to mean the High Court. This is so also with the interpolated section 77A, introduced by section 18 of the Patents, &c., Act, 1888, and under which the court or a judge may certify as to a trade-mark in the same way as may be done in regard to a patent under section 31.

They also cited *Reddaway* v. *Banham*, 44 W. R. 638, [1896] A. C. 199, 215, per Lord Macnaghten.

Spokes, for the plaintiff.—No doubt the High Court has complete control over the registration of a trade-mark, but the county court may still have jurisdiction to try an action for its infringement. In that part of the Act of 1883 which relates to patents the language clearly shows that the High Court alone

has jurisdiction; but it is otherwise with the part relating to trade-marks. The county court can grant an injunction where no damages are claimed or where they do not exceed £50. Since the Judicature Act, 1873, a passing-off action could be brought in the county court, and the Patents, &c., Act, 1883 did not interfere with that jurisdiction. It did not, it is true, expressly confer jurisdiction, but that was done by section 56 of the County Courts Act, 1888. The only one of the exceptions in that section which could possibly be said to apply is that of a franchise, and the right to a trade-mark is not a franchise though the grant of a patent is so, as is shown by the wording of the grant in Form D in the first schedule to the Act of 1883. [VAUGHAN WILLIAMS, L.J.—We think that a trade-mark is not a franchise, but if you say a franchise cannot be created by Act of Parliament, I say emphatically we do not agree with you.] Section 56 is a useful enactment when the action to be tried is of a simple character, and the effect of it ought not to be cut down. It would always be possible to transfer to the High Court an action which is not simple.

Beddall replied.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J., read the judgment of the court as follows: This is an appeal from a Divisional Court of the King's Bench Division, which reversed the decision of the judge of the Rochester County Court. The question in the case is whether the county court judge had jurisdiction to try an action brought in respect of an alleged infringement by the defendant of the plaintiff's registered trade-mark. In that action the plaintiff claimed an injunction to restrain the defendant from infringing the trade-mark, and also an account or damages. The claim for damages was, however, abandoned. At the trial it was urged that the county court had no jurisdiction—first, because the registration of a trade-mark under the Act of 1883 amounts to the grant of a franchise, and section 56 of the County Courts Act, 1888, which defines the jurisdiction of county courts, excludes from the cognizance of the county court any action in which the title to a franchise shall be in question, and that the defence raised by the defendant in this case put the plaintiff's right to his trade-mark in issue; and, secondly, on the ground that actions for infringement of trade-marks can only be brought in the High Court. The learned county court judge was of opinion that registration of a trade-mark is not the grant of a franchise. He had some doubt as to whether an action for infringement of a trade-mark could be brought in the county court even in a case where no question as to the right of the plaintiff to the trade-mark is in issue, but he made the following order: "It appearing that the defence to this action puts in issue the question of the plaintiff's right to the exclusive use of his registered trade-mark, and his right to have such trade-mark continued on the register, which is a question which this court has no jurisdiction to decide, I do not think fit to make any order in this action." The Divisional Court reversed this decision, and held that the county court judge had jurisdiction, and we have to consider whether the Divisional Court is right.

We approach the case with diffidence, because we agree with Lord Alverstone that it raises a question of considerable importance and difficulty, a question, indeed, as to which the Chief Justice himself expressed his anxiety that his decision should be reviewed by the Court of Appeal. The case is certainly one of difficulty, but we think that in the Court of Appeal we have had the advantage of arguments on points which were not raised in the Divisional Court. The Lord Chief Justice and Kennedy, J., both agreed with the county court judge that a trade-mark is not a franchise within the meaning of the exception from county court jurisdiction contained in section 56 of the Act of 1888. We agree. The decision in *Reg.* v. *The Halifax County Court Judge*, [1891] 2 Q. B. 263, on a question of franchise only applied to actions relating to infringements of patents, which actions were excluded from the cognizance of the county courts, because a patent right is a franchise within the meaning of section 56 of the Act of 1888. We think that the registration of a trade-mark does not give to the owner of the trade-mark a privilege granted by the Crown in right of its prerogative. Registration of a trade-mark under the Patents, Designs, and Trade-Marks Act, 1883, only affects the rights of proprietors of trade-marks in legal proceedings for infringement, and the conditions under which actions for infringement can be brought, and the effect of proof of registration in support of the plaintiff's case. There is nothing, it will be observed, in sections 75, 76, and 77, which deal with the effect of registration, to suggest a grant of a privilege in derogation of the common law rights of other subjects of the Crown. The Act assumes that in a sense there may be property in a trade-mark, and provides for the protection of that property by a statutory system of registration, and regulates the proceedings to obtain registration or to object thereto, and the correction of the register, and regulates legal procedure. But this is all that this Act or the amending Act of 1888 seems to us to do in respect of trade-marks. But, even though the registration of a trade-mark under these statutes does not operate as the grant of a franchise, and therefore does not make an action for infringement of a trade-mark fall within the exception in section 56 of the County Courts Act, 1888, as being an action in which the title to a franchise is in question, yet it may be that the jurisdiction of the county court is excluded by the express terms of the Patents, Designs, and Trade-Marks Acts. Great reliance was placed by counsel for the plaintiff upon the definition of "the court" in section 117 of the Patents, Designs, and Trade-Marks Act, and upon the fact that in sections 62, 69 (4), 71, 72, 81 (5) (12), 90 (1) (2) (3), 92, the word "court," in the sense of the High Court of Justice in England, is used in respect of trade-marks, and an argument was also based upon the fact that, by section 18 of the Act of 1888, it is provided that in the action for infringement of a registered trade-mark, a judge may certify that the right to the exclusive use of the trade-mark came in question, and that if the court or a judge so certified, then in any subsequent action certain consequences as to costs should follow; and it was urged that, as it was manifest that this certificate could only be given in the High Court, this pointed strongly to the conclusion that an action for the infringement of a registered trade-mark could only be brought in the High Court of Justice. We think that there is considerable force in these arguments, especially as the definition of "the court" is stated to be, "in and for the purposes of, this Act," that is, the Patents, Designs, and Trade-Marks Act, 1883. We do not, however, think that the decision in *Reg.* v. *The Halifax County Court Judge* is conclusive in favour of these contentions, although, in our opinion, it tends strongly in that direction. It may be, however, that the decision of the Court of Appeal in that case was based upon the special provisions in the Act with regard to the trial of patent actions. But there is a further point to be considered, and that is, that, even assuming that the definition of "the court" in the Patents, Designs, and Trade-Marks Act, 1883, does not exclude the jurisdiction of the county court in actions for infringement of trade-

marks, yet one has to examine the County Courts Acts to see if by those Acts any jurisdiction is given to the county courts in actions for the infringement of trade-marks. It is said that the jurisdiction is given by section 56 of the County Courts Act, 1888, which in substance is identical with section 58 of the repealed Act of 1846, the sum of £50 in the later Act being substituted for the sum of £20 in the earlier Act. The words relied upon as giving jurisdiction, under either Act, are the words, "all personal actions where the debt, demand, or damage" (in the later Act), "debt or damage" (in the earlier Act) "is not more than," &c. Prior to the Judicature Act, 1873, there was a difference between the common law courts and the equity courts with respect to actions to enforce the right to trade-marks. This is well pointed out in *Singer Manufacturing Co.* v. *Wilson*, 24 W. R. 1023, 2 Ch. D. 434, by Mellish, L.J., who says (at p. 454): "To give a right of action at common law the thing must have been done fraudulently, it must have been intended to deceive. But the courts of equity said, if you have purchased goods with another man's trade-mark upon them, although you may have done it perfectly honestly, not knowing that it was another man's trade-mark, or if you have manufactured goods for somebody else who has ordered you to manufacture them with a certain trade-mark upon them, and you have manufactured the goods with that trade-mark upon them, perfectly honestly and not knowing that you were doing anything wrong in putting that trade-mark upon them, yet, nevertheless, you cannot be allowed to put the goods into the market with that trade-mark upon them, because the effect of it will be that the goods will pass from hand to hand as being goods manufactured by the person whose trade-mark it is, and therefore you shall be restrained from doing that." That case was appealed to the House of Lords (26 W. R. 664, 3 App. Cas. 376) and the decision of the Court of Appeal was reversed; but Lord Cairns says, with reference to the point now under consideration (p. 391): "That there have been many cases in which a trade-mark has been used, not merely improperly, but fraudulently, and that this fraudulent use has often been adverted to and made the ground of decision, I do not doubt, but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark." The present action is not based on fraud; it seeks to restrain (in the language of Lord Cairns) an "improper" as distinguished from a "fraudulent" use of the trade-mark. Such relief was, prior to the Judicature Acts, only given in courts of equity, and consisted in an injunction and an account of profits: damages could not be awarded until after the passing of the Chancery Amendment Act, 1858. Now, in 1846 the county courts had no equitable jurisdiction, and the common law courts could not have entertained an action for an injunction to restrain the infringement of a trade-mark, while the courts of equity, although exercising this jurisdiction, could not have given damages, and, even after the passing of the Chancery Amendment Act, 1858, could only have given damages by way of a subsidiary alternative. By section 1 of the Act of 1865, an Act to confer on the county courts a limited jurisdiction in equity, the power and authority of the High Court of Chancery in certain suits and matters were conferred on the county courts, but this Act certainly did not confer upon the county courts authority to entertain an action for an injunction or to give damages under the Chancery Amendment Act, 1858. We find, therefore, nothing in the County Courts Acts to confer this jurisdiction. Then it is said that the jurisdiction is given by the Judicature Act, 1873, which gives, by section 24, to the High Court, whether in the King's Bench Division or the Chancery Division, all the power and authority exercised by the Court of Chancery; and it is said that the county court, having the jurisdiction to entertain a personal action, where the debt, demand, or damage is not more than £50, can, by section 56 of the Act of 1888, entertain the present action and grant an injunction to restrain the defendants from infringing the plaintiff's trade-mark. We cannot agree. Such an action would not have been a personal action within the meaning of that word in section 58 of the Act of 1846, nor do we think that it comes within the meaning of the same word in section 56 of the Act of 1888. We think, therefore, that the county court judge had no jurisdiction, and rightly refused to make any order in this action; and it follows that the decision of the King's Bench Division must be reversed.

Appeal allowed.

Solicitors, *Churchman & Winser; Carter & Bell.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Jan. 19.

O'BRIEN v. DOBBIE & SON. (a.)

Master and servant—Employers' liability—Accident—Compensation — Building — Scaffolding — Ladder — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the deceased workman was employed on the work of constructing or repairing a building more than thirty feet in height, and that he and his fellow workmen made use of a ladder by standing on the rungs for the purpose of enabling them to do certain parts of the work. Apart from the ladder nothing in the nature of scaffolding was used in the work. The county court judge found that the ladder was used as a scaffolding, and held that it was a scaffolding within the meaning of the Act.*

Held, that the decision of the county court judge could not be interfered with.

Appeal from an award of the judge of the Liverpool County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a deceased workman whose death had resulted from accidental injuries sustained by him in the course of his employment.

The employers had undertaken the work of converting into a shop a building which had been previously used as an ordinary dwelling-house. The building was over thirty feet in height. The workmen engaged in the operation made use of a ladder—that is to say, they from time to time stood on the rungs of the ladder for the purpose of enabling them to do certain parts of the work. Apart from this ladder nothing in the nature of scaffolding was used in the work. The deceased man was standing on one of the rungs of the ladder engaged on his work when he accidentally fell and received the injuries which resulted in his death.

The question was whether the work was being done "by means of a scaffolding" within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act.

The county court judge, in giving his decision,

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

said: "I think it is made out to my satisfaction that the building was being constructed by means of a scaffolding. I think it is evident in this particular instance that the ladder was used as a scaffolding. It had been used before and on the same day for the same purpose—that is, for a man to stand upon to do some work which was necessary in the building, and, in my opinion, that constitutes it a scaffolding within the meaning of the Act." He accordingly made an award in favour of the applicant.

The employers appealed.

Ruegg, K.C., and *Hugh Fraser*, for the employers.—The finding of the county court judge that this ladder was a scaffolding cannot be supported. A ladder *per se* is not and cannot be a scaffolding. *Hoddinott* v. *Newton, Chambers, & Co. (Limited)*, 49 W. R. 380, [1901] A. C. 49, shows that the question whether a particular erection constitutes a scaffolding is not a mere question of fact on which the finding of the county court judge is final. Lord Macnaghten said: "It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion." It is a matter of practical importance that county court judges should now have the opinion of the Court of Appeal on the question whether a ladder pure and simple can be a scaffolding. There is a *dictum* of the Master of the Rolls in *Veazey* v. *Chattle*, 50 W. R. 263, [1902] 1 K. B. 494, that a ladder may be scaffolding; but there is no actual decision to that effect; and the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co. (Limited)* did not overrule the earlier decision of the Court of Appeal in *Wood* v. *Walsh & Sons*, 47 W. R. 504, [1899] 1 Q. B. 1009, that a ladder by itself cannot be a scaffolding.

Tobin, K.C., and *W. Greaves Lord*, for the applicant, were not called upon to argue.

COLLINS, M.R.—The question raised in this case is one which has often been discussed—viz., whether a ladder can under any circumstances be deemed to be a scaffolding within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act. The county court judge has not given a mere decision without explanation, but he has set out the reasons why he has arrived at the conclusion that in the circumstances of this case this particular ladder was a scaffolding. He said: "I think it is evident in this particular instance that the ladder was used as a scaffolding. It had been used before and on the same day for the same purpose—that is, for a man to stand upon to do some work which was necessary in the building, and in my opinion that constitutes it a scaffolding within the meaning of the Act." We cannot interfere with the finding of the learned county court judge unless he has arrived at it by misdirecting himself on some point of law. Now, has he misdirected himself? In order to say that he has misdirected himself in this case we should be bound to affirm that under no circumstances could a ladder pure and simple, without additions to it, be a scaffolding; that a ladder, as a matter of law, was incapable of being a scaffolding. But, as we have said more than once before, it is impossible to extract from the decisions of the House of Lords any principle which would have the effect of excluding a ladder *per se* from the category of possible scaffolding. I agree that it must now be taken that the question whether a particular arrangement is a scaffolding or not is not a pure question of fact. I think it is a question on which a jury, if the case were tried by a jury, would require some guidance from the judge. In my opinion a practical direction to a jury would be as follows: If a ladder were used exclusively for the purpose of giving access to a particular place, it ought to be held not to be a scaffolding, but if a ladder were used throughout the process of constructing or repairing a building exclusively for the purpose of enabling workmen to rise to a certain height and then and from that height to carry on the work of constructing and repairing, using one or other of the rungs as a standpoint from which to carry on their work, then it might properly be held to be a scaffolding. I cannot exclude the system of two uprights with rungs connecting them from the category of possible scaffoldings. The question to which of the two uses the ladder had been applied must be a question of fact, and that would be the question for the consideration of the jury. It might well be that an isolated case of a particular man on a particular occasion standing on the ladder while he was doing a certain amount of work would not constitute it a scaffolding. The question the jury would have to ask themselves would be this, to what use the ladder had been applied throughout the work. In my opinion the learned county court judge did not misdirect himself in arriving at the conclusion that this ladder was a scaffolding. The appeal will therefore be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicant, *Helder, Roberts, & Co.*, for *John A. Behn*, Liverpool.

Solicitors for the employers, *Faithfull & Owen*, for *T. B. Eastley*, Liverpool.

High Court of Justice.

Chan. Div. Buckley, J. — March 17.

PAWLEY v. PAWLEY. (a.)

Married woman—Restraint on anticipation—Removal—Costs—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

Where a married woman possessed of separate estate, subject to restraint upon anticipation, was a plaintiff in an action which was dismissed with costs,

Held, that the onus *is on the married woman to show that the jurisdiction under section* 2 *of the Married Women's Property Act*, 1893, *to remove the restraint upon anticipation should not be exercised; but that the order will not be made as a matter of course.*

Motion.

By the judgment delivered on the 9th of December, 1904, in an action in which Lucy Dresel, a married woman, was named as one of the plaintiffs, it was was ordered that the action be dismissed with costs, such costs when taxed to be paid by the plaintiffs to the defendant, as to the plaintiff Lucy Dresel out of her separate property as thereinafter mentioned, and not otherwise; and it was ordered that execution therein against the plaintiff Lucy Dresel be limited to her separate property not subject to any restraint upon anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint; and liberty was given for the defendant to apply as to enforcing payment of the said costs when taxed, as regards the plaintiff

(a.) Reported by H. H. KING, Esq., Barrister-at-Law.

Lucy Dresel, out of any of her property which was subject to restraint on anticipation and otherwise as he might be advised.

The costs were taxed and certified at £125 11s. 6d., and the defendant was unable to obtain payment of them.

Lucy Dresel was entitled under the will of C. Pawley, deceased, to the income during her life of a share in the testator's estate, for her separate use without power of anticipation.

The trustees of C. Pawley's will, of whom the defendant was one, had about £200 income accrued due to the plaintiff Lucy Dresel in their hands.

The defendant moved on notice of motion to Lucy Dresel for an order (1) that he be at liberty notwithstanding the restraint upon anticipation to apply income accrued or accruing due to the plaintiff Lucy Dresel in his hands as a trustee of the said will in payment of (*a*) the sum of £125 11s. 6d. and interest, the amount of his taxed costs of the action, and (*b*) the defendant's taxed costs of this application; (2) that if necessary the defendant be appointed receiver of the said income up to the value of £125 11s. 6d. and interest, and the amount of the defendant's taxed costs of this application.

Cozens-Hardy, for the motion. — The application is made under section 2 of the Married Women's Property Act, 1893, which says that in any action instituted by a married woman the court before which such action is pending shall have jurisdiction to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property, or otherwise as may be just. That jurisdiction has been frequently exercised: *In re Godfrey, Thorne-George* v. *Godfrey*, 43 W. R. 244, 72 L. T. 8; *Cummins* v. *Perkins*, 47 W. R. 138, 214, [1899] 1 Ch. 16. The *onus* lies on a married woman who has unsuccessfully brought an action to show why costs ought not to be made payable out of property subject to a restraint.

He also cited *Hood-Barrs* v. *Cathcart*, 43 W. R 560, [1895] 1 Q B. 873; *Crickitt* v. *Crickitt*, [1902] P. 177, 50 W. R. Dig. 147; Seton on Judgments, vol. 2, pp. 886, 887; Annual Practice, 1905, vol. 2, pp. 365, 366.

Lucy Dresel, in person.—I was joined as plaintiff in the action without my consent, and I told the solicitor who acted in the matter that I disclaimed all responsibility.

BUCKLEY, J.—On the 9th of December, 1904, the trial took place of an action in which one of the plaintiffs was Lucy Dresel, a married woman. The action was dismissed, the plaintiffs being ordered to pay the defendant's costs, and liberty being given to the defendant to apply as to enforcing payment of the costs as against Lucy Dresel out of any of her property which was subject to restraint upon anticipation. The costs were taxed at £125 11s. 6d., and this is an application under section 2 of the Married Women's Property Act, 1893, to enforce payment of these costs out of her separate property subject to restraint on anticipation. No principle is laid down in the reported cases for the guidance of the court upon the hearing of these applications. If the court, merely because a married woman has brought an action and failed and has been ordered to pay her opponent's costs, can remove the restraint on anticipation in order that the successful defendant may obtain payment of his costs, any married woman can fritter away everything she has by becoming a professional litigant. It is not, in my opinion, a matter of course to make an order for payment of costs out of separate property subject to restraint. In the present case the judgment left it open for the defendant to apply for such an order. No grounds have been shown either for or against the removal of the restraint. *Primâ facie* the person who has obtained an order for costs against another person is entitled to have his costs paid, and the *onus* is on a married woman ordered to pay the costs to show that the doctrine of restraint upon anticipation ought to be applied in her favour to the prejudice of the person who has obtained an order for payment of costs. In the present case the married woman does not sustain that *onus*. She has handed in an affidavit to the effect that she did not consent to the proceedings in which she appeared as a plaintiff being taken. But I cannot consider this allegation in view of the fact that the order on her to pay costs is binding on me. It may or it may not be that she has some ground of complaint against the solicitor who commenced proceedings in her name; it is not for me to say whether she has or has not any claim against him. I make the order asked for on the present application.

Cozens-Hardy.—The applicant being one of several trustees, it would be advisable to take the order appointing him receiver without remuneration and without giving security on the lines of form 16 in Seton on Judgments, vol. 2, p. 887.

Solicitors for the applicant, *Sandom, Kersey, & Knight*.

Chan. Div.
Swinfen Eady, J. } Feb. 21.

In re SPARK'S LEASE.
BERGER *v.* JENKINSON. (*a*.)

Landlord and tenant—Covenant not to underlet without licence—Licence not to be "unreasonably withheld."

Where there was a covenant not to assign or underlet without the landlord's written consent, "such consent not to be unreasonably withheld,"

Held, under the circumstances, it was reasonable for the landlord to stipulate for a similar covenant between the undertenant and himself.

Originating summons.

The landlord of a building occupied a part of it himself and underlet the remaining part to a tenant. There was a covenant by the tenant not to carry on or permit certain trades, and not to assign or underlet without the landlord's written consent, "such consent not to be unreasonably withheld." There was only one entrance to the building.

The tenant proposed to underlet, and eventually the landlord offered to grant the licence if the undertenant would agree not to assign or underlet without his consent, such consent not to be unreasonably withheld.

This summons was issued by the tenant to determine the question whether the landlord was entitled to insist on this condition.

The case was adjourned to enable the landlord to state in writing the exact licence he was prepared to grant.

It was subsequently agreed that the landlord should be a party to the underlease, and should have a direct covenant from the under-tenant.

The case came on again on the question of costs.

Martelli, for the tenant.

Eve, K.C., and *Daniel Jones*, for the landlord.

(*a*.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

SWINFEN EADY, J., in giving judgment, said: As the landlord occupied part of the building and had let off another part with a covenant by the tenant not to assign or underlet without the landlord's written consent, such consent not to be unreasonably withheld, it was reasonable for the landlord before granting the licence to underlet, to ask for what purpose the portion to be underlet was to be used, and to stipulate for a similar covenant between the undertenant and himself. The tenant's contention was not well founded, and he must pay the costs of the summons.

Solicitors, *Downey & Linnell; Boyce & Son.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) March 24.

REX *v.* GRIMWADE AND ANOTHER (JUSTICES OF IPSWICH).
REX *v.* DODDS AND OTHERS (JUSTICES OF BIRKENHEAD). (*a.*)

Licensing law—Undertaking—Renewal of licence—Beerhouse—Mandamus—*Licensing Act*, 1904 (4 *Ed.* 7, *c.* 23), *s.* 9.

Upon an application for the renewal of an existing on-licence, the licensing justices have power under section 9 *of the Licensing Act*, 1904, *to require the licence-holder to give such reasonable undertakings, as the justices deem fit, as a condition to the renewal of the licence, provided that, by section* 9, *sub-section* 3, *of the said Act, the aforesaid power cannot be exercised in respect to licences to which section* 19 *of the Wine and Beerhouse Act*, 1869, *and section* 7 *of the Wine and Beerhouse Amendment Act*, 1870, *apply.*

REX *v.* GRIMWADE AND ANOTHER.

Rule calling upon the justices of Ipswich to show cause why a writ of *mandamus* should not issue commanding them to hear and determine according to law an application for the renewal of the licence of a beerhouse licensed before May, 1869.

The Boiler-makers' Arms was a beerhouse licensed prior to the 1st of May, 1869. Upon an application for the renewal of the licence, the justices purporting to act under section 9 of the Licensing Act, 1904, hereinafter set out, in a considered judgment made the following order: "refuse to renew the licence unless the applicant give an undertaking that he would not sell beer for cash over the counter."

Section 1 of the Act of 1904 enacts: "The power to refuse the renewal of an existing on-licence on any other ground than the ground that the licensed premises have been ill-conducted . . . shall be vested in quarter sessions instead of the justices."

Section 9, sub-section 2, enacts: "If the justices of a licensing district refuse to renew an existing on-licence on the ground that the holder of the licence . . . has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises have been ill-conducted: Provided that where the justices, on the application for the renewal of an existing on-licence, ask the holder to give an undertaking as aforesaid, they shall adjourn the hearing of the application and cause notice of the required undertaking to be served upon the registered owner of the premises, and give him an opportunity of being heard. (3) Section 19 of the Wine and Beerhouse Act, 1869, and section 7 of the Wine and Beerhouse Act, 1870, are hereby repealed, and, in the application of this Act to licences to which the said section 19 extends, the grounds mentioned in section 8 of the Wine and Beerhouse Act, 1869, shall be substituted for the grounds mentioned in this Act as the grounds on which the power to refuse the renewal of an existing on-licence is reserved to the justices of a licensing district."

The said justices did not appear by counsel, as they were advised that no fund existed out of which the fees of counsel might be defrayed. By permission of the court, the affidavit filed by them was read. They submitted the following material grounds why the rule should be dismissed: (1) That the applicant and the owners had an alternative remedy by appeal to quarter sessions, which course had been taken, and an appeal was now pending. Therefore the court should should refuse a *mandamus* on the authority of *Reg.* v. *Justices of Bristol*, 9 Times L. R. 273; *Reg.* v. *Justices of Lancashire*, L. R. 8 Q. B. 146; *Reg.* v. *Charity Commissioners of England and Wales*, 45 W. R. 336, [1897] 1 Q. B. 407; *Reg.* v. *Registrar of Joint Stock Companies*, 36 W. R. 695, 21 Q. B. D. 131. (2) That they had exercised the discretion given generally under the Licensing Acts, and especially under the Licensing Act, 1904, s. 9.

Avory, K.C. (*Henlé* with him), for the owners.—There is no appeal to quarter sessions unless the justices refuse to renew the licence. In this case the justices have in fact actually renewed the licence, but directed the clerk to retain it until the required undertaking is given; that is not a refusal in fact, and if we go to quarter sessions, the case might be well dismissed on that ground. The cases referred to in the affidavit of the justices only go to show that unless the remedy by *mandamus* is in some way more convenient, the appeal must go in the ordinary way to quarter sessions: *Reg.* v. *Bowman*, [1898] 1 Q. B. 663, 46 W. R. Dig. 83. [Lord ALVERSTONE, L.C.J.—We have frequently in this court acted on the grounds that a grant on condition may be treated as a refusal, but you had better address yourself to the real point in the case.] Sub-section 2 of section 9 is incorporated into section 1 of the Act, 1904, which enumerates the only grounds upon which the justices can now refuse to renew an existing licence. But sub-section 3 of section 9 explicitly enacts that the grounds mentioned in section 8 of the Wine and Beerhouse Act, 1869, are substituted for the grounds mentioned in the Act of 1904 in the case of beerhouses licensed prior to May, 1869. In this case the justices have not refused on one of the grounds mentioned in the said section 8 of the 1869 Act, and the rule must be made absolute.

REX *v.* JUSTICES OF BIRKENHEAD.

Rule calling upon the justices of Birkenhead to show cause why a writ of *mandamus* should not issue commanding them to deliver up to the applicant his renewed licence in respect of the premises known as the Commercial Hotel, and situate at No. 123, Beckwith-street, Birkenhead, which said licence was granted by the said justices to the said applicant on or about the 1st day of March, 1905.

In this case the justices also purported to act under section 9 of the 1904 Act, but this case is distinguished from the above-mentioned *Rex* v. *Justices of Ipswich*, in that the application was in respect of an ordinary on-licence, and section 9, sub-section 3, therefore did not apply. The affidavit of the justices disclosed that after careful inquiry in their district they had come to the conclusion that precautions must be taken with a view to putting an end to the following evils which are found to be prevalent in

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

connection with the sale of intoxicating liquors: (1) The sale of intoxicating liquor on credit; (2) the sale of intoxicating liquor to children; (3) the introduction of various games on the premises with a view of increasing the sale of intoxicating liquor; (4) the failure in many cases of licence-holders to devote attention to their business; (5) the use of back-door entrances to the premises; (6) the existence of societies accumulating funds to be expended on intoxicating liquor.

Before the passing of the Act of 1904 it was the practice of the justices to obtain undertakings, that the applicant would not permit any of the aforesaid evils to exist in respect of his premises. At the general licensing meeting held on the 1st of January, 1905, the justices announced that no licence would be renewed unless the applicant entered into an undertaking not to permit any of the said evils to arise in connection with the premises for which the licence was required, and that the undertaking would be indorsed upon the licence. The justices then adjourned the meeting to the 15th of January, 1905, in accordance with the proviso to section 9, sub-section 2, of the Act, 1904, in order that notice might be served on the owner of the premises, to give him an opportunity of being heard. At the adjourned meeting, after hearing counsel, the justices, in giving judgment, said, *inter alia:* "We have decided that the Act does give us the power. We renew the licences on the condition of the undertakings being given, otherwise the licence will remain in the hands of the clerk." No appeal had been lodged to quarter sessions, and the time for appealing had passed.

Asquith, K.C. (with him *Low, K.C.*, and *Shepherd Little*), showed cause.—It is admitted on both sides that the undertakings are reasonable, so that no question can arise on that point. It has been the practice for years all over the country to give similar undertakings, and the legality has never been tested. It is necessary to notice this, because it is by the recognition of the practice that a meaning is given to section 9. [WILLS, J.—It was never an undertaking that was given in reality. But if the requirements of the justices were not fulfilled the result would be that the licence was refused upon the next application for renewal.] If section 9 of the new Act only referred to undertakings which had been once given, or given voluntarily, the provision might be put into the waste-paper basket, because nobody would be so foolish as to give an undertaking without which the justices would have no discretion to refuse to renew the licence except on the grounds referred to in section 1. For this reason the Act provided that notice should be served upon the registered owner of the premises, for the licence-holder might well give any undertaking, no matter how prejudicial to the owner, in order to secure the renewal of his licence. The section does not work harshly against the licence-holder, as it is provided that the undertaking is to be reasonable. Indeed, if a person refused to give an undertaking which was reasonable, the justices, in accordance with the dictates of common sense, might well find that he was not a fit person to have his licence renewed. I reserve the objection that the rule should be dismissed on the ground that the true course was by appeal to the whole body of justices acting in and for the borough (section 8, sub-section 2, of the Act of 1904).

Bodkin, (*F. E. Smith* with him), for the applicant.—To deal with this question adequately it is necessary to consider the history of undertakings. In only two cases is there power to impose conditions on the renewal or grant of licences, and in both cases it can only be done by the consent of the licence-holder, and at his request: (1) Six-day licences, under section 49 of the 1872 Act; (2) early closing licences, under section 7 of the 1874 Act. But a custom sprang up of imposing conditions, and if these conditions were broken the applicant was refused his licence at the next meeting. Those undertakings were assented to voluntarily by the licence-holders; there was no power to force them upon them, nor does section 9 now create such a power. The section has abundant effect; if the applicant has entered into an undertaking in the past, or should do so in the future, then the jurisdiction of the justices is grounded. The proviso has a rational meaning; it might happen that the applicant might consent to give an undertaking which the owner could not submit to—*e.g.*, to brick up a back door, where the owner had covenanted with his lessor not to do so.

Pickford, K.C. (*Rigby Swift* with him), for the owner.—The court seems impressed with the use of the word "reasonable." That was inserted for the protection of the owner in case the licensee recklessly gave an unreasonable undertaking. The section is of great value. If the applicant refuse to give the required undertaking, the justices, under section 1, sub-section 2, can refer the matter to quarter sessions. [KENNEDY, J.—Yes; but if your construction is correct, then at the most the licence can only be refused upon payment of compensation. That is very different from the contention of the justices, which, if correct, would enable them to refuse without compensation.] You cannot impose an "undertaking"; the mere use of the word shows that the Legislature intended it should be assented to. In fact, the language of the statute is "an undertaking given to the justices." [WILLS, J.—The Legislature meant more than that. In the proviso you have the words "ask to give an undertaking" and "the required undertaking." That is drawing nearer to the word "impose."] Upon any other construction of the statute, an applicant for the renewal of a licence would be placed in a worse position than an applicant for a grant of a new licence under section 4. [WILLS, J.—The conditions referred to in that section have nothing to do with undertakings of this nature. They have relation to monopoly values in the general interest of the public.] The justices, without this section, still have the same indirect power to obtain undertakings as they had prior to the Act. Before the Act the justices did not refuse to renew on the grounds that the undertakings were not given, but whenever the justices might have refused the renewal upon legal grounds, then they said, "We have the power to refuse to renew under the peculiar circumstances which have arisen, but if you enter into this undertaking we will look the matter over." The position is precisely the same now.

Lord ALVERSTONE, L.C.J.—In the first case I think the objections must prevail. Sub-section 2 of section 9, coupled with section 1 of the Act of 1904, modify the law as to the jurisdiction of the justices in connection with the renewal of licences under particular circumstances. But sub-section 3 of section 9 expressly keeps alive the provisions of section 8 of the Act of 1869 with regard to beerhouses before 1869. [The learned judge read the sub-section set out above.] It seems, in my view, with regard to these beerhouses the powers of the justices are still confined by the earlier legislation, and nothing is added by the Act of 1904 to the jurisdiction of the justices. I think the rule must be made absolute.

In respect to the other case, in dealing with this kind of legislation, where we can see what seems to be the clear intention of the Legislature, and the purposes intended to be carried out, we ought not to divert that clear purpose and destroy the powers which would contravene the purpose by acting upon

a narrow view of the expressed words, though I admit the words would seem to afford ground for the argument urged before us by Mr. Pickford and Mr. Bodkin. I think that this legislation cannot be understood without bearing in mind the existing practice which was well known and is correctly stated, I have no doubt, by Mr. Bodkin. In regard to statutory conditions I think he was right in saying there were only two, viz. (1) under section 49 of the 1872 Act in regard to closing on Sunday, (2) under section 7 of the 1874 Act in respect to early closing. But there had been, as was admitted by Mr. Bodkin in stating the case for the applicant, a long and well-known existing practice, whereby the magistrates had been in the habit of saying to applicants "We shall require you to enter into an undertaking if we are to grant the renewal of the licence." We are pressed to say that these undertakings were voluntary, and of no effect in law. In dealing with the matter as a mere question of law to a certain extent I agree, but I think that inasmuch as in the great majority of cases the statement made by the bench that they would require an undertaking to be given would practically mean a statement that the licences would not be renewed unless the undertaking were given, it amounts to a condition, because the requirement was such that they would not have got their licences renewed unless they gave the undertaking. Now, if one appreciates that state of things, I think it quite possible to see how the framers of this Act, which I do not doubt was hotly contested in the House of Commons, slipped into the use of an expression which, if construed in the strict sense in which Mr. Pickford wants us to construe it, would have the effect of destroying the old practice and making this legislation of none effect. I think one requires to look at the whole Act. Sub-section 1 of section 1, though it removed from the licensing justices the question of general discretion, left to them the power of refusing to renew on the ground "that the premises have been ill-conducted, or grounds connected with the character or fitness of the proposed holder of the licence." Therefore, what I may call the individual house, apart from the question of the number of public-houses in the neighbourhood, the conduct of the house and character of the holder are still left to the justices. Then we come to sub-section 2 of section 9, which to a certain extent extends the purview of the words "ill-conducted." The section provides that "if the justices refuse to renew . . . on the ground that the holder has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence. . . ." Now, stopping there, Mr. Pickford asks us to say that the section is only intended to apply to the case in which the justices have asked the applicant to give an undertaking. Then it is said, if in a subsequent year the justices found the licensee had failed to fulfil the undertaking, they could decide that the house was ill-conducted. The words are open to the construction Mr. Pickford puts upon them, but I am bound to say the legislation would be absolutely worthless. I cannot see, on such a construction of the Act, how anybody would give an undertaking if he could get the licence without it. I proceed with the section: "Provided that where the justices . . . ask the licence-holder to give an undertaking as aforesaid they shall adjourn the hearing of the application and cause notice of the required undertaking . . ." I cannot help thinking that the draughtsman of this Act of Parliament in using the word "require" had got in his mind the existing practice. It is something the justices require the licensee to give as a condition of renewal. The undertaking is not made to depend solely upon the consent of the licence-holder. It is possible the publican will promise almost anything if he is going to get his licence. Hence it must be a reasonable undertaking, and the justices must adjourn "the hearing of the application" to give the registered owner of the premises an opportunity of being heard. I come to the conclusion that the justices have got the power to say "If we renew this licence, you (the licensee) must give this reasonable undertaking, subject to the owner being heard as to the question of it being reasonable." In this particular case no question of reasonableness arises. We are asked to say that this construction is not correct because section 4 of the Act uses the word "condition" on the grant of a new licence, and if it was meant to use the word "undertaking" in the sense I have used it, we should have found the word "condition." I must say I think the word "condition" concerns really conditions as regards the tenure and property and conditions which have in view other sections of the Act dealing with monopoly value. It is quite true the section speaks of "good management," but the conditions to be imposed to secure to the public any monopoly value, having regard to proper provisions for suitable premises and good management. I do not think section 4 was intended to touch the matter with which we are dealing. Now the fair interpretation of section 9 is that the justices may require a reasonable undertaking to be given, and as I have taken this view after full argument, then if I am wrong, and if another construction is to be put upon the section, it must be by a higher authority. I do not think we must narrow this sub-section. I have had some doubt whether the magistrates have so acted that we ought to discharge this rule. It was pressed upon us, and there was some ground for the contention that the magistrates did not refuse to renew the licences. But we have always stated, and we have acted upon it in more than one case, that a renewal with a condition attached to it is a conditional renewal or is a conditional refusal if the condition is not complied with. If I am not right, some question may arise as to whether the justices have sufficiently refused this licence, but I point out that no substantial harm has been done. The applicants have thought fit to allow the time for appealing to go by. Entertaining the view I do, that the justices had the power to deal with this case, I do not think we ought to send the case back, especially as the applicants took no steps to have the appeal heard. For these reasons I have come to the conclusion in this very important matter that the rule has failed and must be discharged with costs.

WILLS, J.—I am of the same opinion with regard to both cases. I have nothing to add to what my lord has said in respect to the first case, because it appears to me that sub-section 3 of section 9 is clear, definite, and unmistakable. The magistrates have no power to refuse the renewal of the licence except on the four grounds mentioned in section 8 of the 1869 Act.

With regard to the other case I think it undoubtedly raises a question of considerable difficulty. The difficulty arises from the imperfect draughtsmanship of the Act, or more likely owing to the circumstances under which Acts of Parliament are passed in England, which so often makes it absolutely impossible that the whole legislation should be carefully collated at the time the Act is passed and consolidated into an absolutely harmonious expression. I am very much pressed in my own judgment by the consideration that if we are to read section 9 as we are urged to do by Mr. Pickford and Mr. Bodkin, then this section is simply an extravagantly idle piece of legislation,

because I cannot get to the frame of mind in which Mr. Pickford appears to be on the matter, that there would be any possibility of anybody giving an undertaking of this character. The effect of giving such an undertaking would be this: if the undertaking given at the grant or renewal were broken, the justices would be at liberty to refuse the renewal of the licence under circumstances which would prevent compensation attaching. On the other hand, if he refused to give such an undertaking he would be subject to no such disability and no such disadvantage. And looking at human nature as it is, I cannot conceive that anybody would be so foolish in fact as to give such an undertaking where the only consequence would be to subject himself to a substantial disadvantage, and therefore it would reduce this piece of legislation to an absolute absurdity or to that which would be only applicable to the existing licences which were actually current at the time the Act was passed. Nobody would doubt but that this was meant to last more than a year. I do not think that any construction which would drive us to that consequence can be given, unless it is impossible to interpret the language by any other construction. Now the word "required" is used in the second paragraph of sub-section 2. [The learned judge read the proviso.] The "required undertaking" means what it says, an undertaking which is required. How can they require if there be no power to enforce it either directly or indirectly. Require is a word which implies the existence of some means or other of making the requirement operative. I need not go into the history of the manner in which these undertakings came into being, to which my lord has referred, except for the purpose of saying that it does explain how the phraseology should have run into a wrong course. It is rather a matter of form than anything else whether the proper way of looking at it is that the magistrates having the power to require, have really the power of attaching a condition to the licence, or whether the proper way of looking at it is this, they are not bound to act until the undertaking is given. It is a pure matter of form and is only material for the purpose of seeing whether an appeal would lie. To my mind an appeal would clearly lie, as it is something which touches the renewal of the licence. I come to the conclusion that we should be be doing wrong if we did not do our best to give a reasonable construction to the Act and prevent it from being a nullity. It seems to be a beneficial piece of legislation.

KENNEDY, J.—I am of the same opinion, and I can say nothing further, because there is nothing which is required to be said, with respect to the first case.

The second case is one of difficulty; I concur entirely with the view which has been taken by my lord and brother Wills. I just wish to add a few words as to the point to which Mr. Pickford in his very clear argument laid special stress. I refer to the provisions in the same Act of Parliament, viz., section 4, sub-section 2, which deals with the grant of a new licence, and the imposition of certain conditions. His argument was that it seemed unreasonable that in regard to the powers of the justices in granting new licences, while they might attach conditions, there was no provision, as in section 9, sub-section 2, to be found, that if those conditions be not fulfilled the justices should be deemed to refuse the licence on the ground that the premises were ill-conducted. In other words, it is unreasonable that in section 9, in regard to renewal, there should be a result which has not been conceded to the non-fulfilment of the conditions which the justices might impose on granting a new licence. To my mind there is nothing in that argument, and for this reason, that with regard to the conditions which may be imposed under section 4, there is no limitation as to the character of the condition. There the justices may attach to the grant of a new licence such conditions as they think proper. There is no limitation such as is attached to the powers given under section 9. The only undertaking to which they apply is a reasonable undertaking, and where a reasonable undertaking is given, the Legislature has thought fit to enact—as I should have thought only commensurate with common sense—that in the event of the breach the justices might refuse the renewal on the grounds that the premises had been ill-conducted; whereas under section 4 there is no qualification at all as to the conditions which may be imposed on the grant of a new licence, for the Legislature has left entirely to the discretion of the justices what they shall impose, and as there is no qualification as to unreasonable terms, there is not imposed as a consequence of the breach the same penalty as where the statute required reasonable terms. The only matter which troubled me at all, as to which I should have been sorry to have come to any other conclusion than I have, was whether the justices by the course they have taken have not precluded themselves in their judgment from saying "We refuse this licence." It occurred to me that it might be said there had been no determination in point of form which would have admitted of an appeal; but on reflection it appears to me there is nothing in that point. It seems to me the applicants might have gone to quarter sessions by treating this as a refusal to renew. My lord has expressed that view, and I do not see why they could not have appealed, as persons who had been aggrieved in respect to an act on the renewal of a licence. I am of opinion the rule should be discharged.

Rex v. *Grimwade: Rule made absolute.*

Rex v. *Dodds: Rule discharged with costs.*

Solicitors for applicant (1), *Field, Roscoe, & Co., for Leighton & Aldous*, Ipswich.

Solicitors for applicant (2), *Godden, Son, Holmes*, for *Thomson, Hughes, & Mathison*, Birkenhead.

Solicitors for justices (2), *Lloyd-George, Roberts, & Co.*, for *Gerrard Copeland*, Town Clerk of Birkenhead.

K. B. Div.
Warrington, J. } Feb. 13, 18.

TILLING (LIMITED) *v.* DICK, KERR, & CO. (LIMITED). (*a.*)

Highway — Obstruction — Tramway reconstruction — Maintenance of tramcar traffic—Public authority—Statutory powers — Implied powers — Contractors — Action six months after damage—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 25—*London County Tramways (Electrical Power) Act,* 1900 (63 & 64 *Vict. c. ccxxxviii.*), *s.* 6—*Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61).

The London County Council owned and worked certain tramways. They had power by a special Act to reconstruct the tramways for their electrification, but had no express statutory power to provide for the maintenance of the tramcar traffic meanwhile, or to put any rails in the streets raised above the surface. The defendants contracted with the council to carry out the reconstruction, and to provide during the work for the continuance of the tramcar traffic. For that purpose they placed a line

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

of rails in the streets raised above the street level which, unless authorized by statute, was a nuisance. The omnibuses of the plaintiff company sustained damage in passing over these raised rails.

Held, that the raised rails were not necessary for the reconstruction, and were not therefore authorized by the special Act, but were a nuisance, and that the damage caused was actionable.

Held, also, that as the defendants were independent contractors they were not protected by the Public Authorities Protection Act, 1893 (56 & 57 *Vict. c* 61), *although the acts complained of were done more than six months before the issue of the writ.*

This was an action by an omnibus company for damages for injuries caused to their omnibuses by obstructions placed in the streets by the defendants, who were reconstructing tramways in London under contract with the London County Council.

The London County Council prior to the year 1900 purchased under statutory powers the South London Tramways of the London Tramways Co. By the London County Tramways (Electrical Power) Act, 1900, provision was made for the substitution of electrical for horse traction on their tramways. Section 6 of the Act provided that "for the purpose of working the tramways by electrical power" the London County Council "may reconstruct or make such alterations of the tramways and may execute all such works on or in connection therewith in, over, or under the streets or roads in which the same are laid as may be necessary for adapting the same to be so worked," provided that in certain cases certain consents were obtained. The Pimlico, Peckham, and Greenwich Street Tramways Act, 1869, which authorized the construction of the tramways in question (by sections 6 and 37), and the Tramways Act, 1870 (by section 25), provided that the uppermost surface of the tram rails should be on a level with the surface of the street, and that the rights of the public to pass over or along the streets should not be abridged save as in the Acts provided.

For the purpose of converting the South London tramways to a system of electrical tramways, in December, 1902, the London County Council entered into a contract with the defendants by which the latter undertook the work connected with the conversion, as described in the contract and in a specification annexed, at a certain price. The contract and specification contained provisions casting upon the defendants the duty of observing the provisions of the statutes, and the responsibility for all the damage caused by the interference with traffic or otherwise. Clause 13 provided for the continuance of the tramway traffic during the alterations, stating (*inter alia*) "the contractors shall provide all flush or raised temporary junctions and turnouts for diverting the horse-car traffic so that it can be carried on for both the up and down services on the track not in process of construction, and they are to lay flush or raised temporary lines as required between the turnouts." The plaintiffs were a company whose omnibuses plied for hire over the roads in the district in question. They complained that in carrying out the work the defendant company had placed tramrails raised as to project above the surface of the road in various places in the district, and that in crossing over these raised tramrails on various occasions their omnibuses had been damaged, and they gave particulars of sixty-nine cases of the kind. The plaintiffs claimed from the defendant company the amount of the damage thus sustained by them.

At the trial a portion of the Romney-road, opposite the Royal Naval College at Greenwich, was taken as an example of what had been done by the defendant company. For the purpose of maintaining the traffic on the double line of rails, and with a desire at the same time to interfere as little as might be with the ordinary traffic, the defendant company had laid between the kerb on one side of the road and the permanent tramway a temporary line of rails, at the same time closing altogether the other half of the road. The one half which was open for traffic was thus occupied by one of the two permanent lines and the temporary line. The temporary line was constructed of rails with a bevel on either side from the ground to the height of two inches or thereabouts, and with a groove in the top to take the flange of the wheel; the uppermost surface of the rails was therefore not on a level with, but was above the surface of the street. At intervals there were clamps and nuts projecting above the surface of the raised rails. At the two ends of each section so dealt with, called "turnouts," a junction was made between the temporary line and the permanent way.

His lordship found as facts that the raised rails placed by the defendant company were an obstruction to the highway and caused damage to the plaintiffs' omnibuses, and also that it would have caused great public inconvenience to interrupt the service of cars, and that less real interference to the ordinary traffic was caused by the construction of a turnout as described than by carrying on the tram service on a single line with crossovers at intervals.

By their defence the defendant company pleaded that the acts complained of were done by them under the powers conferred by the statutes above mentioned, and that the causes of action arose more than six months before the issue of the writ, and that the action was therefore barred by the Public Authorities Protection Act, 1893.

Avory, K.C., and *J. A. Simon*, for the plaintiff company.—Neither the London County Council nor their contractors were authorized to put upon the streets raised rails either for permanent or temporary purposes. The temporary line was not necessary for the reconstruction, which could have been carried out without it. They were placed for the convenience of the tramway traffic during the alteration. The case therefore falls within *Rapier* v. *London Tramways Co.* [1893] 2 Ch. 588, 41 W. R. Dig. 154, and not within *London, Brighton, and South Coast Railway Co.* v. *Truman*, 34 W. R. 657, 11 A. C. 45. The defendant company are not protected by the Public Authorities Protection Act, 1893, as that Act only applies to the public authority itself and its officers. This is shown by its title, which must be read as part of the Act: *Fielding* v. *Morley Corporation*, 47 W. R. 295, [1899] 1 Ch. 1. The defendant company are not officers of the public authority: *Stringer* v. *Barker*, W. N. 1879, p. 127. The Act was not meant to apply to persons acting for their own profit (*Attorney-General* v. *The Proprietors of the Margate Pier and Harbour*, 48 W. R. 518, [1900] 1 Ch. 749), and this is also shown by the judgments in *The Ydun*, [1899] P. 236, 47 W. R. Dig. 166, and in *Parker* v. *London County Council*, 52 W. R. 476, [1904] 2 K. B. 501. Independent contractors do not come within the Act: *The County Council of Kent* v. *The Mayor, &c., of Folkestone*, *ante*, p. 371.

Ruegg, K.C., and *J. P. Glasgow*, for the defendant company. — The temporary rails were reasonably necessary in connection with the work of reconstruction, and as such are justified, upon the principle of *London, Brighton, and South Coast Railway Co.* v. *Truman*. The defendant company are protected by the Public Authorities Protection Act, 1893. That Act extends to servants of the authority: *Greenwell* v. *Howell*, 48 W. R. 307, [1900] 1 Q. B. 535. The

defendant company were the agents of the London County Council, which was liable for their acts: *Penny* v. *Wimbledon Urban District Council*, 47 W. R. 565, [1899] 2 Q. B. 72.

Cur. adv. vult.

Feb. 18.—WARRINGTON, J.—The plaintiffs are omnibus proprietors using the roads on which the work was done. I find as a fact that the raised rails were an obstruction to the highway and caused damage to the plaintiffs' omnibuses. There is evidence, which I accept, that it would have caused great public inconvenience to interrupt the service of cars, and that less real interference to ordinary traffic is caused by the construction of a "turnout" than by carrying on the tram service on a single line with "crossovers" at intervals. The first question is, Were the acts of the defendants authorized by the statutes? It is, I think, clear that the acts of the defendants would be a cause of action to the plaintiffs unless they were so authorized; and, further, that if the acts in question are authorized expressly or by necessary implication, the defendants would be excused, although the doing of them may occasion a nuisance, public or private. It is contended that the works constructed by the defendants are works necessary for adapting the tramways to be worked by electricity, and are, therefore, authorized by section 6 of the London County Council Tramways (Electrical Power) Act, 1900. I cannot adopt the defendants' construction; in my opinion the works they have constructed are not necessary for adapting the tramways to be worked by electricity, but were necessary (if at all) for maintaining the tramcar service uninterrupted. Works for this purpose are, in my judgment, not covered by the Act, and the defendants are accordingly not protected by it.

Then arises the question whether, as to the causes of action which arose more than six months before the date of the writ, the action is barred by the Public Authorities Protection Act, 1893. The full title is as follows: "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties"; and the first section runs thus: [His lordship read the section, and continued:] It has been held that the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate (*Greenwell* v. *Howell and Another*), but there is no case deciding that it extends to independent contractors doing under contract and for their own profit the works which the public body is authorized to do. In the absence of authority I should have been prepared to hold that contractors undertaking work for their own profit are not within the protection of an Act passed as this is "for the protection of persons acting in the execution of statutory and other public duties." I am glad to find that this view is supported by the decision of the Court of Appeal in *County Council of Kent* v. *Mayor, &c., of Folkestone*. In my opinion, therefore, the plaintiffs are entitled to the relief they ask. It is agreed that the damages are to be ascertained by some form of reference. The defendants must pay the costs up to and including judgment. I propose, therefore, to make declaration that the plaintiffs are entitled to recover damages in respect of the matters complained of in this action, and to refer it to the official referee in rotation to ascertain the amount of such damages.

Judgment for the plaintiffs.

Solicitors, *Hicklin, Washington, & Pasmore; William Hurd & Son.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Feb. 1.

WILSON v. JUSTICES OF CREWE. (a.)

Licensing Law—Justices—Jurisdiction—Licence, What amounts to—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4 *and* 14.

Sections 4 *and* 14 *of the Alehouse Act,* 1828, *must not be read as separate enactments. Section* 14 *enumerates the special cases referred to in section* 4: "*In the cases hereinafter directed.*"

The non-sale of excisable liquors in a place kept as an inn is not conclusive in law that the place is not being kept as an inn so as to deprive the licensing justices of the jurisdiction given to them under section 4 *of the aforementioned Act. The question is one of fact.*

Reg. *v.* Cotham, [1898] 1 *Q. B.* 802, *explained.*

Special case stated by the court of quarter sessions for the county of Chester.

The Earl of Chester's Own Inn was a fully-licensed public-house kept by one Darbyshire, who in the early part of 1904 became a bankrupt.

In March of that year Herbert John Wilson, hereinafter called the respondent, applied to the justices of Crewe for the transfer of the licence with the consent of Darbyshire's trustee in bankruptcy. It was refused, partly on the ground that the respondent was not a fit and proper person.

The respondent appealed on the 6th of April to the court of quarter sessions, when the transfer of the licence was granted on terms—viz., that he should not exercise the licence, the object being to keep alive the licence till a more suitable person could be secured. In pursuance of this understanding the order of the court was sent direct to the clerk of the justices of Crewe. The respondent, not possessing the order, was prevented from taking out an excise licence, and in consequence could not retail excisable liquors. The house in fact was kept closed till October, but the key had been given to the respondent on the 7th of March. He subsequently put furniture into the house, gave directions to have it painted, made arrangements with benefit societies to hold meetings in the house, and did other acts to indicate his intention to use the place as it had been used.

On the 28th of June he applied to have the licence transferred to one Spencer. It was dismissed, on the ground that under section 4 of the Alehouse Act, 1828, the justices had no power, as the transfer must be from a person who "theretofore kept" the inn, whereas the respondent had not kept the inn, which had been closed for some months, and in respect to which there was no existing excise licence actually taken out.

The respondent again appealed to the court of quarter sessions, which allowed the appeal subject to the special case stated for the opinion of the court, whether the justices under the circumstance aforementioned had any jurisdiction to grant the transfer of the licence. There was a further question submitted, as to whether the correct course should not have been by *mandamus* instead of appeal to the court of quarter sessions, but by agreement the point was not argued.

Low, K.C. (*Ellis Griffiths* with him), for the appellants, the justices of Crewe.—This application to transfer the licence was made under section 4 of the Alehouse Act, 1828. The respondent was never granted a licence in any real sense, because the justices

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

held the order, so that he could not take out the licence. As to what amounts to a licence see *Tower Justices* v. *Chambers*, 52 W. R. 541, [1904] 2 Q. B. 903, and the Master of the Rolls, at p. 913: "A licence involves the idea of a person who is to be the licence-holder." The justices could not regard the respondent as the holder of the licence for a further reason, that under sections 1 and 4 their jurisdiction is only to grant the licence to a person deemed fit and proper, whereas the justices and the court of quarter sessions considered the respondent did not fulfil these requirements. Again, it is essential under section 4 that the respondent Wilson should have kept an inn. He did not do so. The inn was shut from January to October. Wilson could not have sold excisable liquors had he desired to do so. Section 37 gives the definition of an inn: "Houses in which shall be sold by retail any excisable liquor to be drunk or consumed on the premises." The important point is that the house was not "theretofore kept as an inn" at the time of the application: *Mackrell* v. *Brentford Justices*, 48 W. R. 648, [1900] 2 Q. B. 387. Further, the respondent had not been in occupation of the premises, the house having been closed. *Reg.* v. *Cotham*, 46 W. R. 512, [1898] 1 Q. B. 802, is decisive on both these points, where the justices had granted a licence by way of transfer from a person who was not, and had not been, in occupation of the premises, and no excisable liquors had been sold for some years. Even if it be suggested that the application is under section 14 of the aforesaid Act, yet there is no jurisdiction, because Wilson must have had a licence before the section applies.

Marshall, K.C. (*Trevor Lloyd* with him), for the respondent.—It is unnecessary to discuss whether the respondent was a fit and proper person, because the first appeal to the court of quarter sessions, where the licence was granted on terms, is not impeached. *Cotham's case* is under section 4, whereas I am entitled to treat this application as under section 14, the application being perfectly general It is true the applicant is the respondent and not Spencer, but there is not a word in section 14 that suggests the application must be by the new tenant: *Reg.* v. *Justices of Liverpool*, 32 W. R. 20, [1883] 11 Q. B. D. 638. The respondent did keep an inn so far as he could, and he at all times showed his intention to keep an inn by his acts. In *Cotham's case* the house was used for some years as a draper's shop.

Lord ALVERSTONE, L.C.J.—This case raises points of difficulty. The questions that have been argued before us may practically be confined to two. First, whether the justices had or had not any jurisdiction under section 4 or 14 of the Alehouse Act, 1828, to grant a licence to Spencer by way of transfer from Wilson upon the ground that the house in respect to which the transfer was sought to be made had not been kept as a beerhouse such as would give to the justices the jurisdiction necessary at the time of the application. Secondly, assuming Wilson was not such a person who could transfer, whether this application must not be treated as an application by Spencer to have a licence transferred to him and not merely an application by Wilson to transfer. The last point was not raised by the justices. First, it has been argued that *Reg.* v. *Cotham* lays downs the principle that if a house has not been kept as an inn at the time of the application, the house was not one in respect to which a transfer could be made. The facts are not in dispute. [The learned judge then stated the facts as set out above.] It is said that at the time of the hearing of the second appeal to the court of quarter sessions the respondent was stated to be a person to whom a licence would not be granted, but that it was granted to keep the licence alive in order that a transfer might be made by him to a proper person. I state that fact in order that it may not be overlooked if the matter is taken further. In pursuance of that state of things the order was sent to the clerk of the justices, and not to Wilson himself, and in due course Spencer, who is seeking to get the licence, makes an application. The justices thought they had no jurisdiction.

An appeal was made to the court of quarter sessions, which granted the licence, but not under section 14. The first point raised by the court of quarter sessions in the special case, whether as a matter of procedure an appeal actually lay to that court, has not been argued before us. We must deal with the second point. The difficult consideration is to rightly decide whether or not, under the circumstances, the case comes under the principle laid down in *Cotham's case*, or whether it can be distinguished in law or in fact from that case. I think that temporary non-selling of liquors could not be a bar to the justices acting under section 4 or section 14. Both sections 4 and 14 must be regarded. You cannot treat them as separate enactments. They both deal with the power of the justices to transfer the licence; section 14 deals with special cases arising out of the general case dealt with in section 4. I should think that as regards jurisdiction under the two sections it would be difficult to contest that not selling excisable liquor for a limited period of time was a bar to the jurisdiction. I will mention a case to which I referred in the argument. So far back as 1883, in *Reg.* v. *Justices of Liverpool*, it was held that a person applying in respect to a house where there had been no sale for a considerable time was entitled to apply. That decision was followed by Lord Coleridge in *Symons* v. *Wedmore*, 42 W. R. 301, [1894] 1 Q. B. 401. It is not a decision on the express point, but it assumes the point. Also, in the case of *Baldwin* v. *Justices of Dover*, [1892] 2 Q. B. 421, 41 W. R. Dig. 115, the same decision was interpreted and followed, so that the authority is a permanent one. It seems to me, therefore, that non-sale would not be conclusive. It seems to me a question of fact. The magistrates have dealt with this question of fact. Wilson was certainly endeavouring to carry on the place as an inn. Wilson was applying for a licence. He was keeping the house as a house which had been used as an inn, and as far as he did anything at all he used it as an inn would have been used, for he contrived in various ways to keep the premises recognized as an inn. When the court of quarter sessions in June granted him a licence, they did it upon terms, which show the premises were going to be renewed as an inn, because they make it a sort of condition that he or some other person should apply for a transfer to a fitting person.

I am troubled by the reasoning in *Cotham's case*, because, if I had come to the conclusion that Wills, J., or Kennedy, J., had intended to lay down as a principle that any substantial interruption of the sale of excisable liquors was not keeping the place as an inn in the sense of a place where liquor was sold, I should have felt bound to obey that ruling, though not without criticism. I cannot help thinking that Wills and Kennedy, JJ., were really speaking with reference to matters of fact, viz., that a licence had been granted in respect to a place which was not and had not been kept before as an inn. It was an extravagant proposition, as Wills, J., pointed out, to contend that the application came within section 4 where for thirteen years the place had been used for the purpose of carrying on a draper's business. I do not think it was necessary to lay down a general principle in regard to that matter. Kennedy, J., bases his judgment

equally on the facts: see p. 807. I come to the conclusion that the learned judges decided the case on the facts, and we ought not to hold that a general principle was laid down which would prevent the justices admitting an application in the case of continuous occupation coupled with an interruption in the sale of excisable liquors.

Lastly, is Mr. Low entitled to say that the terms under which the court of quarter sessions made the order and what was done with the order show that Wilson was a person who could not transfer. If this was an application by Wilson to transfer it is possible that the machinery did not cover this case. But Mr. Marshall is right in saying that section 4 and section 14, being looked at together, the magistrates might have dealt with it as an application by Wilson or by Spencer under section 14. It appears to me, however, that for the purpose of the last hearing Wilson was the licensed holder. The justices had granted him the licence and upon terms. If that be not the case I think we should be entitled to treat it as an application on behalf of Mr. Spencer coming under section 14. I have decided this question as a question of fact, and I do not think it contravenes any principle which has been laid down as a principle of law in the cases referred to. This appeal must be dismissed.

KENNEDY, J.—I agree, and should wish to add a few words on the relation of section 14 to section 4 of the Alehouse Act, 1828. I think Mr. Bruce Williamson is correct when he states on p. 73 (Law and Practice of Licensing Sessions): "The words in the above section" (*i.e.*, section 4) 'in the cases and in the manner and for the time hereinafter directed,' refer to section 14 of the same Act. That section ought there to be read in conjunction with section 4." It limits the jurisdiction of the justices to those cases specified in section 14. Section 4 constitutes the tribunal which grants transfers in cases coming under section 14.

RIDLEY, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Taylor, Hoare, & Co.*, for *Fletcher*, Northwich.

Solicitors for the respondent, *E. W. & Bruce Beal*, for *C. E. Speakman*, Crewe.

IN BANKRUPTCY.

K. B. Div. (Bigham, J.) Jan. 17.

In re FITZGEORGE.
Ex parte ROBSON. (*a.*)

Bankruptcy—Proof—Guarantee of interest on debenture—Extinction of debt by operation of law—Continuing liability of guarantor.

The bankrupt had guaranteed the interest on a debenture in a limited company which was afterwards dissolved, the debt being thereby extinguished.

Held, on the bankruptcy of the guarantor, that the debenture-holder was entitled to prove as a creditor on the guarantee, as the debt had been discharged by operation of law and not by any act of the creditor.

Appeal against the rejection of a proof.

In August, 1892, the debtor gave to one Robson a guarantee that he would pay the interest due under a debenture for £3,000 in a limited company, should the company make default in payment of such interest, until the principal sum secured by the debenture should be repaid by the company.

In 1893 the company made default in payment of interest, and Robson thereupon enforced his debenture, which only realized £933.

In 1894 the company went into liquidation, and in 1895 it was dissolved under section 143 of the Companies Act, 1862, and thenceforth ceased to exist.

From 1894 to 1902 the debtor made payments to Robson on account of the interest under his debenture.

In 1902 the debtor became bankrupt, and in January, 1903, Robson presented a proof against the estate for £129 2s. 8d., being the interest due to that date, and also claimed that the trustee should estimate the capitalized amount of the debtor's liability to pay interest as guaranteed upon the principal sum of £2,067 remaining due under the debenture, and admit the proof for such amount.

The trustee rejected the proof on the ground that by the dissolution of the company the debt had gone, and therefore the liability for interest was also gone.

Robson appealed.

Carrington, for the appellant.—It must be admitted that the debt is gone, but as it has not gone by any act of the creditor, but simply by operation of law, the liability under the guarantee still subsists: *In re London Chartered Bank of Australia*, 42 W. R. 14, [1893] 3 Ch. 540.

Hansell, for the respondent.—The guarantee is simply for interest payable in respect of a debenture until the principal is repaid, and so long as the company is liable. The effect of the dissolving of the company is that there is no debt or debtor in existence, and interest cannot be payable upon a debt that has ceased to exist. [BIGHAM, J.—The creditor has done nothing to discharge the debt, why should he lose the benefit of the guarantee] I agree if the guarantee were for the debt, but it is only for the interest. [BIGHAM, J., referred to *Ex parte Jacobs*, 23 W. R. 251, L. R. 10 Ch. 211.]

Carrington was not called upon to reply.

BIGHAM, J.—In this case the creditor is entitled to prove for the value of his guarantee, whatever that may be. It has been argued that because the debt has gone the liability to pay interest has gone also. I do not agree to that proposition; the debt has not gone by any act of the creditor, but by operation of law, therefore the obligation under the guarantee is untouched. That obligation is that regular payment of the interest shall go on until the debt is repaid by the company. The debt has not been paid, and under the circumstances which have arisen it never will be paid, therefore the obligation under the guarantee remains, and the proof upon the guarantee must be admitted for a sum to to be ascertained.

Appeal allowed; the proof was admitted for a sum agreed between the parties.

Solicitors for the appellant, *Paice & Cross.*

Solicitors for the trustee, *Tarry, Sherlock, & King.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (Ireland). } May 10, 1904.

McCARTNEY v. LONDONDERRY AND LOUGH SWILLY RAILWAY. (a.)

Water—Riparian owner—Abstraction of water—Purposes for which taken.

A railway company owning a small strip of land adjoining a natural stream have no right to abstract water for the purpose of supplying the locomotive engines of their railway; and a lower riparian owner is entitled to an injunction to restrain the company exercising such an alleged right, even though he suffers no substantial injury.

Decision of the Court of Appeal in Ireland *reversed.*

Sandwich (Earl) *v.* Great Northern R ilway, 27 *W. R.* 616, 10 *Ch. D.* 707, *overruled.*

This was an appeal from an order of the Court of Appeal in Ireland (Lord Ashbourne, L.C., and Walker, L.J.; Fitzgibbon, L.J., dissenting), which affirmed that of the King's Bench Division.

The respondent railway company were the owners of strips of land adjoining a stream into which they inserted a pipe and diverted the water into a tank on their land about half a mile away, and by this means supplied their engines with water for forty miles of railway. The appellant, who was a riparian owner lower down the stream, stopped up the pipe; and the respondents brought an action against him for a declaration of their right to convey the water through the pipe and for an injunction. The action was tried by Holmes, L.J., without a jury, and judgment was given for the appellant with costs, which was reversed by the King's Bench Division.

M. Drummond, K.C, and *D. S. Henry, K.C.* (*P. Law Smith* with them), all of the Irish Bar, for the appellant.

Ronan, K.C. (of the Irish Bar), and *S. T. Evans, K.C.* (*John Leech* with them), for the respondents.

M. Drummond, K.C., replied.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—In this case the question arises between a millowner and a railway company, the latter claiming the right to take the water of a stream which the millowner uses to supply the power for his mill. The case was originally tried before Holmes, L.J, who decided in favour of the mill-owner; but the issues between the parties have become a little confused from admissions made on both sides, but which do not appear on the pleadings, or, indeed, by any written admission at all.

The railway company brought an action seeking to restrain the mill-owner from obstructing the railway company's alleged right in what the statement of claim described as a natural stream The mill-owner, in his plea, denied that it was a natural stream, and alleged that in fact it was an artificial water-course. There was ample evidence of this, and the learned judge who tried the cause found as a fact that it was an artificial watercourse made by the defendant and his predecessors in title, and had been used by him for a long time. For some unexplained reason this finding has been got rid of, I know not how, and the case has been argued upon the hypothesis that the stream is a natural stream, and another concession made, without pleading or written admission of any kind, that the action of the defendant in obstructing the plaintiffs' works was justified, unless the plaintiffs possess the right they claimed to abstract and use without in any way returning to the stream as much water as they require for the locomotives on their line of railway up to 15,000 gallons. Some effort was made in the argument to minimize the amount which the railway company claim to have a right to take, and, indeed, the Court of King's Bench in Ireland preface their judgment by a recital, which is apparently intended to limit the user; but it does not do so, nor, as FitzGibbon, L.J., pointed out, is it easy to see what operation that recital can have.

The railway company claim a right to place in the stream a pipe which, if used to the full capacity, would take 15,000 gallons a day, but of which they say their present requirement would be satisfied with a third of that quantity. Notwithstanding the recital, it appears to me the judgment of the Court of Appeal would entitle them to take as much as they wanted up to the extent of 15,000 gallons. The pipe would take 15,000 gallons per day. The railway company claim to keep their pipe such as it is, together with an admission that they may want more than they at present take; and the Court of Appeal have affirmed the judgment of the King's Bench. But Holmes, L.J., also decided that, even if the stream were a natural stream, the defendant was entitled to the verdict, inasmuch as the plaintiffs were not entitled to the use of the stream in the manner claimed. I am of opinion that Holmes, L.J., was right. It seems to me that any other decision would be in conflict with the decision of this House in the case of *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, 24 W. R. 284, L. R. 7 H. L. 697. In that case Lord Cairns, with the complete assent of Lord Hatherley and Lord Selborne, gave an elaborate exposition of riparian rights, which, though not a new decision, was nevertheless supposed to have settled and almost codified the law upon the subject.

Now it is necessary to consider what it is the railway company do, because that is what they claim a right to do. By a pipe placed in the stream at a point where they own some land adjoining the stream they fill a tank with water to be used in the boilers of their locomotive engines. The engines, of course, consume the water in the course of their journeys; the railway itself is forty miles in length, but is connected with other railways over which their engines run for a much greater distance. If the question were the reasonableness in respect of quantity, I should think it a most unreasonable thing that the use of a stream passing through a very small area of riparian land should be made to extend to forty miles of country, or wherever else the exigencies of the railway service might require. Speaking of it simply in respect of quantity, I think it more unreasonable than supplying drinking water to an asylum built on the banks, which has been held to be unlawful. But, in truth, it is not a question of the quantity at all. I now apply Lord Cairns' words, which I think are literally applicable here: "The use which they" (in this case the railway company) "claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream . . . it is a confiscation of the rights of the lower owner." It is to be observed that Lord Cairns used this language when a water company who were riparian proprietors had taken water to supply their customers in a neighbouring town, but in which case it was found as a fact that the complaining plaintiffs were not damaged at all.

For another reason the question of damage here has become immaterial. The railway company set up a right to do what they have done. It is not here a

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

question of an injury being so trifling that a court of equity will accordingly not interpose by the remedy of an injunction. Here they not only set up a right, but actually ask for a declaration of their right to do what they have done.

I have said that the judgment of Lord Cairns had codified the rights of riparian proprietors, and I used that phrase because I do not think there is any novelty in the decision. It certainly has been the law as understood in England for more than half a century. The only part of the judgment of FitzGibbon, L.J. (who has admirably dealt with every other part of the case), with which I am unable to concur is that in which he expresses the opinion that Bacon, V.C.'s, judgment—*Sandwich (Earl)* v. *Great Northern Railway*, 27 W. R. 616, 10 Ch. D. 707—was right upon the facts proved before him. I cannot agree to that. It may be that the Vice-Chancellor would have been justified in refusing an injunction and leaving the plaintiff to his remedy at law, but unfortunately he uses language which seems to affirm the right of the railway company to carry the water along their line, and justifies this as a riparian use. To this I cannot assent. For the reasons I have given I think this is not a riparian use at all, and, except upon the ground I have suggested, I must say I think the decision was wrong.

I move that the appeal should be allowed, that the judgment of Holmes, L.J., be restored, and that the respondents do pay to the appellant the costs both here and below.

Lord MACNAGHTEN.—I prefer the judgment of FitzGibbon, L.J., and what now remains of the judgment of Holmes, L.J., to the opinion of the learned judges from whom they differ.

Holmes, L.J., who tried the case at the Derry Assizes without a jury, rested his decision on two grounds. In the first place he came to the conclusion that the stream about which this litigation has arisen was really an artificial watercourse, and that McCartney and his predecessors in title had had the control and management of it from a point above the proposed intake of the railway company for a period beyond living memory. In the second place, assuming the stream to be a natural watercourse, he held the thing which the railway company proposed to do was not within the rights attached to riparian ownership.

For some reason or other which I do not understand the first ground of decision was abandoned in the Court of King's Bench and in the Court of Appeal. I regret the course that was taken. The matter seems to me to be worthy of serious consideration, and I cannot altogether accept the view of one of the learned judges of the Court of Appeal, who dealt with the question and disposed of it summarily and without argument. However, the point is not open now. The appellant must be held to the concession made on his behalf, and the case must be tried as if McCartney's mill-race were to all intents and purposes a natural stream. Even so, if it had not been for the judgment of the Lord Chancellor of Ireland and the great preponderance of judicial opinion in Ireland, I confess I should have thought the case very plain and covered by authority.

There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all.

Now it seems to me that the first question this House has to consider is, under what category does the proposed user of the railway company fall? Certainly it is not the ordinary or primary use of a flowing stream, nor is it, I think, one of those extraordinary uses connected with or incidental to a riparian tenement which are permissible under certain conditions. In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes, substantially undiminished in volume and unaltered in character. What the railway company propose to do is to abstract a certain portion of the water of the stream, to carry it along their own property to a tank half-a-mile off, and then to consume it in working their locomotive engines. They have more than forty miles of railway of their own, and they have running powers over the lines of other companies. They have no intention of restoring to the stream a single drop of the water they mean to abstract, nor is it possible for them, under the circumstances, to do anything of the kind. Is that a user which, though extraordinary, is yet legitimate and permissible? I should say, certainly not. So far as the interests of the lower proprietors are concerned, they mean to efface and blot out, as it were, that portion of the stream which they propose to abstract. They mean to do so for their own gain—to save themselves the expense of paying for the water required for the purposes of their business or gathering it for themselves. And they claim to do this as of right. It seems to me that they might just as well claim to sell the water. And, indeed, counsel for the respondents did not shrink from that position. He boldly contended that they would be perfectly justified in selling the water, or doing anything they pleased with it, provided the lower proprietor was not practically injured. By way of clenching this argument, counsel pointed out that the learned judge at the trial expressed no opinion as to the extent to which McCartney's water power would or might be diminished by what the railway company proposed to do. And he succeeded, I think, in showing that there was no reported case in which the court had interfered where the injury complained of was so inconsiderable as that which would be likely to occur in the present case. That may be very true, but all the cases to which he referred were cases where the injury complained of was done in the exercise, or assumed exercise, of an authorized and permissible user. That seems to me to make all the difference.

I said I thought this case was covered by authority. It seems to me to be entirely covered by the decision of this House in the case of *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* There Lord Cairns, L.C., gave a judgment as to the rights of riparian owners so complete and exhaustive that I venture to say no case has since come before the courts, not excepting the case of *Kensit* v. *Great Eastern Railway*, 32 W. R. 885, 27 Ch. D. 122, which might

not have been disposed of by the application of one or two sentences taken from it, and that perhaps without any very great loss to the general stock of legal knowledge. The *Swindon case* presented two aspects. The navigation company sued as canal proprietors with statutory powers. They sued also as riparian owners in respect of a tenement called Wayte's tenement, on which formerly there had been a mill. The waterworks company, who were upper proprietors, had diverted a portion of the stream for the purposes of their business. His lordship pointed out that such an appropriation of the water did not come within the range of those authorities, which deal with cases of extraordinary user permissible under certain conditions. "Those were cases," said his lordship, "where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all. . . . That is not a user of the stream which could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties who have no connection whatever with any part of the stream." Then his lordship points out that the navigation company as riparian owners had clearly a right to complain of what was done by the waterworks company, if what was so done by them was insisted upon as a thing which they had a right to do. After the claim of right it was impossible, he said, that the court could do otherwise than decide the issue which was thus raised between the parties. "It is a matter," he added, "quite immaterial whether, as riparian owners of Wayte's tenement, any injury has now been sustained or has not been sustained by the respondents. If the appellants are right, they would, at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once, by injunction, or declaration, as the case may be." The other learned lords—Lord Hatherley and Lord Selborne—entirely agreed. Lord Hatherley observed that enough had been made out to justify the interference of the Court of Equity. "A very slight amount of evidence," he added, "of the actual amount of damage done would be sufficient to justify an injunction; and the declaration of right to be made by the court is absolutely necessary, in consequence of the assertion of right made by the appellants." And so this House altered the order of the Court of Appeal by declaring the rights of the navigation company, as owner of Wayte's mill, to the flow of the stream down to their tenement, "subject to the ordinary and reasonable use of the said stream and waters by the riparian owners higher up upon the said stream"; and then there was added an express declaration, which was not to be found in the order of the Court of Appeal, to the effect that the proposed user by the waterworks company was not within such ordinary or reasonable use. As riparian owners the navigation company were not injured in the very least in present enjoyment, but yet it was as riparian owners that they were held entitled to this declaration in their favour negativing the pretended rights of their opponents.

The question in that case in regard to the rights of the navigation company as owners of Wayte's tenement and the pretended rights of the waterworks company was precisely the same question as that which has arisen in the present case. The railway company claim the right to do that which they propose to do. That was admittedly the question at the trial before Holmes, L.J., and therefore it was not incumbent upon McCartney to do more than to show a very slight case of actual or probable injury. He has shown a certain amount of injury—not very substantial, I admit, but still I think quite sufficient—sufficient to entitle him to damages at law when a claim of right is set up, and sufficient therefore to entitle him to a declaration in equity. It may well be, if I may refer to a suggestion thrown out by Lord Cairns in the *Swindon case*, that if the railway company had said, "We do not claim a right at all, but what we propose to do is such a trivial matter that it cannot do you any practical injury," the court might have thought fit not to interfere; but that is not the line which the railway company took. They claimed a right; they admitted that if that issue was found against them their whole case must fail. The question of right was not merely the sole question at the trial. It was really the sole question at issue before the Court of King's Bench and the Court of Appeal. And those courts have made a declaration of right, but a declaration I think in favour of the wrong party. They have declared in effect that the railway company are entitled to abstract and consume for purposes unconnected with the tenement which gives access to the stream a portion of the waters of the stream which can by no possibility be restored to it. That declaration seems to me to be contrary to principle and precedent.

I do not think it necessary to say anything more. But I may venture to add that the law laid down in this House in the *Swindon case* was no new doctrine. It is stated clearly and precisely by Parke, B., in the Court of Exchequer in *Embrey* v. *Owen*, 6 Ex. 353, and by Cresswell, J., in delivering the judgment of the Court of Common Pleas in *Sampson* v. *Hoddinott*, 5 W. R. 230, 1 C. B. N. S. 590.

I have only to add that in my opinion it would be extravagant to suggest that the system of the Londonderry and Lough Swilly Railway Co. and the lines of other companies over which they have running powers form one single riparian tenement, or that the railway company, by virtue of contact with this stream at one point, possess throughout their system, and all through the lines of other companies over which they have running powers, rights analogous to those possessed by persons who dwell on the banks of a river in respect of their riverside property. It may be difficult to say how far the rights of the railway company as riparian owners extend, but they can hardly go to such a length as that.

I am of opinion that the judgments of the Court of Appeal and the Court of King's Bench ought to be reversed, and the judgment of Holmes, L.J., restored, and that the respondents ought to pay the costs both here and below. But, in order to prevent any dispute in future, I think it would be well to preface the order by a declaration of opinion that the railway company are not entitled to use the stream in question for the purpose of supplying their locomotive engines with water.

Lord LINDLEY.—It is not now disputed that the stream from which the railway company desire to take water is, or at all events must be regarded as, a natural and not an artificial stream, nor is it disputed that the railway company are the proprietors of the strip of land on which their line is constructed where

it crosses the stream. For a short distance, therefore, the railway company are the proprietors of a few feet of land next the stream. They put down a three-inch pipe by which they intended to draw water from the stream in order to fill a tank some distance off, from which they could supply their locomotive engines with water. This pipe was on their own land, and the defendant had no right to interfere with it unless he was entitled to do so in order to protect his own water rights as a riparian proprietor lower down the stream, where he had a water-mill. In order, however, to protect those rights he took up the pipe, and it was admitted at the trial that he was justified in what he did if the railway company were not entitled to use the water in the manner proposed. Holmes, L.J., who tried the case, held that the defendant was justified in what he did. The Divisional Court took a different view and reversed his decision, and the Court of Appeal affirmed the decision of the Divisional Court, FitzGibbon, L.J., however, dissenting.

It was proved at the trial that the defendant's mill was an old mill and required a flow of 7,000 gallons of water per minute to work it. To work for one hour, therefore, 420,000 gallons would be required. The total quantity of water reaching the mill in dry weather was about 627,000 gallons per day, and of this quantity 500,000 gallons only came down the stream as far as as the mouth of the railway company's pipe. The remaining 127,000 gallons entered the stream lower down. On the other hand, it was proved that the pipe would carry off 15,000 gallons a day if allowed to run unchecked. The railway company gave evidence that they did not want more than 5,000 gallons a day, and that they only had ten locomotives a day to fill. But their witnesses admitted that more would probably be wanted shortly. The practical result of the evidence was that in dry weather the defendant wanted all the water he could get, and that if the railway company drew off only 5,000 gallons a day his mill would be stopped for less than a minute a day; and that if they drew off 15,000 gallons a day it would be stopped for less than three minutes a day. Holmes, L.J. did not apparently decide the case upon the ground that the defendant would sustain serious damage, but on the wider ground that the railway company had no right to take water from the stream for the purpose of supplying their locomotives with water. The Divisional Court and the Court of Appeal were of opinion that the railway company were entitled to take water for their locomotives, provided they did not seriously interfere with the working of the defendant's mill; and they considered that the interference would be too slight to amount to an infringement of his rights.

The water which the railway company contend they are entitled to take is wanted for use over the whole line, including the little strip of land which immediately adjoins the stream and is crossed by it. But the whole line cannot be regarded as riparian property; and the quantity of water required for use on the short strip which immediately adjoins the stream is too small to be of any consequence to either party. The right to take that much is not worth discussing, and may be conceded; but the concession will not decide the important question which this House has to determine. Although the damage suffered, or likely to be suffered, by the millowner is small, yet it is plain that, if the railway company are not entitled to retain and use their pipe as intended, but are nevertheless allowed to do so without interruption for twenty years, they will be infringing the millowner's rights all that time, and will, at the end of the twenty years, gain a prescriptive right to continue such use for ever. Such an invasion of his rights the mill-owner is entitled to prevent. This has been long well settled. In the note to *Mellor* v. *Spateman*, 1 Wms. Saund. 346*a*, it is said: "Wherever any act injures another's right, and would be evidence in future in favour of the wrongdoer, an action may be maintained for an invasion of the right without proof of any specific injury." This principle has been repeatedly recognized and acted upon in cases involving water rights—for example, *Sampson* v. *Hoddinott*, and *Harrop* v. *Hirst*, 17 W. R. 164, L. R. 4 Ex. 43. The principle must be borne in mind when reliance is placed on judicial decisions in cases in which it was unnecessary to allude to it. The principle was conceded and recognized in *Kensit* v. *Great Eastern Railway*, which was decided on the ground that what was there complained of was not in excess of the defendants' rights and never could grow into a prescriptive right, inasmuch as all the water taken from the stream was returned to it undiminished in quantity and undeteriorated in quality. This was the *ratio decidendi* of that case.

The question for decision is therefore reduced to this—namely, will the use of this pipe by the railway company infringe the mill-owner's rights? Or, in other words, are the railway company entitled to use this pipe for the purposes for which they have put it down? Two cases only have arisen in which the right of a railway company to take water from a stream for its locomotive engines has called for judicial decision. One is *Attorney-General* v. *Great Eastern Railway*, 18 W. R. 1187, in which Lord Romilly expressed his opinion that a railway company having a line adjoining a stream had no right to take water from it for supplying their locomotives. The other is *Sandwich (Earl)* v. *Great Northern Railway*, in which Bacon, V.C., decided that they had. In the first of these cases, which was affirmed by Lord Hatherley, L. R. 6 Ch. 572, the abstraction of the water seriously impeded the navigation of the stream, and Lord Hatherley decided the case on that ground. In *Sandwich (Earl)* v. *Great Northern Railway*, no substantial damage was proved, and the Vice-Chancellor considered that the railway company was entitled to take what water they wanted, so long as they did not inflict any substantial damage on other riparian owners. He held, in short, that the railway company were not exceeding their own rights, and were not infringing the rights of the plaintiff. This decision is in favour of the railway company in the present case. I cannot, however, think it right in point of law. It is, in my opinion, impossible to reconcile it with the principles laid down and acted on by this House in *Swindon Waterworks Co.* v *Wilts and Berks Canal Navigation Co.* In that case a water company had bought a mill by a stream, and took water from it to supply a neighbouring town. They were held not entitled to do this, although the plaintiffs, who were lower riparian owners, were not in fact damaged by the defendants' operations. Lord Cairns there stated the law as to the water rights of riparian owners, and it is unnecessary to do more than to refer to his judgment.

The railway company in this case became riparian owners simply by buying a small strip of land crossed by the stream. They thereby acquired the water rights, whatever they were, of the owner of the land so bought, but they acquired no greater rights than he could give them in respect of that land. These rights did not include the right to take water from the stream for consumption off the land the possession of which conferred his rights. He could not lawfully take water from the stream in any appreciable quantity and sell it for use miles away, or, indeed, use it himself at a distance from his riparian tenement without returning it to the stream. Such a user

can only be justified by a grant from lower riparian owners or by prescription. This I take to be now settled by *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300, by the decisions of the Court of Appeal and of your lordships' House in the *Swindon case* and by *Ormerod* v. *Todmorden Mill Co.*, 31 W. R. 759, 11 Q. B. D. 155. The intended use of the water in this case by the railwaycompany was reasonable enough from their point of view, but such use would have been in excess of their rights and an infringement of the rights of the defendant.

I am of opinion, therefore, that the appeal should be allowed, and that the judgment of Holmes, L.J., should be restored, and that the railway company should pay the costs here and below.

Appeal allowed; judgment of Holmes, L.J., restored with costs here and below; declaration that the respondents are not entitled to use the water of the stream for the purpose of supplying their locomotive engines with water; cause remitted to the Irish King's Bench Division.

Solicitors, *Greene & Underhill*, for *Hugh C. O'Doherty*, Dublin; *William Webb & Co.*, for *James E. O'Doherty*, Dublin.

Court of Appeal.

Appeal.
(Vaughan Williams, Romer, and Stirling, L.JJ.) Jan. 24.

In re HULL AND LADY MEUX'S ARBITRATION. (*a*.)

Landlord and tenant—Farming agreement—Crops to be consumed on farm—Destruction by fire—Whether contract broken.

Tenants held a farm under agreement, one of the clauses of which bound them to stack on the premises all the hay and corn arising from the farm, to consume on the farm (inter alia) *all the hay, straw, and chaff arising therefrom, and to carry out and spread the resulting manure on the land. An accidental fire having destroyed some of the crops so stacked,*

Held, that the clause was only for the regulation of acts of husbandry when such acts were capable of being performed, and that if no such acts could be done it had no application. Therefore there had been no breach of the tenants' agreement to consume crops and spread manure.

Appeal from a decision of the county court judge of Wiltshire, given on a special case stated in an arbitration under the Agricultural Holdings Acts, 1883 to 1900.

By an agreement dated the 25th of February, 1901, and made between Lady Meux, the landlady, of the one part, and Robert Hull and John Newman, the tenants, of the other part, for the letting from year to year of a farm at Christian Malford, near Chippenham, the tenants were bound, *inter alia*, "to manage and cultivate the whole of the land in a good and husbandlike manner, keeping the same in good heart and condition. Also to stack upon the premises all the crops of hay and corn arising from the farm, and to consume on the farm all the hay, straw, chaff, and turnips, and other green crops arising therefrom, and to carry out and spread upon the farm in regular succession all the dung and manure arising therefrom."

During the tenancy an accidental fire took place, which destroyed a quantity of hay and straw stacked in accordance with the agreement. On the tenancy coming to an end, by notice, on the 25th of March, 1904, the tenants made a claim for compensation in respect of the unexhausted value of feeding stuffs purchased since the fire to the amount of £124 1s. 1d., and the landlady claimed, besides certain arrears of rent, £137 for breaches of contract, which sum included the loss of manurial value of the hay and straw destroyed by the said fire.

These claims were referred to arbitration, and, the arbitrators being unable to agree, an application was made to the county court judge to order a special case to be stated, which was accordingly done, the question for decision being whether under the circumstances there had been a breach of the tenant's contract as above set forth in respect of consuming crops and spreading manure.

The county court judge, in giving judgment, said that on the whole he was of opinion that the law applicable to the facts was that acted on in the cases which had been cited before him on behalf of the tenants, *e.g.*, *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826; *Howell* v. *Coupland*, 24 W. R. 470, 1 Q. B. D. 258; *Krell* v. *Henry*, 52 W. R. 246, [1903] 2 K. B. 740—namely, that where in a contract the continued existence of a thing or a set of circumstances is essential for the performance of the contract, and the thing or set of circumstances accidentally ceases to exist, both parties are discharged from liability. Here the existence of the hay and straw was necessary in order that they might be consumed, and that existence was therefore an implied essential condition of the contract. On the landlady's part cases had been cited where there was a covenant to repair and keep in repair premises, and such a covenant seemed at first sight very similar to the one now in question, but there was this essential difference, that where a tenant entered into a covenant to repair and keep in repair he contemplated the possible occurrence of a fire which would oblige him to repair under his covenant by practically rebuilding the premises unless he had protected himself by putting in the words "with the exception of fire." For the landlady it was said that the present covenant was practically the same thing, and that it would be fulfilled if the tenant bought other foodstuffs and consumed them instead of those grown on the farm. His honour could not adopt that reading. If he did he would not be taking the real meaning of the words, but would be putting in others which did not exist in the covenant. It was argued that performance of the contract was not impossible, because the tenants could have bought hay and straw from somebody else, but that would not be fulfilling the contract. The covenant to repair a house was fulfilled where new materials were bought, but in that case such purchase was necessarily involved in the covenant, for a house could not be repaired without buying materials; but in the present case all the tenants undertook to do was to consume on the farm that which had been grown thereon. For these reasons the landlady's claim was not tenable.

The landlady appealed.

Holman Gregory (*W. H. N. Bagot* with him), for the appeal.—The possibility of a fire occurring must have been in the contemplation of the parties, just as it was long ago held to be in the case of a covenant to repair, and keep in repair, a house. Indeed, the present is a stronger case, because the risk of fire in a stackyard is much greater. The question must be whether it was not in the contemplation of the parties that the produce of the farm was to be consumed thereon in any case. In *In re Arthur, Arthur* v. *Wynne*, 28 W. R. 972, 14 Ch. D. 603, a covenant in absolute terms to insure within two years the life of

(*a*) Reported by R. HILL, Esq., Barrister-at-Law.

the covenantor for the benefit of his wife and children was held to have been broken where the insurance was delayed till a few days before the expiration of the period, when the life was found to be uninsurable. The destruction of these particular crops did not put an end to the contract, for it cannot be said they were the foundation of it, like the view of the coronation procession in *Krell* v. *Henry*, 52 W. R. 246, [1903] 2 K. B. 740, 751. The case is the same as that of a covenant to keep in repair a house which is accidentally destroyed by fire: *Bullock* v. *Dommitt*, 6 T. R. 650.

He also cited *Nickoll* v. *Ashton* (the judgment of Vaughan Williams, L.J.), 49 W. R. 513, [1901] 2 K. B. 126.

F. E. Weatherly, for the tenants, was not called upon.

VAUGHAN WILLIAMS, L.J.—In my judgment this appeal fails. We need not, I think, have recourse to any implied condition that on the failure of something that was in existence at the time of the contract, as in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, or of something that was to come into existence, as in *Howell* v. *Coupland*, 24 W. R. 470, 1 Q. B. D. 258, the further performance of the contract shall be excused. There is no need to apply the principle stated by Blackburn, J., in the case first named (3 B. & S., at p. 833), although I am very far from saying that if the words of the contract were such as to necessitate the application of that principle, this is not a case in which that principle ought to be applied.

The view I take of the case is this. We have a contract for the letting of a farm, containing conditions intended to ensure the proper cultivation of the land, one great object being that the crops shall be so dealt with that the land shall not be impoverished. It seems to me that this contract provides in a series of respects set forth therein that the tenant should undertake to deal with the farm in accordance with a recognized system, and the particular clause we have to deal with is one imposing on the tenant the obligation to stack on the farm the crops arising therefrom, to consume the same on the farm, and to carry out and spread on the land the manure produced thereby. In my judgment, according to the proper construction of this clause, its words only relate to things which have existence on the farm—to things only which can be dealt with actively or left passively for the benefit of the farm. The covenant to stack, to consume, and so on, relates only to such crops as are capable of being so dealt with. It is, according to my understanding, only a regulation of acts of husbandry when the state of things is such that the acts are capable of being done, and if no such acts can be done the clause has no application. In my opinion the county court judge was right.

ROMER and STIRLING, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Upton & Britton; Collyer-Bristow & Co.*, for *Wood & Awdry*, Chippenham.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Jan. 21.

SIMPSON v. EBBW VALE STEEL, IRON, AND COAL CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Coal mine—Certified manager—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7 (2).

A certified manager of a coal mine was paid a salary of £400 a year, payable monthly, and provided with a house rent free and coals for domestic use. While engaged in his duties in the mine he met with an accident, which proved fatal.

Held, that the widow was not entitled to compensation, because the position held by the deceased man was not that of a "workman" within the meaning of that term, as used in the Workmen's Compensation Act, 1897. *Whether a man was a "workman" or not depended upon the particular facts in each case, and in the present instance there was ample evidence upon which the county court judge could come to the conclusion that the deceased man was not a "workman," and the employers therefore not liable to pay compensation.*

Appeal from an award made by the county court judge sitting at Newport (Monmouthshire) in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of the late certified manager of the Prince of Wales Colliery, Monmouthshire, which was one of the collieries owned by the respondents. The evidence given in the county court was to the effect that in the course of his duties as manager he had gone down on the 4th of December, 1903, into the pit and there met with an accident which resulted in his death; that his duties frequently took him underground, but that he did no manual labour in the mine. As certified manager he received £400 a year, paid monthly, which remuneration was to increase year by year, and was not liable to adjustment on the sliding scale, as were the wages of colliers. In addition to the £400 a year he had a house found him rent free and a free supply of house coal.

The county court judge held that the position held by the deceased man was not what could properly be described as that of a "workman" in the sense that the term was used in the Act of 1897, and, therefore, that his widow did not come within the benefit of the Act.

From that decision the present appeal was brought.

S. T. Evans, K.C., and *John Sankey*.—The benefit of the Act is to apply to all workmen except such as by reason of the nature of the employment or for some other ground stated are expressly excluded. A certified mines manager is not specially excluded, and the deceased man having met with the accident in the course of an employment to which the Act applies, his widow is entitled to compensation. In the present case the wages that the deceased man earned were no doubt above those usually commanded by a workman, but in many mines the certified managers get less than it is possible for a collier to earn. By the definition in the Employers' Liability Act, 1880, a workman within that Act must be employed in manual labour, but the words of the Act of 1897, "whether by way of manual labour or otherwise," show that the Legislature contemplated the inclusion in the word "workman" of persons holding positions in which the services rendered were other than those of manual labour. [MATHEW, L.J.—If the remuneration paid the deceased man was a wage or wages, how would you assess his average weekly earnings?] The amount of compensation that the widow is entitled to is £300, because that is the maximum in case of death. In the case of disablement, if 50 per cent. of the injured man's yearly salary exceeded £1, that would be the maximum which he could claim. [MATHEW, L.J.—Suppose the man's salary here had been £4,000, a sum often drawn by a managing director of a company, does it seem reasonable that

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

his widow, if entitled to compensation at all, should only receive £300, or, in case of the accident not proving fatal, his compensation should not exceed £1 a week? For the first two weeks the workman has no claim.] If it was the intention of the Legislature to limit the benefit of the Act to that class of man who is paid a living wage only each day or each week, words to that effect would have been found in the Act. Here the two conditions imposed by the statute —the employment to be one to which the Act applies and the accident arising out of and in the course of that employment—being fulfilled, the applicant is entitled to an award in her favour. [They cited *Vamplew* v. *Parkgate Iron and Steel Co.*, 51 W. R. 691, [1903] 1 K. B. 851; *Hedley* v. *Pinkey & Sons Steamship Co.*, 40 W. R. 113, [1892] 1 Q. B. 58.] The deceased man rose from being a pit-boy, and was still a fellow workman with the other colliers. *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326, decided that a workman did not cease to be a fellow workman merely because they were not all equal in position of station or authority. Here the deceased man's duties took him almost daily into the mine. He ran the same risks as the other colliers, and was therefore entitled to the benefit of the Act giving colliers compensation in case of injury or death by accident.

Ruegg, K.C., and *Albert Parsons*, for the employers. —The key to the question who is a workman within the meaning of the Act of 1897 is to be found in section 1, sub-section 2 (*a*), and Schedule I., clause 1 (*b*). If it be a question of fact in each case, then it is for the county court judge to say whether the injured man was or was not a workman. He has found in this case that the deceased man was not a workman, and his decision, there being ample evidence to support it, cannot be set aside by this court. There must be some limit put upon the word, otherwise a professional man commanding his hundred a year, if injured while in the course of his employment with the railway or mine would be entitled to claim compensation for accident. The class of persons to whom the deceased belonged, like directors, managers, and professional men generally, are not "workmen" because they are not the servants of their employers in the ordinary sense in which the term "master and servant" is used to define the relative position of master and man. The doctrine of common employment has no application to the work done by a manager of a railway or mining company. The word "workman" must be construed in its ordinary and popular sense. While it was no doubt intentionally enlarged by the words "whether by way of manual labour or otherwise," it cannot reasonably include a man holding the position of master of his department, which would be wholly inconsistent with such a person coming within the scope of the Act passed to give the benefit of insurance to that class of workmen who, from want of knowledge or want of means, are unable to make use of the advantages offered by an ordinary insurance office.

COLLINS, M.R.—This is an appeal against an award of his Honour Judge Owen, sitting at the Newport (Monmouthshire) County Court, in an arbitration under the Workmen's Compensation Act, 1897. The applicant was the widow of a man who held the position of certified manager of one of the mines belonging to the respondents, and the question was whether a person holding such a position came within the definition or description of those persons to whom the Legislature intended that the benefit of the Workmen's Compensation Act, 1897, should apply. The county court judge held that the deceased man did not come within the scheme of the Act; and that being the ground of his decision, we have to consider, in the first place, the terms of the Act itself.

To begin with, the title of the Act is given as "an Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment." Now, the law with respect to compensation to workmen which it was proposed by this statute to amend was to be found in certain then existing statutes passed for the benefit of workmen, and although the orbit in which this Act was to apply was enlarged, nevertheless it was in my judgment restricted to workmen as that term is used in the Act itself. Section 1, sub-section 1, throws considerable light on who are workmen. It enacts that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule of this Act." It is obvious that the standard which the Legislature intended to set up was that the person who was to be entitled to claim compensation must be a workman, for a person might be employed and yet not be a workman within the Act. The definition given of workman in section 7 (2) is this: "Workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement be one of service or apprenticeship or otherwise and is expressed or implied, is oral or in writing." There again, that which is being defined is "workman." The element "workman" is not eliminated, although the description "workman" is said to be capable of including, and does include, a person engaged in an employment to which the Act applies—that is another cardinal condition—whether by way of manual labour or otherwise. That makes it possible for the person who cannot vouch that the labour he was engaged in was manual nevertheless to be a workman. We have it on the highest authority that in construing this Act we are, so far as possible, to give the ordinary grammatical meaning to the words. It is very easy to give illustrations of people who, in ordinary parlance, might very well be described as workmen, and whose labour is not manual; and I think it very possible that the genesis of the explanation of the definition is that there had been decisions which had put a somewhat narrow construction upon the word "workman" in the earlier Acts, such, for example, as in the case of a conductor of a tramway, who was held not to be a workman because he was not engaged exclusively in manual labour. There would be no difficulty whatever in treating persons who stood in that kind of position, earning weekly, fortnightly, or monthly wages, as being within the term "workman," according to the standard which the man in the street, if I may use the word, would set up, notwithstanding the fact that they were not exclusively or mainly engaged in manual labour. But although the definition is extended by the Act, the person to be benefited is still to be a workman in the ordinary sense of the term, and none the less so because you find words extending the description so as to cover labour other than manual. Are you to call the solicitor to a railway company or the solicitor to an estate a person who might come under the definition in the Act? Unless you limit the word "workman" as I have suggested, there seems to me no logical halting place at which the line can be drawn. The whole scheme of the Act rests upon the fundamental general interpretation that an ordinary uninstructed person would put upon the word workman. Throughout, the Act presupposes a position of dependence. It treats the persons to be benefited, all as in a sense

inopes consilii, persons for whom the Legislature must do that which they are not in a position to do effectually for themselves, either for want of general education or the want of means. The Act is dealing with persons who are not supposed to be likely to be well off, or likely to be thoroughly instructed in these matters, or to make careful and prudent provision for themselves. Therefore the Act is really giving a sort of State assurance to people who the Legislature supposed were not in a position to provide against accidents for themselves. There would be no common sense in extending that kind of protection to persons drawing good salaries and in a totally different position of life. It would be difficult to lay down the exact line to divide the two classes as a matter of law, but it would be perfectly easy in a given case for a jury to say on which side of the line a particular person came.

If you look through the Act it seems to me clear that the words used in section 1, sub-section 2 (*a*) would not be applicable to a person receiving a salary of £400 a year and a house, or, as it may be in other cases, a salary of double or treble that amount. Those words do not seem to me to deal with such a case as that at all. Again, turning to the provisions as to compensation, we find that in the case of temporary injury the man cannot, under any circumstances, have more than £1 a week, and that sum, judging by the scheme which is laid down in the rest of the Act, is taken roughly as representing the maximum of half the man's wages. Can it be supposed that the Legislature in putting down figures of that kind had in its mind to make the scheme of compensation applicable at all to a person whose income might be hundreds a year. Yet that is what we have to suppose if the definition clause should be taken to cover everything that could by any possibility be embraced in its grammatical construction. It is obvious to me that some limit must be placed on it. Then comes the question, where is the limit to be put? The Act speaks of "wages" and "earnings," and these words coupled with the other provisions of the Act show the Legislature was dealing with the class of persons whose remuneration might be adequately described by those words. It seems to me impossible that those words would include the remuneration of a person in a position of this deceased man. I agree with the judgment of the county court judge. There seems to me to be abundant evidence in this case, as he has pointed out, that this man did not come within the particular description which this particular Act, taking it as a whole, must be taken to intend when it attempts to define the word "workman." It is impossible to lay down an absolute line, or to say that a judge must direct a jury if he has a jury, or to direct himself if he has not a jury, as to the line within which a man is a workman. Here so far as it is a question of fact the county court judge has found that the deceased man was not a workman.

In my judgment the decision of the learned county court judge was right and this appeal fails.

MATHEW, L.J.—I am of the same opinion. Despite the strenuous argument addressed to us on the part of the appellant, I have not been able to entertain any doubt as to what our decision ought to be. I think the county court judge was perfectly right, and I adopt the words of his judgment. It was said that if we introduced any limitation into the description of workman mentioned in the Act we should be legislating, and that we had no right to legislate. That argument might be used in retaliation when we are called upon to legislate by extending this Act of Parliament intended for the protection of workmen to every contract of service. I decline to legislate in that sense. The Act of Parliament has to be construed mainly from the title of the Act. Throughout its provisions there is the same indication and intention that it should be applied to workmen in the ordinary sense of that term—to men who are ordinarily paid by weekly wages.

The provision as to the fortnight during which no compensation may be claimed has been already referred to; but when we examine the provisions of Schedule I., clause 1 (*b*), we find that the weekly payment during the incapacity after the second week is not to exceed "50 per cent. of his average weekly earnings . . . such weekly payments not to exceed one pound." The next provision, in clause 2, fixing the amount of the weekly payment is most significant. Is it credible that the Legislature meant by the words "or otherwise" inserted in the definition of "workman" to extend the Act to every contract of service. Mr. S. T. Evans had the courage of his argument. He did not hesitate to say it applies to every person who is under a contract of service with his employer. It therefore would apply to a manager of a bank, the engineer in an important undertaking, and to the solicitor who is paid a large salary by his employer—in point of fact to everybody. I confess it seems to me that that construction would lead to manifest absurdity.

Now, what definition ought to be put upon these words, "workman includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise"? Surely that means by manual labour or by labour other than manual—physical exertion other than manual. That gives an adequate interpretation to the phrase used, and it brings that phrase and that portion of the Act into entire harmony with the rest. In the particular case we have in the clearest way a description of what the deceased man was doing at the time the accident occurred; he was in control and superintendence of the mine, and that obliged him to descend to the mine, and while there he sustained the injury in question. Does that translate him into a workman? He was not a workman when he went down. Did he become a workman when he was in the mine and exerting himself in the manner he did for the purpose of superintendence and control? I cannot entertain any doubt about the matter, and without further dwelling upon it and referring to the later Act of 1900, which supports the same interpretation, I come to the conclusion that the appeal fails.

COZENS-HARDY, L.J.—I am of the same opinion, and but for the great importance of the case I should be content to say I entirely adopt the judgment of my lord.

I confess that to me the question is one of considerable difficulty—difficulty arising from the very unhappy mode in which that which is called a definition is framed in this Act of Parliament. I doubt whether in an Act of Parliament of this kind this is strictly a definition clause. It is not what "workman" means, but "workman includes" something, and that seems to me to render it more easy for us, more obligatory upon us to consider what is the real governing idea and meaning of the term employed in the Act. You start with this, that there can be no liability unless there is employment. That is the one firm rock we have in construing this Act—that there must be an employment, there must be a contract of service of some kind. But we are dealing with that class of people who ordinarily are called workmen. We know that there are also certain people just on the verge, who

may or may not, according to the strict definition, such as has been adopted in former Acts, be held to be properly included in that term. Therefore we should be entitled to say, remembering that the governing idea is that of a workman, the effect of this clause is simply to somewhat enlarge the ambit of the phrase, and not to narrow it by saying a man is not a workman if he is engaged otherwise than in the discharge of duties of manual labour—for instance, it may be by manual labour or otherwise, and whether the agreement is one of service or apprenticeship or otherwise. It is a singularly unhappy piece of legislation, because an apprenticeship is surely a contract of service and I have not heard yet any explanation and I have been able to satisfy myself that there is any reasonable explanation to be given to those words "or otherwise." I regard this as not strictly speaking a definition, but merely as an indication that in dealing with a word of common meaning you are to include in the class of workmen a certain number of people who on a very narrow construction might be excluded from it. Moreover, here we have that which is not properly called "wages" given to the man, but a salary of £400 a year. I do not say that that alone is conclusive; I do not say that there might not be a workman paid by a salary; but I am not prepared to say that we are not at liberty to impose any limitation to the generality of the word "wages" taken by itself in construing the class to which this Act applies. Speaking for myself I think it might be competent for the county court judge to have found as a matter of fact that this manager was a workman. It seems to me to be a case very near the line; but if it be a question of limit, if every person who has an employer is not necessarily included, then it is for the county court judge to find as a matter of fact whether the particular person was or was not included.

In the present case it is impossible, it seems to me, to differ from the county court judge, holding as he did, that the manager of this mine was not a workman within the definition of the Act.

I agree the appeal should be dismissed with costs

Solicitors for the applicant, *Metcalfe & Sharpe*, for *T. S. Edwards*, Newport, Mon.

Solicitor for the respondents, *H. P. Becher*, for *Vaxie Simons*, Pontypridd.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) And Chan. Div. (Joyce, J.) — March 10; Aug. 1, 1904.

In re LEWIS.

LEWIS *v.* LEWIS. (*a.*)

Executor—Legatee—Conditional gift—Beneficial interest of executor on breach of condition—Estoppel—Duty of executor to give notice of legacy.

Where a legacy is given upon a condition, an executor who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy.

Dictum *of* Lord Hardwicke *in* Chauncy *v.* Graydon, (1743) 2 *Atk.* 616, 619, *discussed.*

A testatrix appointed as executor her son A., and bequeathed a leasehold house to her son B., who was then abroad, and directed that if he did not return and claim it it should go to A. Subsequently to the death of the testatrix, A. wrote to B.: "A house has been left you, and according to the will it is to be in my hands until you claim it." But A. did not inform B. of the gift over, and B. died abroad without having claimed the house.

Held (*affirming* Joyce, J.), *that A. was not estopped by the letter from claiming under the gift over, because* (1) *there was no sufficiently precise representation that B. was absolutely entitled;* (2) *it was not proved that B.'s non-return was the consequence of the representation.*

By her will dated the 17th of February, 1893, Mary Lewis, of 63, Eirw-road, Porth, appointed her son Edward Lewis, the defendant, her executor, and made the following bequest: "I give and bequeath my leasehold house, No. 63, Eirw-road, aforesaid unto my son Evan Lewis, now abroad, and direct that in case he should not return and claim the said house the same shall accrue unto my son Edward Lewis aforesaid."

The testatrix died on the 15th of May, 1897, and her will was proved by the defendant.

At this time her son Evan Lewis was resident at Chubut, in Patagonia, and the following letter, written in Welsh, was sent to him on 16th of August, 1897, by the defendant through his agent: "By now the will has been proved and a house has been left you and £56 13s., which is under my care that is your brother, and according to the will the house and the money are to be in my hands until you claim them."

The defendant, neither in this letter nor at any other time, informed Evan Lewis of the gift over of the house in the event of his not returning to claim it.

On the 5th of April, 1898, defendant by his agent wrote a further letter to Evan Lewis offering £140 for the house.

Evan Lewis died intestate on the 25th of February, 1899, at Chubut, without having become aware of the gift over.

This action was brought by the administrator of Evan Lewis for a declaration that, having regard to the omission by the defendant to disclose the gift over, the plaintiff was absolutely entitled to the house.

A charge of fraud alleged by plaintiff in his statement of claim was abandoned at the trial.

The action was heard before Joyce, J., on the 10th of March, 1904.

R. Rowlands, for the plaintiff.—The letter written by or on behalf of the defendant to Evan Lewis amounted to a representation that the legacy was an absolute gift. The defendant is estopped from denying the truth of that representation: *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82. An omission to state the real truth may amount to a misrepresentation. An executor must give information accurately; he cannot be heard to say that he has made a mistake. Again, by treating with Evan Lewis through his agent, Dunston, the defendant must be taken to have waived the benefit of the gift over. Moreover, the gift over is too indefinite to be enforced. No limit of time is fixed within which Evan Lewis must return to claim the legacy.

Hughes, K.C., and *C. L. Coote*, for the defendant.—There is no obligation upon an executor to give notice of a legacy to a legatee: *In re Hodge's Legacy*, 21 W. R. 558, (1873) L. R. 16 Eq. 92; *Powell* v. *Rawle*, 22 W. R. 629, (1874) L. R. 18 Eq. 243; *Astley* v. *Earl of Essex*, 22 W. R. 620, (1874) L. R. 18 Eq. 290; *Lady Fry's case*, (1671) 1 Vent. 199; *Chauncy* v. *Graydon*, (1743) 2 Atk. 616; Roper on Legacies (4th ed.), p. 839. It was held in *Lovett* v. *Lovett*, 46 W. R. 105, [1898] 1 Ch. 82, that an inaccurate recital in a deed

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

did not work an estoppel, the statement being accurate so far as it went; so here the statement is perfectly accurate so far as it goes. The plaintiff must show that the representation was acted on.

JOYCE, J., after reciting the facts, said: Edward Lewis was in a fiduciary relation to Evan Lewis, and he was, moreover, the person to benefit by the failure of Evan Lewis to fulfil the condition. I do not think, however, that the letters was written with any intention to deceive, though they were certainly very unfortunate. While this correspondence was going on in 1899 Evan Lewis died. Administration to his estate was taken out by his son, the plaintiff, who now claims to be entitled to the house on the ground that Edward Lewis is estopped by his letters from asserting any title to it. I feel a great difficulty in holding that. I do not think the letters contained any such precise representation as would amount to an estoppel, nor is it proved that Evan Lewis would have returned to this country and claimed the house if he had known the truth as to the terms of the gift. Then it was said that Edward Lewis has waived his right to the benefit of the gift over. But in order to establish a waiver it must be shown that the person who waives knew of his rights and deliberately abstained from asserting them.

On the whole, having regard to the terms of the will, and treating it is a gift over, I feel bound to decide against the plaintiff. There will be no costs on either side.

The plaintiff appealed.

The appeal came on for hearing on the 1st of August, 1904.

R. Rowlands, for the plaintiff.

Hughes, K.C., and *C. L. Coote*, for the defendant.

VAUGHAN WILLIAMS, L.J.—This is a very hard case, but one must not, because it is a hard case, lay down principles which are not in accordance with the law. There was no duty on the executor to disclose the condition; and *primâ facie*, inasmuch as Evan Lewis never did, and now never can, return from abroad and claim the house, his administrator cannot successfully claim it unless there is something else to assist us. It is said, however, that though generally there is no duty on the executor, yet in this particular case there is a duty, because by reason of the gift over the executor will get an advantage, and for that proposition, reliance is placed upon an observation of Lord Hardwicke in *Chauncy* v. *Graydon*, of which the marginal note is this: "Where there is a condition annexed by a will to a devise of real or personal estate, and no notice required to be given, unless the legatees perform the condition, they cannot be entitled, and where there is a devise over a forfeiture incurs." As Mr. Rowlands very properly says, that is against him; but in giving judgment Lord Hardwicke is made to say this: "It is said the executors should have given notice, but the testator has laid no such obligation upon them, neither do the executors take any beneficial interest, whether the condition be performed or broken." It is said of that passage that, although it assumes that generally there is no duty on the executor to give notice, it puts an exception to that rule where a testator has by the terms of his will laid an obligation upon the executor, or where the executor takes some beneficial interest. If one were sure that Lord Hardwicke intended to decide anything of the sort, one would give further consideration to the contention founded on that passage. But the question which we have to decide was not raised in that case, and there was no argument based on the assumption that an executor who took a beneficial interest had a special obligation to give notice. That being so, it seems to me we must start with the assumption that there is no duty to give notice imposed on the executor either by the general law or by the special provisions of the will.

Under these circumstances what is the position of the plaintiff? The plaintiff must either make out misrepresentation amounting to fraud, or a misrepresentation acted upon on which an estoppel can be based. It is admitted that fraud cannot be maintained. This is merely a case of estoppel, and the estoppel is supposed to be based on the assumption that on the correspondence the executor by himself or his agent represented that the bequest of the house was a simple bequest, without any such condition as in fact existed, and that Evan Lewis changed his position in consequence of this representation. It seems to me that he did not change his position in consequence of that representation. I very much doubt whether anyone can find in these letters the statement of fact relied on; but even if one could, it is plain that there is no proof that the non-return of Evan Lewis to claim was the consequence of his acting upon this representation. I think the onus was on the plaintiff to prove that; so that in the result there are two reasons why this alleged estoppel fails. One is because the letters contain no statement sufficiently precise and clear to form the basis of the estoppel; the second is that, even if there was a sufficiently precise and clear statement, there is no proof that it was acted upon. For these reasons I think that the judgment of Joyce, J., was right, and that the appeal must be dismissed with costs.

ROMER, L.J.—I am of the same opinion. [His lordship then gave his reasons for the view he took of the case.]

COZENS-HARDY, L.J.—I agree, and that for the same reasons. It is plain there is no *primâ facie* duty resting on an executor to give notice. But it is said that although that is so, there is an exception in the case of an executor having himself an interest in the legacy. For that there is no trace of authority in the way of decision, and no trace of an opinion by any text-writer. There is nothing but the passage in Lord Hardwicke's judgment which the industry of counsel has succeeded in unearthing. I do not regard that as anything more than the sort of observation which a judge might make upon a point which was not argued before him and which did not arise in the case.

Solicitors, *Wrentmore & Son*, for *Spickett & Sons*, Pontypridd; *Helder, Roberts, & Co.*, for *W. R. Davies & Co.*, Pontypridd.

High Court of Justice.

Chan. Div. } Farwell, J. } Feb. 28; March 3.

In re MORTIMER (DECEASED).
GRAY *v.* GRAY. (*a.*)

Will—Construction—Perpetuity—Cy-près.

A testator devised freeholds to F. G. for life, then to the issue of F. G., upon various limitations which were void for remoteness, and finally to F. G. in fee. F. G. died a bachelor. The limitations to the issue of F. G. left out his sons' sons' daughters.

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

Held, that the doctrine of cy-près *does not apply when simple estates tail cannot be framed to exclude and include the classes of persons designated by the testator for exclusion and inclusion. To attain this result contingent limitations are not to be introduced in the course of the estates tail.* Dictum, *that the doctrine of* cy-près *may be invoked on behalf of an ultimate remainder.*

Doctrine of cy-près *discussed.*

Monypenny *v.* Dering, 2 *De G. M. & G.* 145, *approved.*

Martelli *v.* Holloway, 5 *H. L.* 532, *explained.*

Summons.

John Mortimer, of Pippingford Park, in the county of Sussex, by his will, dated in 1870, bequeathed the Pippingford Park estate (subject to certain charges) "to the use of Frederick Gray and his assigns during his life without impeachment of waste, and after his decease to the use of the first and every other son of the said Frederick Gray successively according to seniority and as to his respective assigns for his life without impeachment of waste and from and immediately after the decease of each such son respectively to the use of the first and every other son of that son successively according to seniority in tail male so that each elder of the sons of the said Frederick Gray and his first and other sons shall take before each younger of such sons and his first and other sons, and after the determination of all the said uses to the use of all and every the daughters of each of the sons of the said Frederick Gray as tenants in common in tail with cross-remainders in tail between and among such daughters if more than one and if all such daughters but one shall die without issue and if there shall be only one such daughter the whole to be to the use of such one daughter in tail, my meaning being that the daughters of the several sons of the said Frederick Gray shall not take concurrently but that the daughters of each elder of such sons shall be entitled before the daughters of all the younger of the said sons and after the determination of all the aforesaid uses to the use of all and every the daughters of the said Frederick Gray as tenants in common in tail with cross-remainders in tail between or among such daughters if more than one and if all such daughters but one shall die without issue or if there shall be only one such daughter the whole to be to the use of such one daughter in tail, and after the determination of all the aforesaid uses to the use of the said Frederick Gray his heirs and assigns for ever."

The testator also directed certain heirlooms and other personal estate to be settled upon trusts as nearly as possible the same as those above set forth as the rules of law and equity would permit.

The testator died on the 20th of September, 1871, leaving his brother Keith Mortimer his heir-at-law.

Frederick Gray entered into possession of the demised hereditaments, and died in 1903, leaving a will dated the 18th of November, 1901, of which Alexander and H. F. Gray were the executors and trustees. He never had any issue.

The summons sought to have it determined whether upon the death of Frederick Gray the ultimate limitation to him in fee took effect, or whether the Pippingford Park estate or the personalty assigned to attend the inheritance then devolved on the heir-at-law and next-of-kin of the testator.

Haldane, K.C., and *R. J. Parker*, for the executors of the will of Frederick Gray, argued that the doctrine of *cy-près* was applicable to the present case, it being admitted that the limitations in the will offended against the rule against perpetuities. The limitations in the will were so framed as to leave out the daughters of sons of sons of Frederick Gray from the succession, and to get over this difficulty and secure the application of the *cy-près* doctrine two alternative arguments were put forward: (1) If the doctrine of *cy-près* was held only to admit the replacing of the void limitations by simple estates tail, and it was necessary to admit to the succession persons not admitted by the testator—in this case sons' sons' daughters of Frederick Gray—this was not a fatal objection if it did not admit persons expressly left out by the testator, but simply, as in this case, persons tacitly omitted. Lord St. Leonards, in *Monypenny* v. *Dering*, 2 De G. M. & G. 145, approved the cases of *Pitt* v. *Jackson*, 2 Bro. C. C. 51, and *Vanderplank* v. *King*, 3 Hare 1, where the limitations substituted for those in the will brought in persons not provided for by the testator. Lord St. Leonards says that the general intent is to be preserved, but the particular intent being already void at law, it is no sacrifice of the particular intent to preserve the general intent by departing from the exact lines of the particular intent. The *dictum* of Swinfen Eady, J., in *In re Rising*, [1904] 1 Ch. 535, 52 W. R. Dig. 47, that the object of giving effect to the general intent must not be gained at the expense of the particular intent, may be similarly explained. In fact the doctrine of *cy-près* may be used to put in a new line starting from the first tenant for life (*Hampton* v. *Holman*, 25 W. R. 459, 5 Ch. D. 185), the so-called doctrine being merely a rule of construction: *Humberston* v. *Humberston*, 1 P. W. 332. [FARWELL, J., held that by the particular intent was meant the *quantum* of estate given to the various classes of persons.] (2) It is permissible to put in any limitations allowed by law which will carry out the testator's intentions. If by any means you could thus preserve the classes defined for inclusion or exclusion by the testator the doctrine of *cy-près* would apply. In the present case a contingent remainder was proposed to be introduced so as to leave out the daughters of sons' sons of Frederick Gray: *Nicholl* v. *Nicholl*, 2 Wl. Bl. 1159; *Parkin* v. *Cresswell*, 24 Ch. D. 102, 32 W. R. Dig. 230.

Butcher, K.C., and *A. S. Spencer*, for the next-of-kin of the testator, submitted that the doctrine of *cy-près* did not apply and that there was an intestacy. (1) The doctrine had never been applied to make good an ultimate limitation following other limitations bad for perpetuity, but to make good intermediate limitations in favour of persons who were express objects of the testator's bounty, which the heirs of Frederick Gray were not. (2) The doctrine did not apply unless an estate tail or a series of estates tail could be framed to include all the objects of the testator's bounty and no other classes of persons. To attain this end, contingent limitations and similar devices are inadmissible. Buckley, J., in *In re Richardson*, 52 W. R. 119, [1904] 1 Ch. 332, has said that where there is a direction hopelessly inconsistent with an estate tail *cy-près* does not apply. (3) No legal limitations could be framed which would have the desired effect of excluding the class of sons' sons' daughters and no others, even if contingent remainders were allowed to be introduced.

R. J. Parker replied.

Upjohn, K.C., and *Wurtzburg* appeared for others of the defendants.

Jenkins, K.C., and *Errington*, for the trustees of the will of John Mortimer.

FARWELL, J., in giving judgment, said: This is a question of an old doctrine of real property law, and Lord Romilly has said that the doctrine of *cy-près* ought not to be extended. In my judgment this is a case outside the scope of application of the reported decisions, and I do not feel at liberty as a judge of first instance to extend it, though I should be glad

if the Court of Appeal or the House of Lords saw their way to doing so. I think I am bound to express my own view, although by agreeing with some I necessarily differ from others of the many varying expressions of opinion read to me from various learned judges. I agree with Sir George Jessel when he says that, in his view, *cy-près* is an unfortunate phrase, because it is nothing more than a rule of construction. I do not think it an exception to the rule, well established in the House of Lords, that you first construe your will without reference to any question of perpetuities, and then apply the rule. I think that is really what the House of Lords meant in *Martelli* v. *Holloway*, 5 H. L. 532, where they say: "There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will." Now, taking it as a question of construction, I have only to see what is the fair construction of the words of the testator, having regard to the authorities which have gone before. I think they are all summed up in *Monypenny* v. *Dering*, 2 De G. M. & G. 145. I agree with Lord St. Leonards about the general and particular intent. There are not two conflicting intents, because you strike out the particular intent if by that you mean an intent which is contrary to the rule against perpetuities. That is what Lord St. Leonards says, and looked at in the way I have suggested, on the true construction of the will there is no such intent; there is only the general intent, which is a perfectly lawful one, and so far as possible the court will give effect to that. Then there are certain limitations laid down by the courts from time to time. I think the rule is accurately stated in Gray on Perpetuities where he says: "When land is devised to an unborn person for life, remainder to his children in tail, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail; and when land is devised to an unborn person for life, remainder to his sons in tail male, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail male. This is called the doctrine of *cy-près*." Lord St. Leonards, in *Monypenny* v. *Dering*, at p. 174 of 2 De G. M. & G., says: "I apprehend the rule is this, that neither by implication nor by the doctrine of *cy-près* can an estate be carried to a class or a portion of a class for whom the testator never intended to provide." That is binding on me and it does not want my approval, but if it did it has it. It may be that Mr. Haldane was right in his comment, that the Lord Chancellor was dealing at pp. 170 and 171 with a case where there was such a clear intention to exclude a class that to give that class any interest under the *cy-près* doctrine would have conflicted with what may be almost called the express directions of the testator. But whether that is so or not, I think that the same thing may be said here, where a class has been omitted altogether, and I must hold intentionally omitted.

The second branch of the rule, as to excluding someone who is an object of the testator's bounty does not arise in the present case. The difficulty that I should include daughters of the sons of sons if I gave an estate tail is proposed to be got over by a most ingenious contingent limitation suggested by Mr. Parker. The terms of the proposal were only written hastily in court, but even if a limitation could be devised which would hold water—as to which I express my respectful doubt—I do not think the court has ever gone to that length. The court has simply inserted an estate tail. This is not a question of some sort of condition precedent at the commencement of the estate tail, in which case it might be different, but it is inserted in the end of the limitations and it breaks the ordinary peaceful flow of the estates tail. There is no precedent for it, and I am not going, as a judge of first instance, to introduce it now for the first time.

Then if I at once reject that, I can see no ground on which I can seriously distinguish this case from *Monypenny* v. *Dering*, or the case before Buckley J., in 1904 (*In re Richardson*, 52 W. R. 119, [1904] 1 Ch. 332). That being so, it is not necessary to say anything about the other point which Mr. Butcher took (see (1) in Butcher, K.C.'s, argument); I think that Mr. Parker has successfully answered it. If the doctrine of *cy-près* were applicable it would not be any the less so because all the intermediate limitations had slipped out.

Decided that the real estate and the residuary personal estate settled to attend it devolved upon the heir-at-law and next-of-kin of the testator respectively.

Solicitors for the trustees, *A. F. & R. W. Tweedie.*

Solicitors for the heirs-at-law, *Langham & Swift; Peacock & Goddard.*

Solicitors for the executors of Frederick Gray, *Wade & Lyell.*

Chan. Div. } March 16.
Buckley, J. }

In re GRASSI.
STUBBERFIELD *v.* GRASSI. (*a.*)

Will—British subject—Holograph in accordance with law of place where made—Leaseholds in England—Wills (Lord Kingsdown's) Act, 1861 (24 & 25 *Vict. c.* 114), *s.* 1.

A will made abroad by a British subject, which is valid according to the law of the place where it is made, is well executed, not only for the purpose of being admitted in England and Ireland to probate, but also for the purpose of disposing of leasehold property in England comprised in it.

Adjourned summons.

G., an Italian by origin, became naturalized in England, and acquired an English domicil, which he retained until the date of his death.

On the 1st of November, 1901, while on a visit to Italy, he made a holograph will, which was unattested but valid by Italian law, and which contained, amongst other things, a bequest of "the usufruct for life of all my property to my wife wherever the said property may be situate."

The testator died in Italy on the 22nd of December, 1901, and his will was subsequently admitted to probate in England.

It was found by the master's certificate that a bequest of the usufruct of any property of any nature, whether real or personal, by Italian law gives to the legatee the right to enjoy such property *in specie* without liability to account.

The testator at the time of his death was possessed of certain leasehold property in England, and the question raised by the summons was whether any interest in this leasehold property passed by the will, or whether the testator died intestate in respect of that property.

Birrell, K.C., and *A. J. Chitty*, for the widow.—The will is good under the Wills Act, 1861, com-

(*a.*) Reported by H. H. KING, Esq., Barrister-at-Law.

monly called Lord Kingsdown's Act, s. 1, and passes the leasehold property. Personal estate is not restricted to movables, but includes leaseholds: Foote's Private International Jurisprudence (3rd ed.), pp. 268 (*b*), 340; Dicey's Conflict of Laws, p. 72; *Freke* v. *Lord Carbery*, 21 W. R, 835, L. R. 16 Eq. 461, 466. "Personal estate" in Lord Kingsdown's Act means personal estate as defined in section 1 of the Wills Act, 1837, and therefore includes leaseholds. If this will did not pass the leaseholds it did not pass any property at all: *Stanley* v. *Burns*, 3 Hagg. Ecc. 373 and 447; *Davis* v. *Gibbs*, 3 P. Wms. 26; *In re Watson*, 35 W. R. 711.

F. Whinney, for the residuary legatees in remainder, adopted the above arguments, and quoted *Butler* v. *Butler*, 33 W. R. 192, 28 Ch. D. 66.

Buckmaster, K.C., and *Sheldon*, for the next-of-kin. —This will has not been so executed as to pass immovable property in this country. Section 1 of Lord Kingsdown's Act has done nothing with regard to the disposition of personal estate, but only provides for the admission of the will to probate so as to pass the legal title. Even if it has affected the disposition of personal estate, it has not touched the disposition of immovable property: Dicey's Conflict of Laws, 691; Jarman (5th ed.), 9; *Pepin* v. *Bruyère*, 50 W. R. 34, [1902] 1 Ch. 24.

BUCKLEY, J.—The question to be decided is whether the words "personal estate" in section 1 of Lord Kingsdown's Act include leaseholds. The divisions of property into real and personal, and into movables and immovables, are divisions which are familiar to most of us, and are not co-terminous. Leaseholds are immovables, but are nevertheless personal estate, although they are said to savour of the realty. A door is thus opened to controversy whether the words "personal estate" in Lord Kingsdown's Act are confined to movables. When the Wills Act was passed in 1837 care was taken to define personal estate, and in section 1 a definition was introduced which defines personal estate in words which extend to leasehold estates and other chattels real. Section 11 of the same Act provides that any soldier being in actual military service or any mariner or seaman being at sea may dispose of his personal estate as he might have done before the passing of this Act. It could not be disputed that the words "personal estate" as there used would include any leasehold property which the soldier or mariner might possess. Section 26 of the Wills Act provides that a general devise of a testator's lands is to include leasehold estates where he has no freehold estate to which the description could apply; but the Act generally proceeds on the footing that leasehold property is not real estate. All the sections indeed tend to show that the Wills Act proceeds, not on the division between *mobilia* and *immobilia*, but on that between real and personal estate, and that was the distinction recognized when Lord Kingsdown's Act was passed. Lord Kingsdown's Act was passed in 1861, and is entitled "an Act to amend the law with respect to wills of personal estate made by British subjects." That title does not, it is true, refer in so many words to the Wills Act, 1837, but the law which Lord Kingsdown's Act was going to amend was in fact contained in the Wills Act, 1837. The Wills Act required wills to be executed in a certain manner; Lord Kingsdown's Act was going to affect that law and to say that in certain cases wills should be admitted to probate although that Act had not been complied with.

The first section of Lord Kingsdown's Act relates to wills made out of the United Kingdom by British subjects. The second section relates to wills made in the United Kingdom by British subjects. These two sections are framed alike, but there are certain merely verbal differences between them which may have arisen from a want of sufficiently scanning the language, but cannot have been intended to vary the meaning. For instance, section 1 refers to "a British subject," whereas section 2 speaks of "any British subject." One section refers to "the law of the place" where the same was made; the other refers to "the laws for the time being in force in that part of the United Kingdom where the same is made." Again, in the words with which I have to deal there is a difference of language, inasmuch as section 1 runs, "shall as regards personal estate be held to be well executed for the purpose of being admitted . . . to probate"; whereas section 2 runs, "shall as regards personal estate be held to be well executed, and shall be admitted . . . to probate." I have to look to see whether section 1 means that the will is to be well executed for the purpose of being admitted to probate, but not for some other purpose —for instance, the purpose of passing property. I cannot understand how that can possibly be held to be the meaning. The variance between the two sections is, in my judgment, one of words only, and not of meaning. "Shall as regards personal estate be held to be well executed for the purpose of being admitted to probate." What is the meaning of that? Does it extend to make a gift of leaseholds to a certain person effectual? I see no reason at all why it does not. According to the definition in the Act which this is amending, it does; and section 4 of Lord Kingsdown's Act gives an additional reason; it says that nothing in that Act contained shall invalidate any will "as regards personal estate" which would have been valid if that Act had not been passed, except in so far as such will may be revoked or altered by any subsequent will made valid by that Act. The personal estate there referred to is the same thing as is referred to in section 1, and in section 11 of the Wills Act, so that section 4 must include leaseholds. I see no reason whatever why the expression "personal estate" in Lord Kingsdown's Act should be held not to include leasehold property. There is another reason which appears to me to support the conclusion at which I arrive. Before Lord Kingsdown's Act was passed a British subject domiciled abroad who made a will according to the law of his domicil, made a will which was admitted to probate here, and which would pass the legal title in any leaseholds given by the will, but would not pass the beneficial interest in them. That person is the person dealt with in section 1. Mr. Buckmaster argued that nothing was done by Lord Kingsdown's Act for such a person. But it seems to me that this Act enables him to deal with the beneficial interest in the leaseholds.

I need not refer to the cases cited, they are all authorities for familiar propositions. Of course it is a different thing to say that Lord Kingsdown's Act is to affect the legality of the dispositions of a will and that a will to which Lord Kingsdown's Act applies can be effectual in any way other than that which results from its being admitted to probate; for example, although it might be admitted to probate it is clear on the authority of *Freke* v. *Lord Carbery* that provisions in a will infringing Thellusson's Act or the English law against perpetuities would not be validated by Lord Kingsdown's Act. For that reason section 1 does not say that the will shall be held to be well executed for all purposes. The section says in effect that the will shall be valid for the purpose of being admitted to probate, and will then take its place and be effectual for other purposes so far as the law of this country

allows. The testator here was an Italian by origin, but at the time of his death he was naturalized and domiciled in this country, and for all purposes material to this case he was an Englishman. He went on a visit to Italy and died there, and his case clearly falls within section 1 of Lord Kingsdown's Act. The will was made out of the United Kingdom by a British subject, and was valid according to the law of the place where it was made, and has been admitted to probate. By his will he left the usufruct of his property to his wife. I hold that the leaseholds were disposed of by the will, and consequently that the widow is entitled to a life interest in his leaseholds, and it is not disputed that she has the right to enjoy them *in specie*.

Solicitors, *H. F. Oddy; T. Richards; Markby, Stewart, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Feb. 2.

POPLAR UNION *v.* MARTIN. (*a*.)

Poor law—Pauper—Wilful refusal to maintain himself—Refusal of work offered on certain conditions at labour colony—Reasonableness of refusal—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

The respondent, who was an able-bodied man aged thirty-nine years, became an inmate of a workhouse. The labour master took him and other paupers to the labour colony at Hadleigh, Essex, which was established with the sanction of the Local Government Board by the Salvation Army for the reception and employment of destitute men. On signing an agreement to be bound by the rules of the colony the respondent could have started work on probation, receiving in return food and free lodging and 6d. a week. If he had remained on he might have been employed at digging clay for bricks, at which employment he might have earned up to 30s. a week. He, however, refused to sign the agreement, and on subsequently again becoming chargeable to the union was charged as an idle and disorderly person under section 3 of the Vagrancy Act, 1824, by the guardians. The police magistrate before whom the charge was heard refused to convict, but stated a case for the High Court. At the hearing the court decided to remit the case to consider the conditions upon which work had been offered, and whether the pauper's refusal to accept it was or was not in the circumstances reasonable. The magistrate found that the agreement contained conditions by which the colonist was required to undertake to discourage other colonists from entering premises where intoxicating liquors were sold, and to attend the Saturday night roll-call, and other special meetings, which were explained to be a form of (Salvation Army) church parade, and was to attend some place of service once on Sunday. He was of opinion that these were not reasonable conditions to attach to the employment, and consequently that the respondent was justified in refusing work on those conditions, and he accordingly dismissed the information. The guardians again appealed.

Held, that as the conditions, admirable as they were in themselves, had no relation to the work, the refusal to comply with them did not place the respondent in the position of a person who had wilfully refused to maintain himself by work, and therefore the magistrate's decision must be upheld.

Case stated by a metropolitan police magistrate, who had declined to convict the respondent as an idle and disorderly person under section 3 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), for that he being a person able wholly or in part to maintain himself by work or other means, did wilfully refuse or neglect so to do, by which refusal or neglect he became chargeable to the common fund of the Poplar Union.

The facts stated in the case were to the effect that the respondent was an able-bodied man, thirty-nine years of age, and on the 23rd of February, 1904, he was admitted to the Poplar Workhouse, and on the 13th of April following he, with ten other pauper inmates, were taken by the labour master to the farm colony established by "General" Booth at Hadleigh, Essex, for the reception and employment of destitute men. Under the terms of an agreement between the appellants and General Booth, the respondent could have started work at the colony on probation, receiving as remuneration his food and lodgings free and 6d. a week in the nature of pocket-money, and if the respondent had after two or three weeks been employed upon brickwork he could have earned 4½d. a yard for digging clay, at which rate of pay it was possible for some men to earn 30s. a week.

He was told to go to work in the brickfield at the colony. It was not possible to do more than guess at the remuneration which he might have earned later on. These terms were explained to the respondent, and he was asked to sign an undertaking to conform to the rules of the colony, but he refused to work upon the said terms or to sign such undertaking, and left the colony. On the 18th of April, 1904, the respondent returned to Poplar Workhouse, and again became chargeable on the rates.

It was contended on behalf of the appellants that the respondent had rendered himself liable to conviction as an idle and disorderly person under section 3 of 5 Geo. 4, c. 83.

The magistrate decided against this contention on the ground that the respondent could not legally be required to work for anyone on the terms offered, which as to the money wages were, for a time, no wages at all, and as to food, &c., a violation of the Truck Acts. He was also of opinion that the words of the section above referred to ought to be construed with reasonable limitations and reasonable regard to the class of work to which the person charged had been accustomed, and also the rate of wages ordinarily to be earned by persons engaged in similar employment, and therefore held that the respondent had not been proved to be a person able wholly or in part to maintain himself. The facts proved did indeed bring the pauper within the literal meaning of the statute, but the consequences of construing the statute literally seemed to him to be such that a limited interpretation must be placed on the statute. The magistrate appended some of the possible consequences which influenced his decision, because the respondents would not be represented at the hearing of the case by the Divisional Court:

(*a*) Any employer of labour outside the workhouse could, under threat of proceedings under this statute, compel persons who had entered the workhouse to work for him at merely nominal wages, or even for half their food, inasmuch as the remuneration offered, however small, must be sufficient to maintain a person "in part."

(*b*) If men were sent outside the workhouse to work for any employer on any work, no matter how unsuitable to them, they would be liable to conviction under this statute for refusing or neglecting to do such work, whereas in the workhouse they could only be convicted if the work was suited to their age, strength, and capacity. They had also in the workhouse the benefit of the regulations made by the

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Local Government Board, whereas outside the workhouse those regulations did not apply.

(c) A man to whom employment might be offered abroad or in a colony might similarly be liable on refusal to conviction under this statute.

The question was whether the magistrate ought to have convicted the respondent, and dealt with him as an idle and disorderly person under section 3 of the Vagrancy Act, 1824.

The following were the material clauses in the agreement which the respondent refused to sign: "I promise to abstain from all intoxicating drink whilst resident on the colony; and I pledge myself not to enter any premises where intoxicating drink is sold, and to discourage others from doing so. I also promise to abstain from the use of all profane or obscene language whilst on the colony. I promise to attend the Saturday night roll-call meetings in the citadel, and any special meetings which may from time to time be arranged by the governor of the colony. I also promise to attend some place of worship once on a Sunday."

Section 3 of the Vagrancy Act, 1824, provides that "Every person being able wholly or in part to maintain himself or herself or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she or any member of his or her family whom he or she may be legally bound to maintain shall have become chargeable to any parish, township, or place . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted . . .) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month."

On the 9th of July, 1904, the appeal was heard before Lord Alverstone, L.C.J., and Kennedy and Phillimore, JJ., when the court held that there was not sufficient evidence on which they could hold that the magistrate was wrong in deciding that the respondent was justified in refusing the work offered on the ground that the offer was unreasonable as to the conditions imposed. The case was accordingly remitted for further evidence on this point.

At the further hearing the magistrate found that on the 13th of April, 1904, the respondent went to the colony, and that on the 14th one Durman handed to him a form of agreement to sign, and that the respondent refused to sign it and to work on its terms. The respondent would not have been allowed to work at the colony except upon his agreeing to all the terms of this agreement. The respondent assigned no reason for refusal except that the remuneration was insufficient. The respondent stated that he was a member of the Church of England, and it was proved that there was a church of that denomination that he could have attended.

The magistrate was of opinion that the conditions contained in the agreement, by which the colonist was required to undertake to discourage other colonists from entering premises where intoxicating liquors were sold and was to attend the Saturday night roll-call and other special meetings, which were explained to be a form of (Salvation Army) church parade, were not reasonable conditions to be attached to his employment, and the respondent was justified in refusing work on those conditions, and was therefore not guilty of the offence. He accordingly dismissed the summons.

The Union appealed.

Colam, for the Union.—The Local Government Board have sanctioned the work offered on these terms by the Salvation Army to the unemployed. The respondent would work for nothing in the union, whereas he gets something from the first at the colony with a prospect of earning anything up to 30s. a week. In *Attorney-General* v. *Merthyr Tydfil Union*, 48 W. R. 403, [1900] 1 Ch. 516, Lord Lindley, when Master of the Rolls, points out in his judgment that the poor law imposes on the comparatively well off the obligation of supporting those who by reason of their poverty cannot maintain themselves, and that a pauper would not be justified in refusing work simply on the ground that the terms offered were in his opinion not good enough. The employment at the labour colony does not come within the purview of the Truck Acts. To prove that the respondent was idle, it is not necessary that he is able and refuses to work: *Carpenter* v. *Stanley*, (1868) 33 J. P. 37. It is sufficient to show that a person claiming support from the ratepayers has had work offered him and has refused it, to make him liable to conviction under the Act of 1824. The magistrate's grounds for refusing to convict the respondent in this case are wholly insufficient, and therefore the appeal should be allowed.

No one appeared for the respondent.

Lord ALVERSTONE, L.C.J.—I admit that the point raised is one of very considerable importance, and it may well be that it will have to be considered again in reference to other circumstances. What we have to decide here is whether, the respondent, being able wholly or in part to maintain himself, he has wilfully refused to do so, and thereby rendered himself liable to be convicted as an idle and disorderly person within the true intent and meaning of section 3 of the Vagrancy Act, 1824. It is found by the case that the respondent had been offered work on certain conditions, some of which were undoubtedly useful. He was to be employed at work on which we are told after two or three weeks he might possibly have earned as much as 30s. a week. The respondent objected to the rate of pay, and based his refusal solely on the ground that the remuneration was insufficient. That might be a reasonable ground for refusal. But the magistrate has considered that the conditions were either not reasonable or not such that a refusal to comply with them put the respondent in the position of wilfully refusing to do work so as to maintain himself in the sense that such refusal rendered him legally liable to conviction. I wish to express no opinion whatever as to whether the conditions on which work at this labour colony is offered the unemployed are reasonable. I do not, however, think that if a man is sent to a colony of this kind he should be forced to attend the meetings or to put himself under certain restrictions as to intoxicating liquor. But that is not the test that we ought to apply. The conditions must be conditions that affect the work, and if the terms upon which a man is offered work are reasonable with reference to the work he is called upon to do, the court should certainly hesitate before holding that he would be justified in refusing to accept the work offered. I doubt, however, very much if there is any right to impose conditions upon the respondent to which he was not willing to agree to, which in fact have no relation to the work at all. It is very proper that some stipulation should be made for attendance at a place of worship, and anything that would induce people so to attend ought to be encouraged. But on the other hand, of course, there are religious bodies and creeds in England which are perfectly lawful, but which persons might very reasonably take objections to. In the same way anything that promotes temperance, no judge who knows the connection between drink and crime would say was

unreasonable. I have great doubt, however, whether such considerations arise at all when the question is whether a man has wilfully refused or neglected to maintain himself by refusing work that is offered him with any such conditions attached to the offer. These conditions have, in my opinion, nothing to do with the work or with the question whether the person refusing such work renders himself liable to conviction. Some of them certainly in the present case are such that the court ought not to take them into consideration when deciding whether the respondent has wilfully refused within section 3 of the Act.

I come to the conclusion, therefore, that the conditions upon which work was offered this man were not reasonable, and that he was justified, therefore, in refusing to sign the agreement.

KENNEDY and RIDLEY, JJ., concurred.

Appeal dismissed

Solicitors for the union, *C. V. Young & Son.*

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Kennedy, Ridley, and Channell, JJ.) Nov. 18

REX *v.* HALE. (*a.*)

Criminal law — Prevention of cruelty to children — Necessity of attendance of child—Prevention of Cruelty to Children Act, 1894 (57 *&* 58 *Vict. c.* 41), *s.* 16—*Prevention of Cruelty to Children Act,* 1904 (4 *Ed.* 7, *c.* 15), *s.* 16.

By section 16 *of the Prevention of Cruelty to Children Act,* 1894, *which was repealed and in part re-enacted by section* 16 *of the Prevention of Cruelty to Children Act,* 1904, *the attendance of the child at the trial is held not to be essential in certain cases.*

Held, that it was not an essential condition to the proper hearing of the cause that in all other cases, except those mentioned in the section, the child in respect of whom the offence is alleged to have been committed should be present at the trial.

Case stated by Kennedy, J., at the summer assizes for the county of Glamorgan.

The special case was as follows: "At the above-mentioned assizes Ellen Hale was tried before me on an indictment which, in the first eight counts, charged her with offences under the Prevention of Cruelty to Children Act, 1894, s. 1, in regard to four children of the ages respectively of twelve, seven, five, and three years. The indictment comprised in these counts charges against the prisoner, in regard to each child, of wilfully neglecting the child in a manner likely to cause such child unnecessary suffering and injury to its health. In regard to the second count, which was the count charging the prisoner with wilfully neglecting the eldest child in a manner likely to cause injury to his health, I held that there was no evidence that could justify a conviction, and a ninth count against the prisoner under the Habitual Drunkards Act, 1879, and the Prevention of Cruelty to Children Act, 1894, s. 11, was not proceeded with. The jury found the prisoner guilty, in respect of all the four children, of the offences charged against her in the first, third, fourth, fifth, sixth, and seventh counts. None of the children were produced as witnesses for the prosecution and none of them were present in court, and in the course of the trial I drew the attention of the counsel for the prosecution to the provisions of section 16 of the Prevention of Cruelty to Children Act, 1894, and there was some discussion as to whether the effect of that section was or was not, by necessary implication, that a case under the first section of the Act cannot be be 'proceeded with and determined' in the absence of the child in respect of whom the offence is alleged to have been committed, except under two conditions, specified in section 18—namely, (1) that the court is satisfied by the evidence of a registered medical practitioner that the attendance of the child before the court would involve serious danger to its life or health, and (2) the court is further satisfied that the evidence of the child is not essential to the just hearing of the case. There was in the present case no such evidence of a registered medical practitioner as is mentioned in this section. The 16th section has never received judicial interpretation, and the meaning and application appeared to me to be so far open to argument that I thought it right, according to the request of counsel for the prisoner, to state a case for the opinion of this court upon the question, and I postponed judgment and released the prisoner on bail pending the decision of the court. The question for the consideration of the court was whether or not under the said section 16 at the trial of an indictment under the Prevention of Cruelty to Children Act, 1894, s. 1, the attendance at the court of the child in respect of whom the offence is alleged to have been committed is, except under the circumstances of exception therein specified, requisite and necessary in order that the case may be proceeded with and determined. If in the opinion of this court the case was one in which I ought to have held that in the absence of the children and of any evidence of a registered medical practitioner to justify their absence, no case had been presented by the prosecution upon which the accused could properly be convicted, the conviction was to be quashed, otherwise it was to stand."

By section 16 of the Prevention of Cruelty to Children Act, 1894, it is provided: "Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or of any of the offences mentioned in the schedule to this Act, the court is satisfied by the evidence of a medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life and health, and is further satisfied that the evidence of the child is not essential to the just hearing of the cause, the case may be proceeded with and determined in the absence of the child"; and by the Prevention of Cruelty to Children Act, 1904, which came into operation on the 1st of November, 1904, the Prevention of Cruelty to Children Act, 1894, is repealed, and by section 16, "Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or of any of the offences mentioned in the first schedule to this Act, the court is satisfied that the attendance before the court of any child in respect of whom the offence is alleged to have been committed is not essential to the just hearing of the cause, the case may be proceeded with and determined in the absence of the child.

Clarke Hall, for the Crown.—This section does not mean that in all other cases than those mentioned in the section the child must be present. That would introduce a condition which does not exist in any other class of case. Attendance must be read as "attendance to give evidence."

He referred to *R.* v. *Cox,* [1898] 1 Q. B. 179, 46 W. R. Dig. 41.

No counsel appeared for the prisoner.

Lord ALVERSTONE, L.C.J.—I can well understand

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

the motives that have induced my brother Kennedy to state this case in order that there may be an exposition by this court of the meaning of this section. Speaking for myself, I have no doubt at all upon this point. It cannot, as it seems to me, be suggested that the section means that in every case the child in respect of whom the charge is alleged should be present in court. That would be a new and extraordinary enactment, and would have the effect of creating in respect of this class of enactment a condition that does not exist in regard to any other criminal case. There is some difficulty in seeing why such a section was enacted at all, but in my opinion the difficulty is removed if we read the expression "attendance" in section 16 as being equivalent to "attendance for the purpose of giving evidence." Anyone who is acquainted with the theory and practice of criminal law knows that the power and authority of a judge when trying such a case to require that a person should or should not be called, is a quite sufficient power, and exists quite apart from the legislative enactments of this Act. But it is not infrequent that the framers of this Act, not remembering, and perhaps not even being acquainted with all the rules of criminal jurisdiction, have inadvertently inserted clauses which are not necessary. That may be the explanation of this section, which provides that where in any proceedings the court is satisfied that the attendance of the child would involve danger to its life or health, and further, that the child's evidence is not essential to the just hearing of the charge, it need not be called.

No doubt the court has always possessed this power. The section, however, may have been enacted in the interests of the prisoner, to point out that when the child's evidence was really essential to the just hearing of the case the court should not dispense with its presence. Probably the provision as to the evidence of a registered medical practitioner is also unnecessary, but the framers of the Act may have thought that at any rate before the magistrates this condition should also be fulfilled in order that the evidence of the child should not be dispensed with too easily. That is, as it seems to me, the true explanation of the section, and certainly to hold otherwise would be to read into the section "and in every other case the child must be present," which would carry the section much further than the words warrant or can have been the intention of the Legislature.

I come, therefore, to the conclusion that the proceedings were in order, and that the conviction must stand.

LAWRANCE, KENNEDY, RIDLEY, and CHANNELL, JJ., agreed.

Solicitors for the prosecution, *Moreton, Phillips, & Son.*

House of Lords.

From C. A. (England). Feb. 16.

ELDERSLIE STEAMSHIP CO. *v.* BORTHWICK. (*a.*)

Ship—Bill of lading—Exception—Shipowner's negligence—Warranty of seaworthiness of ship—Fitness of ship to carry goods.

Meat was shipped at Melbourne for carriage to London under a bill of lading which contained the following clause in large print exempting the shipowner from liability "for any loss or damage (to the goods) whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not," and "for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners or charterers," or "from any cause whatsoever." There was also a small print clause exempting the shipowners from liability for loss or damage resulting from (inter alia) *"defects, latent or otherwise, in hull, tackle, boilers or machinery, refrigerating or otherwise, or their appurtenances (whether arising or not existing at the time of the goods being loaded or at the commencement or any stage of the voyage), if reasonable means have been taken to provide against such defects or unseaworthiness." The meat was damaged in consequence of the tainted condition of the ship at the commencement of the voyage, arising from the use of carbolic acid for disinfecting and cleansing the ship at Melbourne, which damage would not have occurred if proper skill and care had been used by the shipowners before the ship started on her voyage.*

Held, that the shipowners were liable.

Decision of the Court of Appeal (52 *W. R.* 439, [1904] 1 *K. B.* 319) *affirmed.*

Appeal from an order of the Court of Appeal (Lord Alverstone, L.C.J., Collins, M.R., and Romer, L.J.), reversing a judgment of Walton, J.

The action was brought by the indorsee of bills of lading (the present respondent) to recover damages for breach of contract in the carriage of meat by sea on board the appellants' steamship *Nairnshire* from Melbourne to London.

The bills of lading contained two clauses enumerating exceptions, of which the former was in large type. The first clause provided as follows:

"Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew or other persons in the service of the owners or charterers, nor from any other cause whatsoever . . ."

The second clause, which was printed in small type, was, as far as material, as follows:

"Perils of the seas, rivers, and navigation of whatsoever nature or kind and howsoever caused; whether or not any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the owners or charterers; whether on board the said ship, or on shore, or on board any other ship belonging to or chartered by them, or for whose acts they would otherwise be liable whether such act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage, or any other causes beyond the control of the owners or charterers, or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

at the time of the goods being loaded, or the commencement of the voyage) or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness."

Walton, J., found as follows: (1) That the meat on arrival was found to be tainted with the smell of carbolic acid and was damaged; (2) that the meat was damaged by having become tainted during the voyage with the smell of carbolic acid; (3) that such taint and damage arose from the condition of the ship at the commencement of the voyage; (4) that if proper care, skill, and attention had been paid to the cleaning and preparation of the ship the damage would not have occurred; and held that the damage was within the terms of the first exception clause, which was not cut down by the second. He therefore gave judgment for the appellants with costs.

This was reversed by the Court of Appeal.

Carver, K.C., and *Leck*, for the appellants.—The large type clause is wider in its exceptions than was the case in *Maori King* v. *Hughes*, 44 W. R. 2, [1895] 2 Q. B. 550.

Rathbone Bros. & Co. v. *McIver, Sons, & Co.*, 52 W. R. 68, [1903] 2 K. B. 378, was referred to.

J. A. Hamilton, K.C., and *Maurice Hill*, for the respondent.—The shipowner must exempt himself in plain and unambiguous language. The general words used here left him liable. The words used are only applicable to a ship which has been made seaworthy.

Rathbone v. *M'Iver*; *Price* v. *Union Lighterage Co.*, 52 W. R. 325, [1904] 1 K. B. 412; *Steinman* v. *Angier Line*, 39 W. R. 392, [1891] 1 Q. B. 619, were cited or referred to.

Carver, K.C., replied.

Earl of HALSBURY, L.C.—I do not think it necessary to quote any authority in this case. Construing this instrument, and applying to it the ordinary canons of construction, I must move your lordships that this appeal be dismissed.

It seems to me that if what has been called the large print had stood alone I should not have had the smallest doubt that it would have carried the shipowner the whole way. I can give no other construction to it than that which the words express, but the difficulty in his way is that he has thought proper to execute an instrument which has two different sets of phrases in it; and one rule of construction which must prevail is that you must give effect to every part of a document if you can—you must read it as a whole. Counsel for the appellants has ingeniously spoken of independent contracts and independent paragraphs and so on; but we must remember that this is one contract, and each of the parts of this contract must be read so as to give effect to the whole if it can.

The only mode of reading it is to read the first part of it thus: "I am not to be liable for this"; and then what comes after it by way of exception—"I shall not be liable unless I have failed to take all reasonable means against the injury that has happened." In that way you can read the two together, and this seems to me to be the only way in which you can make a reasonable and intelligible contract and give effect to the words which the parties have agreed to.

Under these circumstances it seems to me that the appeal ought to be dismissed, and I move your lordships accordingly.

Lord MACNAGHTEN.—I am entirely of the same opinion. The clause which has been called the large-print clause seems to me to be perfectly clear, and the small-print clause equally clear. For my part I am unable to reconcile the two; and I do think it is a very wholesome rule that a shipowner who wishes to escape from the liability which would attach to him for sending an unseaworthy vessel to sea must say so in very plain words. The only way to reconcile the two clauses is to apply the qualification in the small-print to the large-print clause.

Lord LINDLEY.—I am of the same opinion. This is a contract between two persons, one of whom, the shipowner, prepared it. I have not the slightest doubt the shipowner understood it as counsel for the appellants contend he did. But when I look at it from the other side, and consider whether the shipper would so understand it, I say, if it were myself, certainly I should not. I should find that the defects which were to render the ship unseaworthy were only to be excepted in certain conditions—that is, if reasonable means had been taken to provide against them. That is how I should read it as a shipper, although the shipowner would not. It appears to me that the vice of Walton, J's, admirable judgment is that he has rather lost sight of what would be reasonably plain to the shipper. I quite agree with the principle on which the Lord Chancellor and my noble and learned friend have proceeded in deciding this case. I agree that this bill of lading did not employ plain terms and relieve the shipowner from liability in the case of unseaworthiness. I mean by "plain terms" terms sufficiently plain to the shipper for him to understand; it he would not understand it in the sense contended by counsel for the appellants.

Appeal dismissed.

Solicitors for appellants, *Lowless & Co.*

Solicitors for respondent, *Walton, Johnson, Bubb, & Whatton.*

From C. A. (England). Feb. 7.

COMISKEY AND OTHERS v. BOWRING-HANBURY AND ANOTHER. (a.)

Will—Construction—Precatory trust—"In full confidence"—Gift over in default of disposition.

A testator gave, bequeathed, and devised to his wife the whole of his real and personal estate absolutely "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." The testator died childless, leaving a widow and seven nieces surviving him.

Held (Lord Lindley *dissenting*), *that the widow took an absolute estate, subject to a conditional executory limitation to the testator's nieces living at her death, in case she should not have made a will devising the estate to one or more of such nieces.*

Decision of the Court of Appeal (52 *W. R.* 662 [1904] 1 *Ch.* 415) *reversed.*

Appeal from an order of the Court of Appeal made on the 10th of July, 1903 (Vaughan Williams and Stirling, L.JJ., Cozens-Hardy, L.J., dissenting).

The will of the Right Hon. Robert William Hanbury, late Minister of Agriculture, who died on the 28th of April, 1903, and which was dated the 31st of October, 1893, contained the following clause: "I

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces. I make this will in full confidence that my dear wife will show the affection of a daughter to my dear mother and stepfather. I appoint my said wife Ellen Hanbury and Charles Fisher, of Brownhills, colliery manager, executrix and executor of this my will, and I give the said Charles Fisher such sum not exceeding £150 as my dear wife may decide upon."

The testator never had a child, and he was at the time of his death entitled to real and personal property of large value.

The testator left seven nieces surviving him.

An originating summons was taken out by the widow, before Kekewich, J., and it was declared that the respondent Ellen Bowring-Hanbury was absolutely entitled to the whole estate for her own use and benefit.

The Court of Appeal affirmed this, and the nieces appealed.

Warmington, K.C., and *Christopher James*, for the appellants.—The cases are collected in *In re Williams, Williams* v. *Williams*, 45 W. R. 519, [1897] 2 Ch. 12, 29.

Haldane, K.C., and *Jenkins, K.C.* (*Austen-Cartmell* with them), for the respondent Mrs. Bowring-Hanbury.—The absolute gift to the widow cannot be cut down by the subsequent words: *Holmes* v. *Godson*, 8 W. R, 415, 8 D. M. & G. 152.

L. W. Bryne, for the respondent Fisher, the executor.

Warmington, K.C., replied.

Earl of HALSBURY, L.C.—In this case the discussion appears to me to be in a very narrow compass. The question which this House has to decide turns upon a very few words. For my own part I am not able to entertain the doubt which appears to have prevailed with the learned judge in the court from which the case originally came, and the majority of the Court of Appeal. The situation of the parties, of course, is to be considered, and the situation of the property in this sense, that whether or not it was property which the testator contemplated remaining intact and not subject to any diminution until the time of his wife's death, is an important factor in the construction of the words that he had actually used. I confess that to my mind it appears manifest that he did contemplate whatever was the position in which he meant his wife to be, that the property which he himself left to her, to use a simple word, was to remain so that she would have power of making some disposition of it at the period of her death, whatever that disposition might be, which is the question which the House has in fact to determine.

Now, I cannot help thinking that enough has not been made of the mode in which the estate is given to her; it is all in one sentence: "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it." I pause there for a moment before reading what follows. Reading that, I come firmly to the conclusion that he did contemplate that the property which he left was to remain; and the first inference I draw is that he did not contemplate that during her lifetime she would have made away with it, and disposed of it in any way, or placed upon it such an irrevocable character, either by way of settlement or anything else, that at the time when she died herself it would have passed away from her power of disposition.

The next thing that occurs to me as to the nature of it is, that he does contemplate that she might make a will herself, and that those words "in default of any disposition" ought not to be read by themselves, but with the other words, "any disposition by her thereof"; so that what he is contemplating is, first of all, that the property is to remain capable of being left by her; and what he is contemplating is not a general failure of any will made by her which did not dispose of this particular property. Of course the case of no will being made by her would come within the same proposition; but what is in his mind is that she may have made a will, but have made no disposition of that particular property which she has come into possession of by reason of his death and his will.

Then what strikes one about it is this (and it is an observation which I think was made by counsel for the appellant)—that he contemplates that, in the state of facts which is before his mind, he is giving directions. I cannot think that if it was in his mind that she was to be absolute owner, and to do what she pleased with it, he would, after he had given her a complete power of disposition, use such a phrase as "I hereby direct." If he contemplates that she is an absolute owner, and that his property may be given away by her, and may be used for the purpose of settlement on a second marriage or what not, the only thing that keeps his property to him and to his nieces is the possibility of her not making a disposition such as he contemplates she might make. To my mind, therefore, it is as clear as any such thing can be, that he is contemplating that she shall have the full use of it during her lifetime, and that when she has not, as by the hypothesis I have been arguing upon she has not, made any disposition of it inconsistent with its complete disposition to the nieces—what he contemplates is that one or more of his nieces is to be the object of his bounty, and if his widow does not select one or more, then they are all to share alike. That, to my mind, is the meaning of the language. I do not stop to bring in any rules of law or any canons of construction. I look at the words merely as they stand in the will, and I think the natural and ordinary meaning of those words is what I have suggested.

The language which is relied upon of the gift to Charles Fisher is, I think, not absolutely immaterial. It is, in one sense, a small point, but I think, on the other hand, it does look as if the testator had in his mind that when she was in possession of whatever it was she was to be in possession of, she was not to be able to do what she would with it; but her power even to give such a sum as £150 is limited, and that in language which I think is not subject to any ambiguity at all: "I give the said Charles Fisher such sum not exceeding £150 as my dear wife may decide upon." It seems to me that that would be an extraordinary thing for him to do if he supposed that she was to be an absolute owner with power to determine in what way every part of the capital of the estate should go.

For these reasons I confess I am unable to entertain any doubt that what the testator did mean was that his wife should have the full use and enjoyment of the property during her life, and at her death she should either select among the nieces such as she

pleased, or, if she did not make any selection, that they should take share and share alike.

Under those circumstances I am unable to agree with the judgment of the Court of Appeal, and I move your lordships that that judgment be reversed.

Lord MACNAGHTEN.—I am of the same opinion, and I accept and adopt the judgment of Cozens-Hardy, L.J.

Lord DAVEY.—I agree, and I will only, out of respect to Vaughan Williams and Stirling, L.JJ., add a very few words to what has been said.

The words which have been so much commented upon, "in full confidence," are, in my opinion, neutral. I think it would be impossible to regard them, and I do not for the purpose of my judgment regard them, as technical words in any sense. They are words which may create a trust or may not create a trust, and whether they do so or not must be determined by the context of the particular will in which you find them.

Now, we have been enjoined a great many times by the learned counsel on both sides of the bar that we must read the whole will in the first instance. I have obeyed that direction, and in fact I have read it more than once, and what strikes me upon reading it is this—first, I observe that the testator did obviously intend—whether his intention can be carried into effect or not is a different question—but he did obviously intend that his nieces should have an interest in and should be entitled to this estate in some event; and secondly, that, although he directed it in the last resort to go to his nieces, he hoped or believed—or, to use his own words, "had confidence"—that they would take the estate through the testamentary bounty of the widow.

I make this further observation—that if I read the will through without paying attention to legal rules, and for the purpose only of seeking the testator's intention—what he meant, and what the meaning of the words is that he used—without for the moment regarding the question whether his intention could legally be carried into effect or not—it is, to my mind, obvious that he did not intend that his wife should have an absolute power of disposition. And for this reason, because, construing the words in the way in which the respondent would wish them to be construed—construing the words "In default of any disposition by her thereof by her will or testament" as meaning any testamentary disposition in favour either of the nieces or of anybody else, he intended in that event that it should go to the nieces. It is quite true that in that event the law would not give effect to the testator's intention; but if you are to seek what the testator's intention was, I think that was the purport of what he intended. That seems to me to throw considerable light upon the meaning we must attach to the word "absolutely." I do not myself attach any great importance to the use of the word "absolutely." Reading it as qualifying or expressing the estate which the wife had to take, it does not seem to me to do more than to give her a fee simple. It is now admitted that she has a fee simple, and the question is whether there is a good executory limitation, capable of taking effect upon her death. The use of the word "absolutely" as defining the amount of the estate which is given to the wife must, of course, be subject to any executory limitation, or any other valid limitation or exception which you find engrafted on that estate in fee simple; therefore I attach no importance, or very little importance, to the use of the word "absolutely." In my opinion, the question really is this: Do those words "in default of any disposition by her" mean any disposition in favour either of the nieces or anybody else; or are they, as counsel for the appellant contended, to receive a referential construction, and to be construed as relating to such a disposition as that which he has expressed his confidence that his wife would make? That is a point which it is impossible to labour, and I do not know that I can add anything to what the Lord Chancellor has said upon it, or that I can do anything more than express my entire agreement with him. I think that is the most natural way of reading the will. I think any layman reading the will, and considering what the testator's intention was, would come to the conclusion—at any rate I come to the conclusion—that he is speaking only of a default of any such disposition as he had expressed his confidence that his wife would make; and, if so, I am of opinion that there is a good executory limitation.

I ought to say that it does not appear to me very important whether you treat the words "in confidence" as creating a trust or not. The question is whether the ultimate limitation is a good executory limitation; and even if you treat the words "in confidence" as only expressing a hope or belief, the will would run thus: "I hope and believe that she will give the estate to one or more of my nieces, but if she does not do so, then I direct that it shall be equally divided between them." I think that is a perfectly good limitation. The case which the appellants' counsel last referred to shews that, although a gift over in default of alienation generally would be bad, yet a gift over in default of alienation to a particular individual, or alienation to any but a particular individual, would be good, and I see no reason whatever for thinking that this is not a good limitation. I will only add this: in none of the cases which have been cited in which questions of this kind have been discussed was there a gift over in default such as we find in the direction in this will, and I am not aware of any case of the kind. I observe in some of the cases to which our attention was drawn, that absence of any such gift over, the absence of any direction such as we find in default of a bequest by the widow, is made a strong point for not holding that the words "in confidence," or similar words, created an obligatory trust.

There is one practical observation I will make for the consideration of the parties, and that is this: The question upon which the argument took place is stated thus: "That it may be determined whether upon the true construction of the testator's said will the testator's real and personal estate and property is given to the plaintiff absolutely for her own use and benefit, or whether the same is given to the plaintiff for her life only and after her death," and so forth. That seems to me to be framed on an erroneous hypothesis. Counsel for the appellants do not contend, and I do not think it would be possible to contend, that the wife has only a life estate. Her real interest is an estate in fee or an absolute estate in personalty, subject to an executory limitation. The parties will perhaps consider what is the best way to state it. I should think something of this kind would do: "That the plaintiff is entitled to an absolute estate subject to a conditional executory limitation to the testator's nieces living at her death, in case she shall not have made a will devising the estate to one or more of such nieces." Some words of that kind would do, but obviously we cannot answer the question which is asked of us, yes or no.

Lord JAMES OF HEREFORD.—I have very few words to add to the judgments that have already been delivered, and in which I concur. It is admitted on all hands that our only duty is to discover what was

the intention of the testator, and that we must make that discovery from the words used in the will.

Now I do not enter, of course, into any consideration of the particular mental powers of the testator, but we must treat him who made the will as a person of ordinary common sense, meaning something by the words he wrote. It is contended on the one hand that this was a disposition of an unfettered freehold estate to the widow. If that had been so, it would have been very easy to have left out the words that appear subsequently to those first words in the will. There is in that contention no meaning whatever given to the words that follow—namely, the phrase "and in default of any disposition by her thereof the estate is to go to his nieces." I do not think we can shut out those words from the construction of this will, but I can quite conceive that, the word "absolutely" being used, we have to find some reason why in the first disposition he should have used the word "absolutely" and in the second there should have been this gift over to the nieces. I think the meaning of the testator from a common-sense point of view is clear enough. He wished his widow to have a life estate in this property, and he then wished after that life estate that it should be left to his nieces—to those of his own blood. If he had made the disposition at that time, in 1893, he must have selected the objects of his bounty without relation to what would be their condition at the time of his wife's death. There are seven nieces. We have no evidence about it, but I infer, from one of them being an infant now, that they were young ladies at the time of the will. At the time of the widow's death they would be in different conditions, deserving a different amount of beneficial gift. One might have married a rich man, and another might have married a poor man; and one might have a large family and another none; and one might not be married at all. Therefore it was that he wished the power of selection to be given at a time more or less approaching that at which they would be recipients of the bounty. For that reason, while he gave his wife a life estate only, he asked her to take care that the nieces should have the estate subject to her selection of the individual nieces and a division of the property apportioned between them as she thought fit. That was apparently a most sensible, business-like, common-sense view of the position which Mrs. Hanbury was likely to take up in relation to these ladies; and I believe that was the whole intention of this will.

Lord ROBERTSON.—I entirely agree.

Lord LINDLEY.—I am sorry to say I am unable to come to the same conclusion, but I will not trouble your lordships with many observations upon the question. It is impossible to say that a trust for the nieces, or at least for one of them selected by the wife, cannot be extracted from this will, but personally I think the construction adopted by Stirling, L.J., is more in accordance with the language used than the construction contended for here by the appellants. The wife was, in my opinion, intended to be the absolute owner, free from any legal or equitable obligation in favour of anybody, and free from any executory gift over. I admit that the contrary construction can be put upon the will, but that does not appear to me to be the natural one.

Appeal allowed.

Solicitors for the appellants, *Walker, Martineau, & Co.*

Solicitors for the respondents, *Patersons, Snow, Bloxam, & Kinder.*

Court of Appeal.

From P. D. & Ad. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — March 8.

"THE TOSCANA." (a.)

Practice—Appeal—Costs—Ship—Salvage—Reduction of of award—Allowance of appellants' costs.

The Court of Appeal, having reduced the amount of a salvage award, allowed the successful appellants the costs of the appeal.

The Kilmaho, 16 *Times L. R.* 155, *and* The Prince Llewellyn, [1904] *P.* 83, 52 W. R. Dig. 169, *followed.*

The Gipsy Queen, 43 *W. R.* 359, [1895] *P.* 176, *not followed.*

Appeal from the judgment of Sir Francis Jeune in a salvage action.

The action was brought by the owners, master, and crew of the steamship *Bonny* to recover salvage for services rendered to the steamship *Toscana.*

Sir Francis Jeune made an award in favour of the plaintiffs for £5,100.

The owners of *The Toscana* appealed, upon the ground that the amount awarded was excessive.

Pickford, K.C., Laing, K.C., and *Pritchard,* for the appellants.

Aspinall, K.C., and *A. D. Bateson,* for the respondents.

THE COURT reduced the amount awarded for salvage to £3,000.

Pickford, K.C., asked that the appellants might be allowed their costs of appeal.

Aspinall, K.C., contrà.—In *The Gipsy Queen,* 43 W. R. 359, [1895] P. 176, Lord Esher, M.R., and Lopes and Rigby, L.JJ., held that the general practice of this court, following the practice adopted by the Privy Council, was not to allow costs where the amount of a salvage award was reduced.

Pickford, K.C., in reply.—In the subsequent case of *The Kilmaho,* 16 Times L. R. 155, where the award was considerably reduced, A. L. Smith, Rigby, and Collins, L.JJ., allowed the successful appellants their costs. That case was followed by a Divisional Court of the Admiralty Division in *The Prince Llewellyn,* [1904] P. 83.

COLLINS, M.R.—I think we are at liberty to follow our own judgment in this matter. The hard-and-fast rule of practice laid down by the Privy Council, when they exercised jurisdiction in these appeals, which was followed as a general rule of practice by this court in *The Gipsy Queen,* has since been abandoned in *The Kilmaho* and *The Prince Llewellyn.* I think we ought to follow the ordinary rule by which a successful appellant is allowed the costs of the appeal. The appeal will therefore be allowed with the costs of the appeal, but the costs in the court below will not be interfered with.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed with costs.

Solicitors for the appellants, *Pritchard & Sons.*

Solicitors for the respondents, *Stokes & Stokes,* for *Batesons, Warr, & Wimshurst,* Liverpool.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Feb. 20.

LEWIN AND OTHERS v. END.
LEWIN AND OTHERS v. CIVIL SERVICE SUPPLY ASSOCIATION. (a.)

Local Government—Rating—Dwelling-house—Authority of old decisions—Interpretation.

The court will not readily overrule the decision of a court of inferior jurisdiction which has been acted on for a great number of years. The word "house" in 12 Car. 2, c. 37, means a dwelling-house—i.e., a house which is in fact being used as a dwelling-house, or which can be so used without any structural alteration.

Surman v. Darley, 14 *M. & W.* 181, *explained and followed.*

Lewin and Others v. George Newnes (Limited), 90 *L. T.* 160, *distinguished.*

Appeals from a Divisional Court (Lord Alverstone, L.C.J., and Kennedy, J.) in an action tried by Judge Woodfall at the Westminster County Court.

The respondents occupied premises situate in the parish of St. Paul's, Covent Garden.

By an Act entitled "An Act for making the Precinct of Covent Garden Parochial," passed in the twelfth year of Car. 2, the sum of £250 was charged upon the "houses of the inhabitants for the support and benefit of the rector, curate, clerk and sextons of the said parish."

This Act was repealed and substantially re-enacted by 51 Geo. 3, c. 150, the charge being increased from £250 to £520. The rate is commonly known as the rector's rate.

The premises, occupied by the respondent End were formerly used as dwelling-houses, but at the present time were being used, as to the lower part of the premises, as a warehouse, and as to the upper part as offices of a theatrical agent. The premises, in fact, could not be reconverted into dwelling-houses without considerable structural alterations. No persons slept on the premises; a caretaker remained in charge during the night, but he was occupied with work throughout the night.

The premises occupied by the respondents, the Civil Service Supply Association, were built upon the site once occupied by dwelling-houses. The present premises were used entirely for the purposes of the business—general stores. No persons slept upon the premises. The kitchens were used as part of the general business. The attendants had lunch on the premises because it would be inconvenient to allow them to leave the premises for that purpose.

The plaintiffs in both actions were the churchwardens of the parish of St. Paul's, Covent Garden.

His Honour Judge Woodfall held, affirmed by the Divisional Court, that the defendants were not liable to pay the said rate.

The plaintiffs appealed.

Macmorran, K.C., and *Clarke Hall*, for the appellants, relied upon *Daniel* v. *Coulsting*, 7 M. & G. 122. Cresswell, J., in his judgment, on p. 125 says: "I am clearly of opinion that the word 'house' does not necessarily mean dwelling-house." This court is not bound by the decision of the Court of Exchequer in *Surman* v. *Darley*, 14 M. & W. 181, but can overrule it. Alderson, B., in his judgment, states: "It clearly meant to impose the charge only on dwelling-houses or, at all events, on those which are capable of being occupied as such." The premises now in question are capable of being so occupied. In the case of the respondent End the rate was paid for many years. In the recent case of *Lewin and Others* v. *Newnes* (*Limited*), 90 L. T. 160, 52 W. R. Dig. 148, the court (Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) adopted this definition of Alderson, B. The court found that the buildings in question were built as dwelling-houses, and were capable of being occupied as such. If this appeal is dismissed it will fall heavily upon the appellants, as the tendency of modern times is to convert dwelling-houses into warehouses and offices. [ROMER, L.J.—Your remedy is a new Act of Parliament.]

Frampton, K.C., and *John Sanderson*, for the respondent End; and *Danckwerts, K.C.*, *Morton Smith*, and *Henn Collins*, for the respondent Civil Service Supply Association.—This court would be bound by the judgment of the Court of Exchequer, constituted of Pollock, C.B., and Alderson, Rolfe, and Platt, BB., in *Surman* v. *Darley*. This decision was now sixty years old and had several times been acted upon, but never departed from. In *Newnes case* the caretaker and his wife actually resided on the premises, and the case was therefore readily distinguishable. In *Merry* v. *Nichalls*, 20 W. R. 929, 7 Ch. App. 733, Sir W. M. James, L.J., at p. 750 of his judgment, said: "However, that is not the way a court like this deals with the decisions of a court of co-ordinate jurisdiction. The cases which are cited do not bind us as *res gestæ*, because they are *inter alios acta*; but they bind us in so far as they are authoritative expositions and statements of the law. It is the principle of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at the same conclusion. Therefore, to say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is that the decision of a superior court is binding upon an inferior court and on a court of co-ordinate jurisdiction in so far as it is a statement of the law which the court is bound to accept." If warehouses, offices, and the like are intended to be included within an Act, the words always are expressly included, as Platt, B., says in his judgment in *Surman's case*. Thus in *The Queen* v. *Christopherson*, 34 W. R. 86, 16 Q. B. D. 7, the rector's rate by 16 Car. 2 and 22 & 23 Car. 2 was charged upon "all and every the houses, shops, warehouses, cellars, and outhouses." Counsel for the appellants laid great stress on *Daniel* v. *Coulsting*, but the actual decision does not support their case, and, with respect to the excerpt from the judgment of Cresswell, J., the learned judge himself gives the true explanation of the decision in *Surman's case* by his reference to *Elmore* v. *St. Briavells*. [*Danckwerts* was stopped by the court.]

Clarke Hall replied.

VAUGHAN WILLIAMS, L.J.—I do not see my way clear to depart from the decision of the Court of Exchequer in *Surmam* v. *Darley*. There they decided that in these Acts "houses" meant dwelling-houses. In neither of these cases are the houses in fact being used as dwelling-houses. If there had been a covenant in either case not to use the premises other than for the purpose of a dwelling-house there would have been a breach of the covenant. Then it is argued that the Court of Exchequer said none but a dwelling-house or one which is capable of being used as a dwelling-house came within the meaning of the word "houses" in these two Acts of Parliament. I think that means capable of being used in its present structural condition. I do not think either the End

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

or the Civil Service houses are houses in respect of which it may be truly said that they come within the meaning of houses capable of being used as dwelling-houses. I think neither of these houses are used as dwelling-houses. The appeal must be dismissed with costs.

ROMER, L.J.—I agree. I think these cases are governed by the case of *Surman* v. *Darley*. To enable the appellants to succeed in these cases they must ask us to overrule the decision in *Surman* v. *Darley*. That case is sixty years old; it has never been differed from, and has been followed up to the present time. That being so, I do not think this court ought to differ from the decision in that case or try to overrule it. On the facts, it appears to me that both these houses were not being used as dwelling-houses. Nobody dwelt there. They could not be used as dwelling-houses without substantial alterations being effected. Therefore both these cases fall within the decision of *Surman* v. *Darley*.

STIRLING, L.J.—I am of the same opinion. In my opinion we are not at liberty at this time to depart from the principle of the decision in *Surman* v. *Darley*. It was laid down by the Court of Exchequer in that case that the Acts were meant to apply only to buildings which were substantially dwelling-houses. That which has been relied on on behalf of the plaintiffs is the language of Alderson, B., who says, speaking of this Act of Parliament: "It clearly meant to impose the charge only on dwelling-houses, or, at all events, on those which are capable of being occupied as such," and it was said that these houses, though not being used as dwelling-houses, were capable of being used as such. Now, I am unable to disagree with the learned county court judge in this respect. I think the learned baron meant houses which, without substantial alteration, could be occupied as dwelling-houses. In both these cases in order to convert these buildings into dwelling-houses substantial alterations would have to be made.

Appeals dismissed with costs.

Solicitors for appellants, *Bartell & Large.*

Solicitor for respondent End, *Harry Wilson.*

Solicitors for respondent Civil Service Supply Association, *Tathams & Pym.*

High Court of Justice.

Chan. Div. } March 3, 4.
Buckley, J. }

In re LONDON PRESSED HINGE CO. (LIMITED).
CAMPBELL *v.* THE COMPANY. (*a.*)

Company—Debentures—Floating security—Appointment of receiver — Judgment creditor — No principal or interest in arrear—Jeopardy.

The court will, at the instance of the holder of a debenture creating a floating charge upon the undertaking and property of a limited company, appoint a receiver of the property comprised in the debenture where the property is in danger of execution being levied upon it by a judgment creditor, notwithstanding that no principal moneys or interest are in arrear under the debenture, and that the judgment creditor appears and objects.

Motion.

This was a motion in a debenture-holders' action in which the plaintiffs were holders of debentures by way of floating security upon the undertaking and all property, present and future, of the above company. Nothing was due and immediately payable in respect of either principal or interest. The principal was payable in May, 1908, or, by virtue of the tenth condition of the debentures, (*a*) upon six calendar months' default in payment of interest; or (*b*) if an order was made or resolution passed for winding up the company. Neither of these events had happened. The interest was payable in May and November. All interest had been paid down to November, 1904.

A creditor had, however, obtained judgment in an action against the company, and was in a position to issue execution.

Under these circumstances the plaintiffs had brought their action against the company, and now moved for the appointment of a receiver and manager of the undertaking and property of the company comprised in the debentures, and to manage the business of the company. The company did not oppose the application, but, at his lordship's desire, the judgment creditor was represented on the motion.

Buckmaster, K.C., and *A. J. Chitty*, for the applicants.—The court will appoint a receiver when the security of the debenture-holder is in danger. A legal mortgagee can always have a receiver. An equitable mortgagee not having the legal estate must come to the court, and the court will appoint a receiver in his favour if he shows good reason for it being done (*Legg* v. *Mathieson*, 2 Giff. 71), and so in the case of debenture-holders: *Wildy* v. *Mid-Hants Railway*, 16 W. R. 409; *Edwards* v. *Standard Rolling Stock Syndicate*, 41 W. R. 343, [1893] 1 Ch. 574. The rights of the debenture-holders come before those of the judgment or execution creditor: *Davey & Co.* v. *Williamson & Sons*, 46 W. R. 571, [1898] 2 Q. B. 194. There is no doubt future property may be assigned in equity: *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 A. C. 523.

Schwann, for the company, consented to the application.

T. Crossfield, for the judgment creditor.—The court only appoints a receiver where either the principal or interest is due or there has been some breach of the contract between the parties: *In re Florence Land and Public Works Co.*, 27 W. R. 236, 10 Ch. D. 530. The debenture still remains a floating charge until one of these events happen: *In re Panama, New Zealand, and Australian Royal Mail Co.*, 18 W. R. 441, L. R. 5 Ch. App. 318; *The Government Stock and Other Securities Investment Co.* v. *Manila Railway Co.*, 45 W. R. 353, [1897] A. C. 81. In all the cases cited for the applicants one or other of these events had happened, except in *Edwards* v. *Standard Rolling Stock Syndicate.*

BUCKLEY, J.—The plaintiffs, to whom nothing is presently payable, ask for a receiver, the effect of which will be that the company can no longer pay the creditor, to whom payment is presently due, in priority to the debenture-holders, to whom nothing is presently due. The company, as is commonly the case, appear and consent to the order. Why, indeed, under the circumstances should they oppose? These applications are becoming so frequent that I have taken the opportunity to look into the cases in order to see whether, as the authorities stand, it is possible to prevent the injustice which is now of frequent occurrence, and which I will describe. The cases are numerous in which the undertaking of a limited company is so loaded with debentures that the profits are barely sufficient, or perhaps not sufficient, to keep down the debenture interest, and that if the company

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

is wound up there is nothing for anyone but the debenture-holders. In short, the facts often are that the undertaking is substantially carried on only for the benefit of the debenture-holders who have a floating security over it. In this state of facts money is lent or goods consigned to the company in respect of which a debt accrues to the creditor, and so long as the security "floats," as it is termed, and no receiver is appointed, the creditor has a possibility or expectation of being paid by the company; for as between the company and the debenture-holder the former may pay in the ordinary course of business. But directly a receiver is appointed this expectation of the creditor is intercepted. He may have lent his money or consigned his goods to the company last week, but if he has the audacity to ask for payment and to enforce his legal remedies to obtain it, the debenture-holder obtains a receiver in a proceeding to which the execution creditor is not a party, and thus closes the door against him, taking his money or his goods as part of the security, and leaving the creditor who supplied the money or the goods to go unpaid. I regret to be driven to the conclusion that as the law s ands those are the rights of the debenture-holder entitled to a floating charge. It was decided in the Court of Appeal in *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627, that an execution creditor takes subject to all equities, and that the sheriff cannot by seizing get rid of the rights of the debenture-holders to which the property was subject when in the hands of the debtor company. The Court of Appeal in *In re Opera (Limited)*, 39 W. R. 705, [1891] 3 Ch. 260, stated that the decision in *In re Standard Manufacturing Co.* was a clear decision that the execution creditor takes subject to the equity of the debenture-holders. From this decision it has resulted that in interpleader—that is to say, even in the case where no receiver is appointed, the execution creditor can have no more than the benefit of the equity of redemption, and that the rights of the debenture-holders prevail over his rights: *Davey* v. *Williamson*; *Simultaneous Colour Printing Syndicate* v. *Foweraker*, [1901] 1 K. B. 771, 49 W. R. Dig. 25; and *Duck* v. *Tower Galvanizing Co.*, [1901] 2 K. B. 314, 49 W. R. Dig. 25. This being the law, the fact is that the appointment of a receiver does not, as between the execution creditor and the debenture-holder, disappoint the execution creditor of anything which otherwise would be his right. For from these authorities it results that the creditor never had any right as between himself and the debenture-holder to enforce payment in priority to the debenture-holder. If he avails himself of his legal right to judgment and execution, the debenture-holder could intercept his execution. In fact, the unfortunate creditor has no right enforceable by legal process in cases where the equity of redemption was of no value, notwithstanding the fact that his money or his goods has gone to increase the property included in the security. His right to look for payment from the company rested only upon the expectation that the debenture-holder would not put an end to the company's authority to pay the creditor in the ordinary course of business. The authorities seem to me to involve that the creditor has no right to complain because steps are taken to put an end to the authority thus given by debenture-holders to their mortgagor. The appointment of a receiver at the instance of an equitable incumbrancer, at any rate where nothing is presently payable to him, is no doubt a matter of discretion: *Thorn* v. *Nine Reefs (Limited)*, 67 L. T. 93, 41 W. R. Dig. 33. But if the execution creditor's rights are not affected, except as above stated, by the appointment of a receiver, there exists, as far as I can see, no grounds why the court should exercise its discretion against the appointment of a receiver by reason of any considerations arising as between the execution creditor and the debenture-holder. The only relevant consideration would seem to be whether as between the company and the debenture-holder it is just and convenient that the company's authority to dispose of its assets in the ordinary course of business should be stopped. As between those parties it would seem reasonable that the authority should be stopped if its continuance would injure the debenture-holder. A legal mortgagee may take possession simply because he chooses. In so doing he accepts the responsibility of a mortgagee in possession. An equitable mortgagee must show good reason why the court should at his instance take possession by its receiver. Lord Chelmsford in *Wildy* v. *Mid-Hants Railway*, 16 W. R. 409, held that danger to the security by anticipated acts of an execution creditor is a good reason. Jeopardy of the security thus becomes relevant. The mere fact of consent by the mortgagor would not be enough. This probably explains the fact that in both the more recent cases in which a receiver has been appointed on the ground of jeopardy, as in *MacMahon* v. *North Kent Ironworks*, 39 W. R. 349, [1891] 2 Ch. 148, and *Edwards* v. *Standard Rolling Stock Syndicate*, 41 W. R. 343, [1893] 1 Ch. 574, the question of jeopardy was treated as material, although the company appeared and consented. But for this consideration the fact that jeopardy was considered material might be thought to tend to some extent in the direction in which I desire to find authority, but the implication, even if it exists, seems to me inconsistent with the express decisions. I am unable upon the authorities to find anything which will enable me to put a stop to what I feel to be an injustice. It is an injustice arising from the nature, as defined by the authorities, of a floating security. The mischief arises from the fact that the law allows a charge on all future property. The subject, however, is one which I think urgently requires attention. I should be glad if the authorities could be reviewed in a court of higher jurisdiction than this, in case the execution creditor should be able to find grounds for thinking that the decisions which bind me can be successfully impeached elsewhere. It is not for me to say whether the matter requires the attention of the Legislature. In my judgment the plaintiffs, as the authorities stand, are entitled to an order for a receiver, and I make the order accordingly.

Application granted.

Solicitors, *Ward, Perks, & McKay; A. R. Gilman*, for *Lucas, Hutchinson, & Meek*, Middlesbrough.

K. B. Div. (Farwell, J.) — Feb. 15.

GLASSBROOK v. DAVID & VAUX. (a.)

Sheriff—Levying distress—Execution on goods—Fees—Writ of fi. fa.*—Sheriff's officer in possession—Several writs—Possession money—Out-of-pocket expenses—Poundage and mileage—Sheriffs Act,* 1887 (50 & 51 *Vict. c.* 55), *s.* 20, *sub-sections* 1 *and* 2*—Rules and Table of Fees of* 1888 *under the Sheriffs Act.*

Where a sheriff, who is already in possession of a judgment debtor's goods under a writ of fi. fa., *is served with another writ of* fi. fa. *by another execution creditor for levying execution on the same debtor's goods, and has*

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

been paid in respect of his seizure, mileage, and possession by the first execution creditor, as there has been one seizure there has therefore been only one man in possession, and the sheriff cannot recover from the second execution creditor the same sum again in respect of seizure, mileage, and possession which he has already received from the first execution creditor, as this would be contrary to the true intent and meaning of the rules and orders under the Sheriffs Act, 1887. *Under these rules the sheriff is entitled to his poundage, and as regards his fees, only to cover his actual out-of-pocket expenses.*

Action.

The plaintiff was the Sheriff of Glamorganshire in 1903-4, and as such claimed to be entitled to recover sheriff's charges which had been certified by a taxing-master as payable to him under the provisions of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), by the defendants in respect of a writ of *fi. fa.* lodged by them on the 18th of December, 1903, and which was indorsed to levy on certain goods of the Gordon Navigation Collieries, the execution debtors, £117 8s. 10d., and £1 10s. for costs of execution together with interest at 4 per cent., besides sheriff's poundage, officers' fees, costs of levy, &c. These charges were taxed by the master at £22 13s.

On the 28th of October, 1903, the plaintiff as sheriff levied under two writs of *fi. fa.* which were lodged with him in an action at the suit of two other execution creditors, and indorsed to levy on the goods of the execution debtors. With the consent of the execution creditors and the execution debtors the plaintiff continued in possession of the goods seized.

At the date of the lodging of the writ of *fi. fa.* by the defendants the plaintiff was in possession. A further writ of *fi. fa.* was issued by another firm of execution creditors indorsed to levy on the goods of the execution debtors, and was lodged with the plaintiff on the 21st of December, 1903.

By letter dated the 24th of December, 1903, the defendants consented to the execution standing over until the 2nd of January, 1904, provided the defendants' liability for sheriff's fees was not increased.

A further writ of *fi. fa.* was issued indorsed to levy on the goods of the execution debtors by another firm of execution creditors with costs of execution and sheriff's charges, and was lodged with the plaintiff on the 6th of January, 1904, and similar writs by other execution creditors indorsed to levy on the goods of the execution debtors were lodged with the plaintiff on the 5th and the 9th of February, 1904, respectively.

By the consent of all parties the plaintiff by his officers continued in possession of the goods and chattels of the execution debtors so seized until the 4th of March, when some of the execution creditors refused to give him any further instructions.

On the 8th of March the plaintiff was served with a copy of an order of the registrar in bankruptcy appointing the official receiver interim receiver of the property of the execution debtors.

On the 11th of March the defendants by letter directed the plaintiff to withdraw, which he accordingly did.

In all the executions except that of the defendants the execution creditors gave no instructions to the sheriff, and an interpleader summons was issued in each case in respect of the various claims, with the result that on the 16th of March orders were made directing the sheriff to withdraw from possession, which he did.

By these various orders the execution creditors were ordered to pay the sheriff's costs and charges, and in pursuance thereof the various bills of costs were taxed.

The plaintiff was allowed and received possession money in respect of the various executions, other than the defendants', and in addition to this the master upon taxation allowed £19 for possession money from the 22nd of December, 1903, to the 11th of March, 1904, which was the amount now in dispute.

The plaintiff and the defendants differed as to the costs and charges payable to the plaintiff as sheriff by the defendants, and the defendants contended that the plaintiff had no claim to fees except £2 for inventory and £1 to cover out-of-pocket expenses. Such fees were allowed by the master at the aforesaid sum of £22 13s. The defendants had previously tendered £3 1s. to the plaintiff, and on his refusal paid it into court on the 8th of August, 1904. It was mutually admitted that the plaintiff did not put into possession a man under the defendants' execution, but kept possession by means of the man actually in possession at the date of the lodging of the defendants' writ with the plaintiff.

The action was tried by Farwell, J., sitting as an extra judge of the King's Bench Division.

A. C. Bailhache, for the plaintiff.

J. R. Atkin, for the defendants.—This liability to poundage to the sheriff, when he is put into possession, is an "incidental expense": *Ex parte Sims, In re Grubb*, 25 W. R. 276, 453, 5 Ch. D. 375. The indorsement on the *fi. fa.* in this case is in the ordinary common form. The practice is to register it as an "incidental expense." [FARWELL, J.—What view did the taxing-master take?] He had no discretion to allow these expenses to the sheriff at all. Section 20, sub-section 1, of the Sheriffs Act, 1887, gives him an allowance upon his accounts of 1s. 6d. in the £ for every sum not exceeding £100, and by sub-section 2 he is entitled to certain fees and poundage. Under that Act the rules made by the judges under a *fi. fa.* show quite plainly what "possession" means. In all the cases the sheriff's expenses are most carefully laid down, and it was never intended he should get all these amounts into his pocket.

He cited *Bilke* v. *Havelock*, 3 Camp. 374; *In re Morgan, Ex parte Board of Trade*, 52 W. R. 79, [1904] 1 K. B. 68; *In re Wells, Ex parte The Sheriff of Kent*, 68 L. T. 231, 41 W. R. Dig. 221; 1 Vict. c. 55. [By FARWELL, J.—*Roe* v. *Hammond*, 2 C. P. Div. 300, 25 W. R. Dig. 255.]

A. C. Bailhache, in reply.—The sheriff, of course, cannot seize all the goods. It appears from the correspondence that separate goods were seized, and there is no admission that the whole of the goods of the judgment debtor were seized at any one time. There is no express authority on the point at all. The master in this particular case has allowed the fees, and he has always allowed them. Counsel for defendants has stated the old law with regard to the sheriff, the law before 1887; but then he was in a different position, and it was extremely doubtful if the sheriff could recover his expenses from anybody, except where he got his poundage. [He referred to the various items in the table of fees under the Sheriffs Act, 1887, in the Annual Practice, vol. 2, pp. 265, 266.] [FARWELL, J.—Why should you make a difference between items 1, 2, 3, 4?] The word "although" in the bill under item 3 ought to be "if." Why should execution creditor number one pay less than execution creditor number two? Why should each execution creditor not each pay execution money? Counsel for the defendants say they are not all liable, that the man in possession is in possession for the first execution creditor. There is no authority directly against the plaintiff. *In re Wells* is as to levy only.

FARWELL, J.—I am obliged to the learned counsel on both sides for the assistance they have given me in this somewhat difficult question. The question, to my mind, turns simply upon the construction of the rules under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55). The old law is stated in the cases referred to, and I need not refer to it again, but the sheriff's right turns on the construction of the rule under the last clause, which is found in the Annual Practice, vol. 2, on p. 267, and is as follows: "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution." That is this case. The sheriff has seized, and for the purpose of my decision in this case I am assuming that he seized all the goods once for all. There was one seizure for all the goods. I think that is the fair meaning of the admissions, and I think that is the point the parties have come here to try. There were seven levies altogether, and the same man in possession, and the goods having been once seized, of course there could be no subsequent seizure. The object of the Rules of 1888 was no doubt to allow the sheriff his poundage and expenses. Although the Act of Parliament uses the word "fees," of course the rule follows it and calls them "fees," but when you come to the details they are actual expenses—firstly, for making inquiries; secondly, for seizure; thirdly, for mileage; fourthly, for the man in possession, to provide his own board in every case. The sheriff claims to have payment for the same man in possession from each of the judgment creditors. The result would be that the sheriff would get a very large sum, I am told £120 and possession money. I do not think that can be the true meaning of these rules. I think the proper view is that the sheriff was entitled to have his poundage, and to have in addition to that these fees which are actual out-of-pocket expenses. It has been held that there can only be one fee for seizure and one fee for mileage. If there can be only one seizure and one journey to make a seizure, the possession also, so long as there is only one man in possession, must be treated as a unit. And I come to that conclusion the more readily because the rule provides that the man in possession is in every case to provide his own board. That looks as if the 5s. a day allowed to him is meant to keep the sheriff from being out of pocket. In *In re Grubb, Ex parte Sims*, James, L.J., treats possession as being one of the incidental expenses the Act intended to provide for, and I think the case is indistinguishable in principle from the decision of Vaughan Williams, L.J., in *In re Wells, Ex parte The Sheriff of Kent*. I am unable to see any ground for distinguishing between seizure, mileage, and possession. The three really hold together, and I think Wright, J., in *In re Morgan*, 52 W. R. 79, [1904] 1 K. B. 68, took the same view. The result is, that whatever may be the liability of the various judgment creditors to the sheriff so long as he remains in possession—and as to that liability I say nothing—when he has been paid in respect of seizure, mileage, and possession by one creditor, he cannot recover the same sum again from any of the others. That is the only decision it is necessary for me to arrive at. I need hardly say I have had great hesitation in differing from the taxing-master, who has great experience. But, after all, it is only the question of the construction of this particular order, and although I should not have interfered with the exercise of his discretion, yet I am bound to consider whether his construction of this order is right, and I think on the authorities that the taxing-master's allocation is in no way equivalent to the award of an arbitrator in an action of this sort. I think on the fair construction of the admissions that is the only point which the parties came here to try, and I think it would be unfair to allow further facts to be opened in reply, which were not opened in the first instance, and to which, if they had been, counsel for the defendants would have been entitled to object and to ask that the case might stand over in order that he might be ready to meet them. The question, therefore, whether there were separate goods seized in respect of each of the several levies is not before me, and I give no decision what the effect of that would be. The result is the action must be dismissed with costs.

Solicitors, *McKenna & Co.; Helder, Roberts, & Co.*, for *Hartland, Issac, & Co.*, Swansea.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Feb. 1.

BAYLEY v. COOKE. (*a.*)

Adulteration—Milk—Analyst's certificate, sufficiency of—Sale of Food and Drugs Acts, 1875 (38 & 39 *Vict. c.* 63), *s.* 6; 1899 (62 & 63 *Vict. c.* 51), *s.* 4—*Sale of Milk Regulations*, 1901, 1.

In a prosecution under the Sale of Food and Drugs Acts, 1875 *and* 1899, *the certificate of the analyst is bad for want of sufficiency if it does not indicate the amount, nature, or character of the adulteration; and the fact that the Board of Agriculture, under powers given by the Act of* 1899, *has published regulations* (*Sale of Milk Regulations*, 1901) *prescribing the standard percentage of ingredients in no way removes the necessity to indicate these matters on the face of the certificate. For this purpose it is not sufficient to refer to the particular regulation fixing the standard.*

Fortune *v.* Hanson, 44 *W. R.* 431, [1896] 1 *Q. B.* 202, *extended.*

Case stated by a court of summary jurisdiction held at Winchester.

A summons under section 6 of the Sale of Food and Drugs Act, 1875, was taken out by the appellant charging the respondent that on the 17th of May, 1904, he sold to the appellant as new milk that which was not of the nature, substance, and quality of the milk demanded, being deficient in milk fat.

The percentage of milk fat required by the Sale of Milk Regulations, 1901, 1—made by the Board of Agriculture under section 4 of the Sale of Food and Drugs Act, 1899—is 3 per cent., whereas the milk only contained 1·4 per cent., being in consequence deficient to the extent of 53·4 per cent. of milk fat. The certificate of the analyst followed the form in the schedule of the Act of 1875, and set out, *inter alia*, the following material figures: Milk fat, 1·4 per cent.; deficiency in milk fat, 53 4 per cent. It did not in terms state the milk should contain 3 per cent. of milk fat, but the standard, it will be seen, could be arrived at by an easy calculation from the figures actually set out.

The justices thought they were bound by the decision in *Fortune* v. *Hanson*, [1896] 1 Q. B. 202, and refused to convict subject to a special case being stated.

C. A. Russell, K.C. (*Brodrick* with him), for the appellant.—I draw the attention of the court to the means of arriving by a simple arithmetical calculation at the standard. Moreover, the standard is now fixed by statute, for the regulations are part of the statute, and therefore there can be no necessity to set it out. It is merely a matter of reference.

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—I wish it to be understood that as far as I am concerned I do not wish it to be thought that the provisions of the Act of 1899 have made it any the less necessary to indicate on the face of the certificate what is the amount, nature, or character of the adulteration, or that it in any way lessens the obligation of the analyst to describe what he is bound to describe under section 18 of the Act of 1875. I do not want to be understood to decide that the certificate is good because of any reference that may be made to the rules made under the Act of 1889, or because of implications which may involve the standards allowed under these rules. For example, if only 1·4 per cent. of milk fats appeared on the face of the certificate, I doubt whether that would be a good certificate. You are bound to show you are comparing it with some standard. This certificate shows the percentage of milk fat and the deficiency in milk fat of the adulterated milk. A mathematical calculation would show that the proper proportion of milk fat should be 3 per cent. I think in this case the certificate does show correctly how much deficiency in milk fat there was and the standard could be gleaned from the face of the certificate itself.

KENNEDY and RIDLEY, JJ., concurred.

Case sent back.

Solicitors, *Robbins, Billing, & Co.*, for *H. Barber*, Manchester.

K. B. Div. (Bray, J.) — Dec. 15, 21.

LONDON, DEPTFORD, AND GREENWICH TRAMWAY CO. *v.* LONDON COUNTY COUNCIL. (*a.*)

Tramway—Purchase of tramway—Cost of widening streets—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.

A local authority in pursuance of its powers under section 43 *of the Tramways Act,* 1870, *gave notice to purchase certain tramways. At the date of the construction of the tramways it was not the practice (as at present) to require tramways to contribute towards the cost of widening the streets. At a reference held to determine the value of the tramways the tramway company claimed that the value of the tramways was enhanced by reason of their being free from such liability to contribute, and tendered evidence to show what such contribution would have amounted to.*

Held, that the referee was right in rejecting such evidence, and that the claim of the company was not well founded.

Award in the form of a special case stated under section 7 of the Arbitration Act.

The special case was as follows: Under the provisions of the Southwark and Deptford Tramways Act, 1879, as amended by the Southwark and Deptford Tramways Acts, 1881 and 1889, and the London, Deptford, and Greenwich Tramways Act, 1891, the Southwark and Deptford Tramway Co., hereinafter called the claimants, were incorporated and authorized to construct and maintain, and did construct and maintain certain tramways therein described.

The tramways were made purchaseable by the local authority as to part in 1901, and as to the other part in 1902. The several Tramways Acts mentioned above incorporated Parts II. and III. of the Tramways Act, 1870.

On the 20th of August, 1900, the London County Council, being the local authority within whose district the tramways so constructed were situate, duly gave notice to the claimants under section 43 of the Tramways Act, 1870, requiring them as promoters to sell to the council the whole of the tramways so constructed. The claimants and the London County Council differed as to the value of the undertaking, and a referee was appointed under the same section to determine the value (exclusive of any allowance for past or future profits of the undertakings or any compensation for compulsory sale or other consideration whatsoever) of the tramways so constructed, and of all lands, buildings, works, materials, and plant of the claimants suitable to and used by them for the purpose of the tramways.

On the 2nd of May, 1904, the referee duly made his award, and determined that the value of the tramways and the lands, buildings, works, materials, and plant of the claimants suitable to and used by them for the purposes of the tramways was £91,363 7s. 6d.

At the hearing the following claim was made by the claimants, who requested the referee to raise the same upon the face of the award as a special case.

At the time of the obtaining of the Parliamentary powers for the construction of the tramways, it was not the practice to require the promoters of tramway undertakings to widen the streets through which the tramways were to run, or to make any contribution towards such widening; nor, in fact, were any of such streets widened; nor was contribution required in the case of the tramways in question.

As a condition of obtaining statutory powers to establish and work the tramways at the date of notice to purchase, the claimants would, according to the present practice, have been required to contribute one-third of the costs and expenses to be incurred in the widening of streets directed by Parliament in such cases.

It was contended on behalf of the claimants that, although no such widenings, nor any contributions in respect thereof, had in fact been made by them, nevertheless in determining the value of the tramways at the date of the notice to purchase, the referee was bound to take into account, as part of the present cost of constructing the tramways, the costs and expenses which would have been incurred by reason of the above-mentioned practice if the tramways had been authorized and constructed at the date of the notice; in other words, that the present value of the undertakings was enhanced by reason of its being freed from the liability to contribute to such widenings. The county council contended that as the claimants had not in fact been obliged to contribute to any such widenings, a hypothetical figure as to what they might have been called on to contribute if the practice at a certain date had been other than what it was, could not be taken into account in assessing the value of the tramways.

The referee was of opinion that the contention of the claimants was wholly unfounded, but he consented upon certain terms to take *de bene esse* the evidence which was tendered by them, as the result of which he awarded and determined that, in the event of the court being of opinion that the contention of the claimants ought to prevail, the value of the tramways with the appurtenances as aforesaid amounted to the sum of £22,773 6s. 8d., in addition to the sum of £91,363 7s. 6d. mentioned above.

The question for the court was whether the contention of the claimants ought to prevail.

Lawson Walton, K.C., Sir E. Boyle, K.C., and *Vesey Knox*, for the claimants.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Cripps, K.C., Freeman, K.C., and *Morten*, for the London County Council.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Dec. 21.—BRAY, J., read the following judgment: This is a special case stated by the referee in his award under the following circumstances. The London, Deptford, and Greenwich Tramways Co., whom I shall call the claimants, constructed under Parliamentary powers certain tramways, and the London County Council, under the powers conferred on them as the local authority by section 43 of the Tramways Act, 1870, gave notice to the claimants to purchase their tramways. The claimants and the council differed as to the purchase price, and Mr. Henry Graham Harris was duly appointed referee by the Board of Trade. During the course of the arbitration a contention was raised by the claimants that the present value of the tramways was enhanced by reason of their being freed from liability to contribute to the widening of some of the streets in which the tramways were laid, to which, according to the present usual practice, they would, if they were now constructing a tramway, have been required to contribute, although in fact such widenings had not been made and no contribution had been made by the claimants. The referee considered such contention to be unfounded, but, at the request of the claimants and on certain terms, heard the evidence upon the point, and stated his award in the form of a special case, in order that the opinion of the court might be obtained as to the validity of that contention, and this is the question I have now to determine.

The argument of the claimants' counsel was shortly this. The House of Lords in *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh*, [1894] A. C. 456, and *London Street Tramways Co.* v. *London County Council*, [1894] A. C. 489, decided in effect that the value of the tramways must be measured by what it would cost at the date of the sale to establish the tramway, if it did not then exist, subject to a proper deduction for depreciation. By reason of the practice which had now become usual, though it did not exist when the claimants obtained their parliamentary powers, the promoters, if they had to construct their tramways now, would have to contribute one-third of the cost of the widening of, at all events, certain of the streets as a condition of their obtaining their powers, and, therefore, at the date of the sale, in order to establish the tramways, the promoters would have to pay not only the actual cost of construction, but this contribution in addition, and the referee ought to take this into consideration in assessing the value.

It certainly is a startling proposition that the council should have to pay, as part of the purchase price, for an expenditure which has never been incurred, and it was admitted that the contention was novel, and that there was no authority to support it. As there was no authority upon the point, I thought it right to take a few days to consider it. I have come to the conclusion that the referee was right when he expressed his opinion that the contention was wholly unfounded. I have read through the judgments in the House of Lords, and of Lord Lindley in the Court of Appeal, and I can find nothing to support the contention. The effect of the judgments seems to be that, as the words of section 43 prohibit profits or rental value being considered, it is necessary to fall back on what is called in rating cases "structural value"; but that is the structural value of the tramway as it exists, and in all the judgments it is referred to as the cost of "the purchased tramways," or other equivalent words. It is true, of course, that no such point as the present was raised in that case, and it was not contended on behalf of the council that there was anything in that case which precluded me from adopting the claimants' contention, but I can find nothing to encourage it. Now, I think Mr. Cripps pointed out at all events one of the answers to the claimants' contention when he said that the referee has to find the value of a tramway in an unwidened street, while the claimants are asking him to find the value of a tramway in a widened street. He has to find the value of an actual, not an imaginary, tramway. In my opinion the tramway in a widened street would be a different and, it may well be, a more valuable tramway. There would be more room for traffic, and possibly more cars might be run and more passengers carried; but it is sufficient to say that it is a different tramway. Another answer is that to calculate the structural value is only a mode of arriving at the real value, and to adopt that mode of calculation in the manner suggested by the claimants would not give the true value. It would be absurd to say that the true value of the tramway would be enhanced by the adoption of a practice as to other tramways in other streets. Although in this case the contention would give the claimants a large additional price, in another case where onerous conditions, which were imposed when the tramways were constructed, were no longer imposed it would follow, if the claimants' contention were correct, that the claimants would lose the cost of fulfilling those onerous conditions, which would appear to be manifestly unjust. The real value of the tramway is not altered by the change in practice. Many illustrations might be put. What if it became the practice to insist upon double the depth of concrete being put in? Ought the value of this tramway to be enhanced by the cost of the additional concrete which, if the tramway were constructed now, would have to be laid, but which was not required to be laid, nor laid? Mr. Walton was obliged to admit that his contention involved this. So also if it became the practice to require an additional width of stone, or other material, outside the rails to facilitate the ordinary traffic. Surely unless the additional expenditure was actually incurred it would not be right to increase the cost of the actual structure. The court, therefore, must declare that it is of opinion that the claimants' contention should not prevail, and that nothing must be added to the sum of £91,363 7s. 6d. The claimants must pay the costs of the argument of this case. The other costs seemed to be provided for by the award.

Stay of execution granted.

Solicitors for the claimant, *Sutton, Ommaney, & Rendall*

Solicitor for the County Council, *Blaxland.*

K. B. Div. (Ridley, J.) — Dec. 16.

BLUNDELL v. THE KING. (a.)

Crown—Compulsory taking of land—Land acquired by Crown for defence of realm — Compensation for injurious affection of adjoining lands of owner—Defence Act, 1842 (5 & 6 *Vict. c.* 94), *ss.* 16, 19—*Land Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 63.

Where part of the lands of a subject are compulsorily taken by the Crown under and for the purposes of the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Defence Acts, the compensation to be paid the owner is not necessarily limited to a fair sum for the land actually purchased. Therefore if the owner can show loss from severance and injurious affection caused to his adjoining land not purchased by the Crown, he is entitled to compensation also on that footing.

Petition of right.

The suppliant, Mr. W. J. Blundell, of Crosby Hall, Blundellsands, near Liverpool, was the tenant for life in possession of an estate in Lancashire comprising (*inter alia*) certain foreshores of the estuary of the Mersey and Crosby Channel. In 1902 the Secretary of State for War served a notice upon the suppliant notifying his desire to purchase absolutely certain portions of the estate for the purposes and under the powers of the Defence Acts, 1842 to 1873, the Ordinance Board Transfer Act, 1855, and the Ranges Act, 1891, s. 11; and it was agreed between the Secretary of State and the suppliant that the compensation to be paid by the Crown to the suppliant for those portions of the estate so required should be settled by arbitration, as if the lands, tenements, and hereditaments had been surveyed and marked out as wanted for the defence of the realm under section 16 of the Defence Act, 1842, and the necessity for the taking the same had been authorized as respectively mentioned by section 23 of that Act.

Accordingly, the Secretary of State caused a notice to treat to be served on the suppliant under section 19 of the Defence Act, 1842, stating that he required to purchase absolutely the agreed portions of the suppliant's estate (therein spoken of as "the lands to be taken"), being some 568 acres, and requiring pursuant to section 11 of the Ranges Act, 1891, that in the event of compensation not being agreed within fourteen days of the notice, the amount should be settled by arbitration and not by a reference to a jury.

The suppliant's claim in respect to the lands to be taken, comprised (*a*) compensation representing the value of the lands to be taken; and (*b*) compensation for damage for severance and depreciation and injurious affection of the lands of the suppliant adjoining the lands to be taken.

An arbitrator was duly appointed to determine the compensation. The arbitration was held, and on behalf of the suppliant evidence was given (*inter alia*) that his lands adjoining the lands to be taken would be injuriously affected by the exercise of the powers of the Acts, and in the course of the hearing it was agreed that the arbitrator should assess separately (1) the compensation payable in respect of the value of the lands to be taken; and (2) the compensation for the damage to be sustained by the suppliant by reason of his adjoining lands being injuriously affected by the exercise of the powers of the Act. The arbitrator did this, and he awarded £12 642 as compensation for the lands taken, and £5,000 for injurious affection of adjoining lands of the suppliant.

No question arose as to the £12,642, but the Crown contended that as the lands were taken for the defence of the realm under the Defence Acts, no claim could be sustained in law for any sum for injurious affection of the adjoining lands of the suppliant, and that therefore the £5,000 was not payable by the Crown.

Freeman, K.C., and *William Wills*, for the suppliant. — The only question on the award that the court has to decide is whether the suppliant is entitled to this £5,000 awarded in respect of the damage arising from the severance of the land and the depreciation of the adjoining lands and the injurious affection of it caused from the land acquired being used for the erection of a fort. We submit that the suppliant is entitled to this sum, as the Land Clauses Act, 1845, gives the basis for determining the reasonable definition of compensation, which would thus include indemnity and satisfaction. In *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 Ex. 221, 18 W. R. Dig. 85, A. L. Smith, L J., who delivered the judgment of the court, deals at p. 251 with the question of reasonable compensation for injurious affection, and there is no doubt here, as the residue of the suppliant's estate was to be sold for building purposes, that the firing of guns and the annoyance of a garrison and camp in the vicinity will seriously decrease his property in value. It is true that in the case of *In re Lawes*, (1847) 1 Ex. 441, a view contrary to the suppliant's claim was expressed, but there are two Irish cases—*Reg.* v. *Abbott*, [1897] 2 Ir. Rep. 362, and *In re Nids Point Battery*, [1903] 2 Ir. Rep. 192, which are directly in his favour, and we rely upon them, although they are not binding authorities on this court.

Sir R. Finlay, A.G., and *Sutton*, for the Crown.—The Irish cases do not bind this court, and the lands being acquired here under section 19 of the Defence Act, 1842, on public policy all that can be claimed is a fair price for the land actually acquired for the defence of the realm by the Crown. The basis of compensation under the Lands Clauses Act, 1845, applies only to lands acquired for commercial undertakings or local improvements and the like, and the words of the Act of 1845 cannot be made applicable to the Defence Act of 1842, which, being passed for the very purpose of giving the Crown power to acquire land for the defence of the realm and for dealing with any such matters of urgent public importance, was purposely drawn up by the Legislature in narrower terms. Assuming that the residue of the estate has been decreased in value to the extent found by the arbitrator (which the Crown does not admit), for the reasons given the suppliant is not entitled to receive anything in respect of what would be "injurious affection" within the meaning of the Act of 1845.

Cur. adv. vult.

Dec. 16.—RIDLEY, J., gave his considered judgment as follows: This is a petition of right in which the suppliant, Mr. Blundell, was tenant for life of an estate in the parish of Crosby, Lancashire, a portion of which had been purchased by the Secretary of State for War under the powers given by the Defence Acts, 1842 to 1873, the Ordnance Board Transfer Act, 1855, and the Ranges Act, 1891. The compensation to be paid for the portion so required by the Secretary of State was settled by arbitration; and on the 13th of August, 1903, the arbitrator made his award, by which he found that the amount of compensation to be paid for the absolute purchase of the land taken was £12,642, and that the amount of compensation for damages to be sustained by the suppliant by reason of other adjoining lands belonging to him being injuriously affected by the exercise of the powers of the said Acts was £5,000. No question was raised as to the amount so awarded for the purchase of the land; but it was contended as to the sum awarded for injurious affection of other adjoining lands that this was not payable when the land is taken under the Acts passed for the defence of the realm, although it would be payable if the land had been taken under the Lands Clauses Act, 1845, and this sum would then have been properly awarded under that Act. By the 19th section of 5 & 6 Vict. c. 94 (being the Defence Act, 1842), provision is made for the case where parties do not agree on the sum of money offered as the consideration for the absolute purchase of the lands required or on the annual rent or sum offered for the hire thereof; and it is enacted that in such case a jury

is "to find the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments or for the possession or use thereof as the case may be." There are in the same Act sections which deal with the proportion to be paid out of the compensation paid for the lands to any persons having an interest as lessees or tenants at will in the lands, and for the investment of the purchase-money by the Barons of the Court of Exchequer on behalf of any persons interested. The statute 23 & 24 Vict. c. 112 (1860) was also referred to on behalf of the suppliant, but I do not think that its provisions are of any assistance on the point now in question. By the Ranges Act, 1891 (54 & 55 Vict. c. 54), s. 11, it is provided that, "where any land is acquired either under the Defence Act, 1842, and the Acts amending the same, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority acquiring the land may require that the compensation to be paid for the land be settled by arbitration and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose of settling the compensation." I think that these words do not, when properly considered, mean more than this—that the provisions for the notices, appointment of arbitrators, costs, delivery of award, and so forth which are contained in the Lands Clauses Act relating to arbitration shall have application to proceedings under the Defence Acts; and, indeed, it was scarcely argued that they have a signification large enough to extend the meaning of the words of the 19th section of the Defence Act, 1842. It should be mentioned that there had been a similar provision in the 4th section of the Barracks Act, 1890 (53 & 54 Vict. c. 25); but by the section just read from the Ranges Act, 1891, that section was repealed. The Lands Clauses Acts Amendment Act of 1860 (23 & 24 Vict. c. 106) also gives, by section 7, to the Secretary for War the right to use powers given to promoters of undertakings by the Lands Clauses Act of 1845, but this section also must have a similar interpretation. There being, therefore, no statute aiding the words which have to be considered, the question is whether they do include, not only purchase-money of the lands taken, but injurious affection of other adjoining lands of the same proprietor. It was contended for the Crown that the Legislature has purposely made a difference between the compensation to be awarded under the Lands Clauses Act, 1845, and that to be awarded under the Defence Acts, and that the former includes, while the latter does not include, damages for injurious affection, because in the former case the undertaking by and for which the land is taken, although for the benefit of the public, yet is not of so great public importance as the defence of the country; and the Attorney-General was able to point to some enactments such as the 33 Geo. 2, c. 11, which, in dealing with the acquisition of land for a gunpowder magazine at Purfleet, empowers commissioners to treat for the absolute purchase of the land, and is silent as to injurious affection; whereas, on the other hand, in the 3 Geo. 4, c. 126, which deals with the widening and improving of turnpike roads, the trustees are to purchase lands for that purpose and to treat and agree, not only for the purchase of the same, but also for the loss or damage that the owners may sustain. It might, indeed be that a person whose lands were taken from him for the purpose of national defence should be awarded compensation on a lower scale and on a different basis than that allowed to persons whose land is taken for the encouragement and development of traffic industry, and commerce. Yet I think that the distinction should be supported by some indication more precise than is to be found in the mere difference between these two examples of statutes. They were passed before the subject of compensation had been dealt with by the Lands Clauses Act and at periods when it was comparatively bare of legal decision, and when the difference between them is less likely to have been intentional. It was further put that the Defence Act, 1842, was passed before the Lands Clauses Act, 1845, but that since that time there have been several statutes passed relating to national defence by which the Lands Clauses Act might have been incorporated with the Defence Act, but was not. That is quite true, and it is an argument of some importance. Some reliance was also placed on the sections which provide for apportionment of the compensation and for investment of the same. But if compensation is to include a sum recovered for injurious affection, I do not quite see why that sum should not be dealt with along with the purchase-money.

But the real question seems to be whether, notwithstanding the absence of a section similar to section 63 of the Lands Clauses Act, 1845, the words of section 19 do or do not include damages as well as a mere purchase price. On the other side it was argued that "compensation" means an indemnity—a full satisfaction for the land taken, and that, if in the taking of that land other land is injuriously affected, that injurious affection must be included in the term. If such a claim were decided by agreement I think there is no doubt that no person would agree on the compensation due for his land to be taken without also adding to the actual purchase-money a claim in respect of the damages done by injurious affection of other land belonging to him; and it is fairly argued that the same elements must be included when a jury or an arbitrator has to assess the compensation. It is also to be remarked that section 63 of the Land Clauses Act does, in fact, treat such injurious affection as a part of the compensation to be given—for it enacts that "in assessing such compensation 'regard is to be had' not only to the value of the land but also to the damage," &c. And in the same section "compensation" is apparently used as equivalent to "purchase-money"—so that the damages to be given for injurious affection are treated as a matter to be included in the purchase-money. I am inclined myself to prefer this reasoning, although I am somewhat pressed with the consequence which seems to follow, that even without section 63 compensation under the Lands Clauses Act, 1845, would have included damages for injurious affection. The matter, however, was dealt with by the Queen's Bench Division in Ireland in two cases. First in *Rey.* v. *Abbott*, [1897] 2 Ir. Rep., p. 362, there lands were taken under the Defence Acts and an arbitration was held before the defendant, who was an arbitrator appointed under the provisions of the Railways (Ireland) Act, 1851. The defendant held he had no jurisdiction to award compensation except for the actual taking of the lands, and the question was brought before the court on a *mandamus* to compel him to do so. It was held by the Court of Queen's Bench Division and the Court of Appeal that the arbitrator was not properly appointed, and, therefore, the proceedings were *coram non judice;* but in the court of first instance it was held by all the judges that the claimant was properly entitled to claim damages for injurious affection beyond the mere purchase-money. O'Brien, J., in particular, discusses the subject at length, and comes to the conclusion that compensation ought to be held to be of the same kind under the two Acts, and that the section of the Lands Clauses Act, 1845, is to be taken

rather as a legislative exposition of what was meant by compensation, and not as granting a new right. In the Court of Appeal it was held that the arbitrator was not properly appointed, and it was unnecessary to decide the present point, but Walker L.J., said: "What evidence, as to compensation, a legally constituted tribunal should receive is not before us; but it has been carefully considered by the judges of the Queen's Bench Division, and I do not desire to be understood as holding out any hope that any considered conclusion of mine would be different from theirs." The other case is *In re Nids Point Battery*, [1903] 2 Ir. Rep. 192. And in that case the Court of Queen's Bench Division followed and adopted the same view. The Attorney-General contended that I am not bound by these decisions—but they are entitled to the greatest respect; and, so far from dissenting from them, I am inclined to take the same view.

My judgment must therefore be for the suppliant.

I understand that the sum of £12,642 has already been paid over to him, and I therefore enter judgment for the suppliant for £5,000 with costs.

Solicitors for the suppliant, *Guscotte, Wadham, & Co.*

Solicitor for the Crown, *The Solicitor to the Treasury.*

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Kennedy, Ridley, and Channell, JJ.) Nov. 18.

REX *v.* BRIDGEWATER. (*a.*)

Criminal law—Evidence—Cross-examination of prisoner—Questions as to previous convictions—Criminal Law Evidence Amendment Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (f).

A prisoner was tried on the charge of stealing copper. His defence was that he was acting under the direction of the police, and his counsel asked a detective, who was one of the witnesses for the prosecution, whether he had not, in other cases, employed the prisoner as a police spy. The prisoner was called as a witness, and was asked as to whether he had been previously convicted. He answered in the affirmative, but a further question as to what the conviction was for was not pressed. The prisoner was found guilty.

Held, that the conviction was bad, as the nature and conduct of the defence was not such as to involve imputations on the character of the witnesses for the prosecution, and therefore, as provided by section 1 (f) *of the Criminal Evidence Act,* 1898, *no questions could be put to the prisoner tending to show that he had been convicted of a previous offence.*

Case stated by the learned Recorder of Birmingham on the trial before him, at Birmingham Quarter Sessions, on the 31st of October, of Charles James Woolf, John Bridgwater, and Annie Bridgwater, on a charge of stealing seventeen yards of copper tape, the property of Statter & Co., on the 11th of October. A count for receiving in the usual form was added to the indictment. The prisoner Woolf pleaded "Guilty," and during the progress of the case the learned recorder directed the jury to find Annie Bridgwater "Not guilty" on the ground that she was acting under the direct coercion of her husband.

The facts of the case were shortly as follows:

When John Bridgwater and his wife, Annie Bridgwater, were charged at the police-station with having the copper tape in their possession, well knowing it to have been stolen, John Bridgwater stated, in reply to the charge that he was working under instructions from Sergeant Moss. Evidence was given for the prosecution by Sergeant Moss, who stated that he had no connection with John Bridgwater in respect of any robbery from Statter & Co., and he had not the faintest idea that there had been any such robbery. In cross-examination Moss said that he had given instructions to John Bridgwater that, if anyone asked him to buy any metal he thought doubtful, not to buy it, but to let him (the sergeant) know, his object being to catch the thieves. The sergeant, in further cross-examination, said that John Bridgwater had given him information, but never information that led to the arrest of anyone, and he had been with Bridgwater in public-houses, standing him drinks, because he could give witness information; but the witness denied that John Bridgwater had ever sold any silver to a certain person on his (witness's) advice, and that he had ever received half-a-sovereign from John Bridgwater. The prisoner John Bridgwater gave evidence for the defence. He stated that he considered that he was acting under the instructions of Moss; that a man had been arrested on information given by him to Moss and sentenced to two months. In cross-examination he was asked whether he had ever been previously convicted, and he replied in the affirmative. Counsel for the prosecution was then proceeding to ask what the conviction was for, when counsel for the defence objected on the ground that the Criminal Evidence Act, 1898, s. 1 (*f*), was prohibitive, and that, independently of any objection by counsel, no such question could be asked unless there was justification for it as provided by the section.

The learned recorder said that objection ought to have been taken to the question as to the previous conviction before the witness had answered it, and he considered that John Bridwater's statement at the police-station, in answer to the charge, involved imputations on the character of Moss, and that the nature and conduct of the defence before the court was such as to involve imputations on Moss. The learned recorder having decided that the case must proceed, the further question was not pressed. In summing up he directed the jury that if they thought that the prisoner was, in point of fact, acting under the directions of Moss or had reasonable grounds for believing that he was acting under the directions of Moss, they should acquit him, but if they thought he was making an independent deal for himself, they should find him guilty. The jury retured a verdict of guilty, and the learned recorder stated the present case on the application of the prisoner's counsel, who cited to him *Charnock* v. *Merchant*, 48 W. R. 334, [1900] 1 Q. B. 474, and *Rex* v. *Rouse*, 52 W. R. 236, [1904] 1 K. B. 184. Judgment was postponed, and the prisoner remanded to prison.

The question for the opinion of the court was whether in the circumstances of the case counsel for the prosecution was entitled to put to the prisoner the questions above referred to.

No counsel appeared on either side.

Lord ALVERSTONE, L.C.J.—I am of opinion that the objection which has been taken to this conviction must prevail. We have to consider whether the circumstances were such as to justify the putting of the questions as to previous convictions. The section provides that "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

been convicted of or been charged with any offence other than that wherewith he is then charged, unless . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." I desire to repeat what I said in *Rex* v. *Rouse* that raising a defence was not of necessity or of itself casting imputations on the character of the prosecutor or the witnesses for the prosecution. In the present case I do not think the prisoner was doing more than raising a defence, and the recorder himself showed by his direction to the jury that he dealt with the case on that view, that if the prisoner was acting, or believed he was acting under the influence of Moss, he should be acquitted. I do not think that the prisoner's counsel in his cross-examination of Moss was doing more than developing the defence raised, and trying to support it by obtaining an admission from Moss, and was not seeking to cast an imputation on Moss. If the cross-examination of Moss had been aimed at showing that he had been guilty of any misconduct independently of the defence in its development then no doubt the prosecution would have been entitled to question the prisoner as to his previous conviction. In the present case the first question, "Have you been convicted of any offence?" was answered by the prisoner without any objection on the part of his counsel. It was only to the later question as to what the offence was of which the prisoner had been convicted that objection was taken. It must not be thought that where counsel allows such a question to be answered without objection he can as a matter of course rely on the fact that the question has been answered as a ground for having the conviction quashed. That would a most dangerous doctrine to lay down. If the recorder had told the jury to disregard the answer the court would not have interfered in this case; but as he did not adopt that course, the jury must be taken to have supposed that the question was justified on the ground that the nature of and conduct of the defence was such as to involve imputation on the character of a witness for the prosecution. As there is no ground for that suggestion I am of opinion that this conviction should be quashed.

LAWRANCE, KENNEDY, RIDLEY, and CHANNELL, JJ., concurred.

Conviction quashed.

IN BANKRUPTCY.

K. B. Div.
(Bigham and Darling, JJ.) April 3.

In re KEET.

Ex parte THE OFFICIAL RECEIVER. (*a*.)

Bankruptcy—Annulment of adjudication—Payment of debts in full—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 35.

Where a bankrupt has obtained from his creditors an absolute release of all his debts, the court may, in its discretion, order the annulment of his adjudication, upon the ground that all his debts are paid in full.

In re Burnett, Ex parte The Official Receiver, 42 *W. R.* 368, *differed from.*

Appeal from an order made by the registrar of the county court at Leeds annulling the bankrupt's adjudication.

The bankrupt had traded as an outside stockbroker, and a receiving order was made against him on a creditor's petition upon the 24th of September, 1903. He was adjudicated bankrupt, and an order for the summary administration of his estate was made upon the 1st of October, 1903. His debts amounted to about £9,700, and his assets were estimated to produce £189, but realized somewhat less. One dividend of about 2s. in the £ was paid to the creditors.

In September, 1904, he paid private creditors to the total amount of £41 in full and induced his trade creditors to the amount of £9,630 to execute an absolute release of their claims against him.

On the 28th of September, 1904, he applied to the registrar at Leeds for the annulment of his adjudication on the ground that his debts were paid in full. The registrar made an order annulling the adjudication, against which the official receiver appealed.

S. G. Lushington, for the official receiver.—Section 35, sub-section 1, of the Bankruptcy Act, 1883, provides that "where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full the court may, on the application of any person interested, by order, annul the adjudication." It was held by the Divisional Court in *In re Burnett, Ex parte The Official Receiver*, 42 W. R. 368, that a mere payment of a small composition to the creditors in consideration of which they release their claims is not payment of the debts in full within the meaning of section 35, and that under such circumstances a bankrupt is not entitled to have his adjudication annulled. In the present case no consideration at all was given for the release.

Carrington, for the bankrupt.—In the case of *In re Izod, Ex parte The Official Receiver*, 46 W. R. 304, [1898] 1 Q. B. 241, the Court of Appeal allowed the rescission of a receiving order, which stands on the same footing as the annulment of an adjudication, where a composition of 10s. in the £1 had been paid and the creditors had released their claims and withdrawn their proofs. An absolute release is equivalent to payment in full.

Goodheart, for the petitioning creditor, supported the order of the registrar.

S. G. Lushington replied.

BIGHAM, J.—I think that the registrar was right. Under section 35, when it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may annul the adjudication. I think that the expression "debts of the bankrupt" refers to debts which have been proved. Then comes the question whether they have been paid in full. I think in this case they are paid in full, or that that which is equivalent to payment has been done. I do not think that payment need be in coin, it may be in what the creditor honestly agrees to take in satisfaction of his debt. Here the creditors desire to release the debts; that, in my opinion, is equivalent to payment in full, and the court is entitled to annul the adjudication. It does not follow that the court must annul the adjudication; it may look into the circumstances, and may see what has been done has been done honestly, and may say whether it is in the interests of justice that the bankrupt should remain a bankrupt.

In this case, however, I see no reason to suppose that what has been done has not been honestly done, or that the bankrupt has done what would disentitle him to the exercise of the discretion of the court in his favour.

DARLING, J., concurred.

Appeal dismissed; leave to appeal refused.

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

Solicitors for the repondents, *Vincent & Vincent*, for *North & Son*, Leeds.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) March 24.

GIBBON v. PEASE. (a.)

Architect—Employment—General retainer—Work completed and remuneration paid—Right of employer to have the plans and specifications.

An architect, who has under a general retainer prepared plans and specifications, is not entitled to keep the plans on being paid his agreed fee, which then become the property of the building owner.

Ebdy v. M'Gowan, 2 *Hudson on Building Contracts*, 7, *followed and approved.*

This was an appeal by the defendant, an architect and surveyor, from a decision of Ridley, J., who tried the action without a jury.

The plaintiff sought a declaration that certain plans and specifications which had been prepared by the defendant were his property, the work having been completed and the agreed remuneration paid the defendant. As a defence to the action the defendant desired to call evidence to prove that a custom or usage existed among architects to retain their plans.

Ridley, J., refused to permit evidence of this alleged custom to be given, and on the authority of *Ebdy* v. *M'Gowan*, 2 Hudson on Building Contracts, 7, entered judgment for the plaintiff.

The facts were, shortly, that the plaintiff, Mr. Henry Gibbon, owned some houses in Queen's-road, Bayswater, which he proposed to alter into shops, with residential flats over. He placed the matter in the hands of the defendant, Mr. Edward Pease, an architect carrying on business in Clifford's-inn, and a member of the Royal Institute of British Architects. The defendant prepared the necessary plans and specifications, and the work was carried out and completed by June, 1903. The plaintiff, having paid the defendant the agreed remuneration, which was 5 per cent. on the contract price of the work, claimed possession of the plans and specifications. The defendant declined to give them up, and the action was brought. It was stated that the Institute of British Architects were anxious that the question should be fought as a test case.

Montague Shearman, K.C., Kemp, K.C., and *Morle*, for the defendant.—The contract here is not one to prepare and sell plans, but a contract for work and labour. There are many practical reasons why an architect should refuse to part with plans, which, if gone into, would show that the custom that undoubtedly exists and is recognized among architects to retain their plans and specifications is reasonable. The action was decided without any evidence having been given on this point by one side or the other, the learned judge ruling that *Ebdy* v. *M'Gowan* applied, and on that authority he entered judgment for the plaintiff. We submit that the learned judge was wrong in declining to hear evidence as to custom, and that if the defendant is not entitled to judgment he is at any rate entitled to a new trial.

Danckwerts, K.C., and *H. Gatehouse*, for the respondent, were not heard.

COLLINS, M.R.—In my opinion this case is clearly governed by the principle laid down in *Ebdy* v. *M'Gowan*. It is not disputed that the defendant was employed to supervise work which necessitated his preparing certain plans and getting out specifications, or that the plans were prepared and used for the purpose of carrying out the building operations, or that the defendant was to receive a remuneration of 5 per cent. on the contract price. The agreed fee having been paid when the work was completed, the building owner claimed possession of the plans. The architect refused to give them up. It was contended as a defence to the claim that there was a custom or usage in the profession that entitled an architect to keep his plans. The matter was tried before Ridley, J., who at once referred to *Ebdy* v. *M'Gowan*. Kemp, K.C., who then led for the defendant, submitted that case did not govern this case, but the learned judge held that if the alleged custom existed it was not a custom which could bind the parties. I am not sure that the learned judge was satisfied as to the existence of the custom; but, at any rate, he held, on the authority of *Ebdy* v. *M'Gowan*, that it was so unreasonable that the court would not give effect to it even if it were proved. The principle on which Mr. Shearman rested the right of the defendant to keep the plans was that the architect's contract was not a contract for the sale of a chattel, but for work and services rendered; and that the contract was performed when he had superintended the building of the houses. That was the principle involved in *Ebdy* v. *M'Gowan*. In that case the plaintiff was an architect who had been employed by the defendant to prepare plans and get tenders for a vicarage. The payment was to be 5 per cent. on money expended, if the vicarage was completed; if tenders were obtained and work not commenced, 3 per cent. on the estimated cost; if no invitation for tenders issued 2½ per cent. The plans were prepared, but the defendant changed his mind and declined to proceed and wrote to the plaintiff offering to pay and asking for the plans. The architect declined to give up the plans but sued for payment, and set up this alleged custom among architects to retain their plans if the work was not proceeded with. It was held by the Court of Exchequer that such custom, even if proved, would be unreasonable, and that the defendant need not pay for the plans unless he got them. In my opinion, a custom which transferred the property in a chattel from the person who paid for it to the person who was paid must be held bad. If the custom had been justified in that case it must have been justified on the same contention as that on which it is sought to justify it here. If the custom was bad in the one case it must be equally bad in the other. In the present case the architect has under his contract done everything he was expected to do, and he has been paid all he was entitled to receive. It is clear, therefore, that the plans are the property of the building owner. I think the contract was one to make a chattel the property in which passed to the employer, who has paid the architect for it.

In my opinion, Ridley, J., was right in doing what he did, and that the case of *Ebdy* v. *M'Gowan* is perfectly good law, and ought to be followed by us. The appeal therefore fails.

MATHEW, L.J., gave judgment to the same effect.

COZENS-HARDY, L.J.—I agree. The proposition that an architect is entitled to retain the plans cannot possibly be maintained. If he were so entitled, how would the building owner know whether the drains, sewers, and flues were properly made? Suppose they required to be repaired, is he to be bound, in order to obtain the requisite information as to where they are placed, to make a fresh contract with the architect? Mr. Shearman had to admit that there would be some sort of an obligation on the architect for the safe custody of the plans, and that admission

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

seems to me to put another great difficulty in the defendant's way. In my opinion, the case is analogous to that of a solicitor who has prepared a conveyance for a client and who has been paid for so doing. In *Ex parte Horsfall*, 7 B. & C. 528, it was laid down that the draft conveyance as well as the deed belonged to the client.

In my opinion the point involved in this case is covered by the decision in *Ebdy* v. *M'Gowan*, and that we are bound to follow the ruling in that case and dismiss this appeal with costs.

Solicitors for the plaintiff, *Gibbon & Moore.*

Solicitors for the defendant, *C. Robertson & Co.*

From Chan. Div.
(Lord Alverstone, L.C.J., and Vaughan Williams and Stirling, L.JJ.) March 22.

ATTORNEY-GENERAL v. METROPOLITAN ELECTRIC SUPPLY CO. (LIMITED) (No. 2). (*a.*)

Electric lighting company—Supply of electric current or electrical energy outside statutory area — Statute — Contravening statutory prohibition—Interpretation—Metropolitan Electric Lighting Act, 1889 (52 & 53 *Vict. c. cxcvi.*), *ss.* 3, 5—*Metropolitan Electric Supply Act,* 1898 (61 & 62 *Vict. c. ccxxxv.*), *ss.* 2, 16.

A limited liability company authorized by statute to supply electrical energy within certain areas, and also authorized by statute to set up a station for generating electric current and electrical energy at a place outside their areas of supply, and from that generating station to supply those areas with electric current and electrical energy, is not authorized under the statutory powers aforesaid to supply electric current or electrical energy to customers outside their statutory areas of supply.

This was an appeal from the judgment of Farwell, J. (reported in full, *ante*, p. 198).

The action was brought by the Attorney-General to restrain the defendants from supplying electrical energy or electric current from a generating station outside their statutory areas of supply to customers outside those areas.

The question turned on the interpetation of two Acts of Parliament, of which the material provisions are as follows: "The undertakers for the purpose of this Act are the Metropolitan Electric Supply Co. (Limited), being a company registered under the Companies Acts, 1862 to 1886, with limited liability. . . . The undertakers shall not purchase or acquire the undertaking of or associate themselves with any other company or person supplying energy under any licence, Provisional Order, or special Act within the administrative county of London unless the undertakers are authorized by Parliament to do so."

"The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply or otherwise than under the authority of Parliament or under a licence granted by the Board of Trade under the principal Act: Provided that where the undertakers were on the . . . supplying or under any binding agreement to supply energy to any premises beyond the area of supply they may continue to supply or supply energy until . . . and ninety or in case any such notice as hereinafter described . . . or may be mentioned in such notice": The Metropolitan Electric Lighting Act, 1889 (52 & 53 Vict. c. cxcvi.), ss. 3, 5.

"It shall be lawful for the company to hold and use as a station for generating electric current or electrical energy certain lands recently acquired by them in the parishes of Willesden and Acton and county of Middlesex or some part thereof . . . and to establish and work on those lands plant for generating electrical energy and for other purposes incidental to or connected with their undertaking or business."

"It shall be lawful for the company to use any of their cables or wires and any mains or cables connected therewith for the transmission of electric current or electrical energy from their works on the said lands at Willesden and Acton to the several distributing stations of the company in their Paddington Marylebone and Mid-London areas defined by the several provisional orders hereinbefore mentioned . . . and to use the generating station on the said lands for the purpose of supplying electric current or electrical energy within the several areas or districts over which the company have now powers of supply or over which they may hereafter have such powers under any special Act or Provisional Order": The Metropolitan Electric Supply Co. Act, 1898 (61 & 62 Vict. c. ccxxxv.), ss. 2, 16.

Farwell, J., held that the defendants were supplying electric current and electrical energy outside their statutory areas in direct contravention of the Act of 1889, and granted the injunction asked.

The defendants appealed.

Cripps, K.C., Jenkins, K.C., and *Sargant*, for the appellants. — The defendants are not supplying electricity as "undertakers" under the Acts or orders, but by virtue of their rights under their memorandum of association; the exercise of those rights is not prohibited by the Acts. The negative words of section 5 of the Act of 1889 must be construed as meaning that the defendants "shall not use any of the powers given to them as undertakers." The enabling words of section 16 of the Act of 1898 should be enlarged by adding words giving the defendants power to supply electric current or electrical energy wherever as a limited company they may desire to exercise the power.

Upjohn, K.C., and *J. W. Greig*, for the respondents, were not called upon.

Lord ALVERSTONE, L.C.J.—Farwell, J.'s, judgment is correct. I agree with it because general legislation in regard to electricity must be considered in interpreting these Electrical Supply Acts. The defendants argued that what they did was not done by virtue of any power conferred on them by statute or order of the Board of Trade; and that, being a limited company, the powers they have under their memorandum of association may be exercised by them, notwithstanding the provisions of the Acts of 1889 and 1898. That argument is not acceptable to me. I can give no other construction to section 5 of the Metropolitan Electric Lighting Act, 1889, than that given by Farwell, J. I also agree with him that the intention of the Act was to apply to the metropolis a scheme of electric lighting which was admittedly the best. The outlying areas cannot be disregarded. The words in the fifth section of the Act of 1889 must be taken in their natural sense; the same terms of prohibition are contained in many, if not all, of the Board of Trade orders made under the Act. On the face of it section 5 means that the defendants are not to supply electricity except in their specified areas unless authorized by Parliament or under licence granted by the Board

(*a.*) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

of Trade. The word "undertakers" cannot, except by a very strained construction, be limited to the persons exercising powers within the district; it can only mean the persons who were named in the Act. As Farwell, J., has pointed out, the proviso which follows section 5 would not have been necessary had the suggested construction been right: the proviso would never have been inserted if the undertakers were to be free to supply energy beyond their areas of supply by virtue of some rights or powers of their own. I can well understand the Legislature thinking that when there were a number of districts, containing their own generating stations, it was not desirable that the companies should set up a non-statutory trade with customers outside their own areas. I think, for all the reasons advanced by Farwell, J., that the defendants have got statutory rights of supply upon the condition that they are not to supply electric energy or electrical current outside their areas. There is nothing in the Act of 1898 which impliedly negatives the provisions of section 5 of the Act of 1889.

VAUGHAN WILLIAMS, L.J.—I agree. I cannot insert into section 5 the words "within the Administrative County of London."

STIRLING, L.J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Barlow & Barlow.*

Solicitor for the respondents, *W. G. Greig.*

From P. D. & Ad. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — March 10, 14.

"THE LONDON." (a.)

Practice—Admiralty—Collision—One vessel held alone to blame—Appeal only on the ground that both vessels were in default—Costs of appeal.

Where in the Admiralty Division one of the vessels was held alone to blame for a collision, and there is an appeal by the owners of that vessel solely on the ground that both vessels should have been found in default, and the appeal is allowed, the appellants are entitled to the costs of the appeal.

The Lebanon *v.* The Ceto, 14 *App. Cas.* 670, 38 W. R. Dig. 187, *followed.*

This was an appeal by the owners of the Hull steam trawler *The Anson* from a decision of the late President (then Sir F. Jeune) pronouncing their vessel alone to blame for a collision in the North Sea on the 5th of June, 1904, with the Danish steamship *The London.*

The appellants admitted that *The Anson* was in default in not having kept her foghorn continuously going, but they contended that *The London* ought also to be condemned for excessive speed in the fog which prevailed at the time of the collision.

By their notice of appeal the appellants asked that the judgment of the President might be varied, and that it might be adjudged that the collision was occasioned by the fault or default of the owners, master, and crew of *The London*, as well as the owners, master, and crew of *The Anson*, and that the damage should be borne equally by the owners of *The Anson* and the owners of *The London.*

THE COURT being of opinion that *The London* as well as *The Anson* must be held to blame, allowed the appeal.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Aspinall, K.C. (*Lauriston Batten* with him), for the appellants, asked for the costs of the appeal. It was the practice in the Admiralty Division that where both parties were found to blame to make no order as to costs. When in circumstances such as the present the Court of Appeal allowed an appeal on the only issue raised, although the practice was not settled, there was authority for saying that the appellants were entitled to the costs of the appeal. In *The Hector*, 31 W. R. 881, 8 P. D. 218, the Court of Appeal, following the practice of the Privy Council, held that where a collision had occurred between two vessels through the bad navigation of each of them the owners of the ships were not entitled to the costs of any litigation arising out of the collision. More recently the ordinary rule that costs followed the result had been emphasized and followed; that was the course followed in *The Batavier*, 38 W. R. 522, 15 P. D. 37; *The General Gordon*, 6 Aspinall's Maritime Cases 533; and was referred to in Williams and Bruce's Admiralty Practice (3rd ed.), p. 550.

Balloch (*Robson, K.C.*, with him), for the respondents.—The practice has been that where both vessels have been held to blame there ought to be no order for costs. That rule was laid down by the Privy Council, and was expressly approved and followed in the case of *The Hector.*

He referred to Marsden on Collisions at Sea (5th ed.), p. 310; *The Beryl*, 32 W. R. 648, 9 P. D. 137; and to *The Arratoon Apcar*, 38 W. R. 481, 15 App. Cas. 37.

THE COURT on this point reserved judgment, intimating that they desired to look into the authorities cited, and to consult with the other members of the court before giving their decision.

March 14.—COLLINS, M.R., in giving judgment, said: In this case we postponed judgment on a matter of costs in order to look into the authorities. Almost immediately after we had left the court Mr. Aspinall, after consultation with Mr. Balloch, was kind enough to call our attention to a case which absolutely decides the point—a case in the House of Lords called *The Owners of The Lebanon* v. *The Owners of The Ceto*, 38 W. R. Dig. 187, 14 App. Cas. 670. There the President, Sir James Hannen, had found that *The Lebanon* was alone to blame in an action in the Admiralty Division. The owners of *The Lebanon* appealed against that decision, admitting that *The Lebanon* was to blame. That is precisely what happened in this case. The Court of Appeal affirmed the decision of the President; and then there was an appeal to the House of Lords. There was a difference of opinion on the merits of the case, but the result was that the judgment of the Court of Appeal upholding the judgment of the President was reversed. The judgment of the House of Lords was as follows: "Judgments appealed from reversed. Declared that both *The Lebanon* and *The Ceto* were in fault. Respondents to pay to appellants their costs in the Court of Appeal and in this House." That is precisely what has happened in this case, and there is nothing more to be said in the matter. Mr. Aspinall is entitled to the costs of the appeal, and there will be no order as to costs in the court below.

MATHEW, L.J.—I agree.

COZENS-HARDY, L.J.—So do I.

Order accordingly.

Solicitors for the plaintiffs, *Pritchard & Sons*, for *A. M. Jackson & Co.*, Hull.

Solicitors for the defendant, *Thomas Cooper & Co.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Feb. 22, 23.

WADE & SONS CO. (LIMITED) v. COCKERLINE & CO. (a.)

Ship—Charter-party—Construction—Exceptions—Accident caused by servants' negligence—Liability of ship-owners.

In the construction of a contract the maxim expressio unius exclusio alterius *is not applicable where the expression is found only in one and not in the other clauses of the same contract. There is no exception in the case of contracts of charter-party.*

This was an appeal from a judgment of Kennedy, J.

The action was brought by the plaintiffs, who were timber merchants, to recover damages from the defendants, who were shipowners, for breach of charter-party which contained these provisions: "Is is agreed between . . . the owners of the good steamship . . . now on passage . . . and . . . charterers: 1. That the said steamship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed . . . and there load, always afloat, from the agents of the said charterers, a full and complete cargo of . . . boards . . . The steamer to be provided with a deck load at full freight at charterers' risk, not exceeding above what she can reasonably store and carry . . . and being so loaded shall therewith proceed to . . . and deliver the same." "7. The act of God, the Queen's enemies, restraints of princes and rulers, and perils of the sea excepted. Also fire . . . strandings and accidents of navigation, or latent defects in, or accidents to, hull, and (or) machinery, and (or) boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the . . . or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the owner of the ship, or by the ship's husband or manager." It appeared that, while the vessel was anchored and loading, some of the timber pressed, through the stevedores' want of due care, so heavily on the uprights, placed against the stanchions to keep the timber in position, that the stanchions gave way and part of the timber was lost; and the question for determination was whether, in the circumstances, the owners were protected by the exception in clause 7 or whether the loss was due to the vessel's unseaworthiness. Kennedy, J., held that the loss was not attributable to unseaworthiness, and that if properly stowed all the timber could safely have been carried, but he found as a fact that the loss was caused by the carelessness of the stevedores, and gave judgment for the defendants, who would have been liable but for the exceptions in clause 7.

The plaintiffs appealed.

J. A. Hamilton, K.C., and *Holman Gregory*, for the appellants.—The exceptions in clause 7 do not relieve the shipowner from liability in respect of deck cargo. The maxim of construction *expressio unius exclusio alterius* is applicable. "Deck" cargo is specifically mentioned in clause 1, and is not referred to in clause 7.

Carver, K.C., and *A. J. Ashton*, for the respondents.

VAUGHAN WILLIAMS, L.J.—A rule of construction based on the maxim *expressio unius exclusio alterius* is only applicable when the *expressio unius* is found in all the clauses of the same contract. There can be no *expressio unius* when the expression occurs only in one clause. There is no authority for the proposition that such a rule exists in the case of contracts of charter-party. The facts of this case are as found by Kennedy, J., with whose judgment I agree. A warranty of the ship's seaworthiness is always presumed. If there is unseaworthiness, the shipowner is not relieved from his responsibility because a charter-party contains a clause such as clause 7. There is no breach of this presumptive warranty proved in this case; and the warranty was of the fitness of the ship while in port and waiting to load and while at sea, the shipowner's obligations thereunder varying at different stages. This ship was fit to receive cargo, and the accident occurred while it was being received. The judgment below must be affirmed.

ROMER, L.J.—Clause 7 applies to deck cargo as well as other cargo.

STIRLING, L.J., concurred.

Appeal dismissed.

Solicitors, *Trinder, Capron, & Co.; Pritchard & Sons*, for *Hearfield & Lambert*, Hull.

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Jan. 13, 14, 16, 17; Feb. 6.

BOSTON FRUIT CO. v. BRITISH AND FOREIGN MARINE INSURANCE CO. (a.)

Insurance—Shipping—Charterers—Right of charterers to sue on policy—Charterers not mentioned in policy—Intention—Construction of charter-party.

Though the words of a policy are wide enough to cover all parties interested in the ship insured, yet to give third parties the benefit of the policy there must be evidence of intention on the part of the person executing the policy to give the third party the benefit of its terms. And when the sole evidence of such intention is to be inferred from the terms of the charter-party, a clause in the charter-party that the owners shall pay for the insurance of the vessel does not constitute an obligation on or authority to the owners to insure on behalf of the charterers, so as to enable the charterers to avail themselves of the wide terms of the policy of insurance.

This was an appeal from a decision of Bigham, J.

The facts are set out at length in the judgment of Vaughan Williams, L.J., but may be shortly stated here. The action was by charterers against insurers, and the question was whether the charterers were entitled to sue on a policy of insurance on the steamship *Barnstaple*. The policy was a time policy from the 21st of March, 1895, to the 20th of March, 1896. It was a valued policy on "hull and material, £12,000; engines and machinery, £7,000: £19,000." Collision and other clauses were attached. The policy was effected on the instructions of Messrs. Craggs & Sons by John Holman & Sons, "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." The name of the plaintiffs did not appear in the policy.

By a charter-party dated the 10th of March, 1894, and made between Messrs. Craggs & Sons, described therein as agents for the owners, and the plaintiffs, the plaintiffs chartered *The Barnstaple*, which was then being built by Messrs. Craggs & Sons, for thirty-six calendar months from March, 1893. The charter-party amounted to a demise of *The Barnstaple*.

(a.) Reported by J. I. STIRLING, Esq., Barrister at-Law.

On the 13th of January, 1896, *The Barnstaple* came into collision with *The Fortuna*, and *The Fortuna* was sunk. The collision was caused by the negligence of the master and crew of *The Barnstaple*.

On the 15th of January, 1896, the owners of *The Fortuna* instituted proceedings against *The Barnstaple* in the district court in the United States of America for the district of Massachusetts, claiming damages in respect of the collision. On the petition of the owners of *The Barnstaple*, the Boston Fruit Co., as charterers of *The Barnstaple*, were made parties to the suit. At the hearing in the district court, the liability of *The Barnstaple* were admitted, and damages agreed at 14,574 dols., and the suit thenceforward proceeded as an independent cause between the present plaintiffs, the Boston Fruit Co., and the owners of *The Barnstaple*, to determine which as between them was the party liable to pay the said damages. This suit, after going through the Circuit Court of Appeals and the Supreme Court of the United States of America, was ultimately decided in favour of the owners. The Boston Fruit Co., having paid the whole damages to the owners of *The Fortuna*, in accordance with the result of the suit, now sued the underwriters for their proportion of the sum so paid as a loss under the policy of insurance.

Bigham, J., dismissed the action.

The plaintiffs appealed.

Carver, K.C., and *Llewelyn Davies*, for the plaintiffs.—This insurance was taken out by Craggs on behalf of the plaintiffs, at least in part. If clauses 17 and 22 of the charter-party be read in conjunction it is plain that there was a contract, or at any rate a duty upon Craggs, to insure. If the policy is in such a form as to fulfil the obligation, it must be held to be for the benefit of the plaintiffs. It is immaterial that the agent may not know for whom he is acting. The general principle is laid down in Arnould on Marine Insurance (7th ed.), pp. 212, 214, ss. 172, 173; *Crowley* v. *Cohen*, 3 B. & Ad. 478; *Routh* v. *Thompson*, 11 East 428, 13 East 274; *Lucena* v. *Crawfurd*, 2 Bos. & P. (N. R.) 269; *Grant* v. *Hill*, 4 Taunt. 380; *Irving* v. *Richardson*, 2 B. & Ad. 193; *Watson* v. *Swann*, 11 C. B. N. S. 756, 10 W. R. Dig. 46; *Small* v. *United Kingdom Marine Mutual Insurance Association*, 46 W. R. 24, [1897] 2 Q. B. 311. A man may ratify what purported to be made in his favour. If there is actual authority the undisclosed principal can sue, although the other party knew nothing about about him: *Keighley, Maxsted, & Co.* v. *Durant*, [1901] A. C. 240, 49 W. R. Dig. 41; *Hill* v. *Scott*, [1895] 2 Q. B. 713, 44 W. R. Dig. 25; *Scott* v. *Globe Marine Insurance Co.*, 1 Com. Cas. 370; *Byas* v. *Miller*, 3 Com. Cas. 39.

Scrutton, K.C., J. A. Hamilton, K.C., and *Maurice Hill*, for the defendants.—However wide words may be found in a policy, it will not extend to those who are not parties unless it is shown that that was the intention: *Watson* v. *Swann*. All the substantial interests in this ship were in the owner, and there was no duty to insure on behalf of the charterer: *Aira Force Steamship Co.* v. *Christie & Co.*, 9 Times L. R. 140, where the charter-party contained a clause which was practically the same as clause 22 in the present case. To enable a person to recover, his interest must be proved, and an authority from him to insure, or his adoption of the contract: Duer's Marine Insurance, vol. 2, p. 37; Pollock on Contracts (7th ed.), p. 98; *Hagedorn* v. *Oliverson*, 2 M. & S. 485. In any case the ratification of the contract must be within a reasonable time.

Carver, K.C., replied.

Cur. adv. vult.

Feb. 6.—VAUGHAN WILLIAMS, L.J.—This is an action on a policy of insurance on the steamship *Barnstaple*, dated the 5th of April, 1895. The policy is a valued policy on "hull and material, £12,000; engines and machinery, £7,000—£19,000." Collision and other clauses are attached. The policy was a time policy, from the 21st of March, 1895, to the 20th of March, 1896. The action is by charterers against underwriters, and the question is whether the charterers are entitled to sue on this policy. The policy was effected by Messrs. John Holman & Sons on the instructions of Messrs. Craggs & Sons, described in the charter-party as "agents for the owners." On the 13th of January, 1896, *The Barnstaple* came into collision with *The Fortuna* and *The Fortuna* was sunk. The collision was caused by the negligence of the master and crew *The Barnstaple*. The plaintiffs were charterers of *The Barnstaple*. By a charter-party dated the 10th of March, 1894, and made between R. Craggs & Sons, described therein as agents for the owners, and the plaintiffs, the plaintiffs chartered *The Barnstaple*, which was then being built by Messrs. Craggs & Sons, for thirty-six calendar months from March, 1893. The charter-party amounted to a demise of *The Barnstaple*. *The Barnstaple* at the time of the collision was employed by the plaintiffs under the charter-party. On the 15th of January, 1896, the owners of *The Fortuna* instituted a suit against *The Barnstaple*, in the district court in the United States of America for the district of Massachusetts, claiming damages in respect of the collision. On the petition of the owners of *The Barnstaple* the Boston Fruit Co., as charterers of *The Barnstaple*, were made parties to the suit. At the hearing in the district court the liability of *The Barnstaple* was admitted, and damages agreed at 14,575 dols., and the suit thenceforward proceeded as an independent cause between the new plaintiffs, the Boston Fruit Co., and the owners of *The Barnstaple* to determine which, as between them, was the party liable to pay the said damages. This suit, after going through the Circuit Court of Appeals and the Supreme Court of the United States of America, was ultimately decided in favour of the owners. The Boston Fruit Co., having paid the whole damages to the owners of *The Fortuna* in accordance with the result of the suit now demand from the underwriters sued their proportion of the sum so paid as a loss under the policy of insurance. Now, the policy was effected by John Holman & Sons, "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." John Holman & Sons, as appears from the agreed facts, effected this policy on the instructions of R. Craggs & Sons—viz., as insurance brokers. The name of the Boston Fruit Co., the plaintiffs, nowhere appears on the policy, and it follows that to entitle the plaintiffs to sue on this policy, which was not made by the plaintiffs themselves, they must show either that it was made on their behalf by John Holman & Sons, authorized to act for them, or whose act has been subsequently ratified and adopted by them. It is not suggested that the Boston Fruit Co. had any direct communication with the brokers, John Holman & Sons; the suggestion is that R. Craggs & Sons either instructed Holman on behalf of the Boston Fruit Co., being authorized so to do by necessary implication arising from the terms of the charter-party, or that even if Craggs & Sons did not effect the policy on the authority of the Boston Fruit Co., yet the terms of the policy are sufficient to describe the Boston Fruit Co. and cover their interest in the ship, and that the Boston Fruit Co. have ratified and adopted the agency thus assumed on their behalf. Bigham, J.,

who gave judgment in favour of the defendants, says in his judgment: "Now, before an underwriter can be made liable on a policy at the suit of a plaintiff whose name does not appear on the face of the document, it must be shown by clear evidence that the person taking out the policy intended at the time to effect the insurance on the plaintiff's behalf"; and he then proceeds to show that there is no evidence of any such intention, and that all that can possibly be contended is that the intention ought to be inferred from the terms of the charter-party. I will deal presently with the terms of the charter-party, and the inferences which ought to be drawn from those terms; but, before doing so, I should like to say that I am not sure that Bigham, J., is right if he means that the onus of proving the intention is thrown on the plaintiff who is suing on the policy in a case like the present, where the words defining the interests intended to be covered by the policy are manifestly wide enough to cover the plaintiffs' interest. The passage in the second paragraph of p. 36 of vol. 2, Lecture IX., of Duer's Marine Insurance does not seem quite consistent with this view. He says: "When it is said that the general words of the policy must in their personal application be limited to those for whom the insurance was intended, it is by no means a necessary consequence that these words must be always understood in a limited sense. The intention of the party effecting the policy may be co-extensive with its terms. He may really mean that every person who may be proved to have an interest in the property according to the nature of his interest shall be entitled to the benefit of the contract, and where persons who are or may be interested are unknown to the agent such is usually his intention." Now, in the present case, the agent with whom we are concerned is not Holman, who effected the policy and who is named in the contract, but Craggs, from whom he received his directions to insure. The charterers certainly were not unknown to Craggs; but I should hesitate to say that because of this knowledge of Craggs the charterers cannot rely on the general words, unless they give extrinsic evidence of the intention of Craggs to insure on their behalf. In the present case there is no evidence whatever outside the general words of the policy available to prove the intention to insure on behalf of the plaintiffs, except the terms of the charter-party itself. The real case of the plaintiffs is based on the terms of the charter-party, which, it is said, either cast a duty upon Craggs to insure on behalf of the charterers, or at least authorized them to insure on their behalf, and it is said that in either case, as the policy contains words wide enough to cover the interest of the charterers, it must be inferred, in the absence of evidence to the contrary, that the intention of Craggs was to insure their interest. If this connection is right, no question of ratification, properly so called, would seem to arise. The case would then resolve itself by the answer to the question—Did the charterers, by the terms of the charter-party, authorize the effecting of the policy on their behalf, for in my judgment, the policy actually effected does in words cover the interest of the charterers? If, however, the terms of the charter-party do not authorize Craggs to effect a policy covering the interest of the charterers, I cannot come to the conclusion that the charterers ever ratified or adopted the policy. On the contrary, they seem to me, with the consent of the owners, to have rejected the agency of the owners in that behalf, and I doubt whether it was necessary for the rejection of that agency that it should be communicated directly to the underwriters, especially as it is agreed between the plaintiffs and the underwriters that the stipulation regarding facts on p. 37 of the American Record, and the evidence taken, shall be included as part of the agreed facts in this case. It remains to consider the effect of the terms of the charter-party and see whether there is anything in it either constituting or excluding an obligation or authority on or to Craggs & Sons to insure on behalf of the charterers. The charter-party relates to two screw steamships to be built, and by clause 1 the owners agree (the words "to let" seem to be omitted), and the charterers agree to hire the steamship for thirty-six calendar months, commencing on the 1st (March, 1893) to the 15th of March, 1896. By paragraph 2 the charterers shall provide and pay for stores, tackle, &c., and for the provisions and wages of the captain, engineers, and crew, who, excepting the "guarantee engineer," shall be appointed by them, and that the owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches with chain, gear, and donkey boiler. By clause 3 the charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Clause 4 provides for payment for the use and hire of the vessel. I do not think that any other clause need be referred to except clauses 17 and 22, which are as follows: Clause 17. "In the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owner preventing the working of the vessel for more than twenty-four working hours, the payment of the hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, break down, or other causes the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." Clause 22, "The owners shall pay for the insurance on the vessel." Now, it cannot be doubted that clause 2 throws on the owner the responsibility for the maintenance of the vessel in an efficient state in hull and machinery for the service, and it seems clear that under this charter-party, which amounts to a demise, the charterers are not only responsible for the negligence of the master and crew towards third persons, but that, as between the owners and charterers, losses arising from such negligence must fall on the charterers; but this, of course, does not prevent the owner having an insurable interest in the ship or anything else covered by this policy. Such being the general scope of the charter-party, I will now consider what is the meaning of clauses 17 and 22, and what is their application to the present case, in which it is an agreed fact that the collision was caused by the negligence of the master, mates, or crew in charge of the navigation of the steamship. Now what is the meaning of clause 17? The first part of clause 17, down to and including the word "service," provides for the cessation of payment of hire in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of owner preventing the working of the vessel for more than twenty-four working hours, and the hire is to cease from the hour when detention

begins until the ship be again in an efficient state to resume her service. The clause is clumsily drawn. The loss of time which prevents the working of the vessel may apparently arise from causes over which the owner has no control—for instance, a collision might arise from negligent navigation of another ship, or it might arise from negligence of the charterer's servant, or the causes of the loss of time might arise from the perils of the sea, or the loss of time might arise from imperfections in the machinery provided by the owner—but in each and all these cases the payment of hire is to cease, and the owners have an insurable interest in the loss of time arising from these causes, and then the clause provides that port charges, pilotages, and other expenses should be borne by the owners if the vessel should put into any port or ports other than those to which she is bound, if that is the consequence of certain causes, and one would expect to find the causes identical with those before mentioned. But they are not identical. "Stranding" is omitted, as also the words "or any cause appertaining to the duties of the owner," and the words "such deficiency" are introduced. I think that the differences arise simply from careless drafting, and that mere repetition is intended. Then follows an antithetical passage—"But should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers." Now I think that this means a stress of weather not resulting in any of the above-mentioned causes as the proximate cause of detention. Then clause 17 concludes: "It is understood in the event of the steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses, as the owners are by their insurance." It is suggested that this concluding clause entitles the charterers, at all events when read in conjunction with clause 22, to the benefit of the policy taken out by the owners as a policy taken out on their behalf, or at all events is consistent with the policy having been taken out on their behalf. I cannot agree. I cannot believe that clause 22, taken alone, means anything more than that the owners are to pay the premiums on any insurance of the vessel which they should choose to effect, and that the owners should not be entitled to charge the charterers in account with these premiums. Nor do I think that the consideration of clause 17 alters this conclusion. I think that the effect of the whole charter-party, including clause 17, is to leave the charterers liable, as between themselves and the owners, for the consequences of negligent navigation, and I cannot find in clause 17 itself, or in clause 17 read in conjunction with clause 22, any words sufficient to cast on the owners the obligation to insure on behalf of the charterers against collision or detention risks. I do not think that the word "covered" in clause 17 imports a contract by the owners to effect a policy on behalf of the charterers. I think "cover" means no more than that the owners will give the charterers the protection of the policy to the extent that they happen to insure against risks cast on the charterers by the charter-party. But this does not affect the underwriters, and I cannot find in the charter-party or elsewhere any sufficient evidence to justify the interference that the policy effected by the owners was intended to be effected on behalf of the charterers. On the contrary, I think that the terms of the charter-party would exclude such an inference, even on the assumption that the onus of proving the exclusion is cast upon the underwriters. Moreover, I think it is impossible to leave out of consideration the evidence of Mr. Bennett in the American litigation, given on behalf of the now plaintiffs, that it was optional with the owners whether they insured or not, and that insurance did not concern the charterers. I think that the judgment of Bigham, J., should be affirmed, and this appeal be dismissed be costs.

ROMER, L.J.—This case took a long time to argue, and many questions were discussed in the course of the argument. But in the view I take the appeal should be dismissed on grounds that, after what my lord has said, I can state shortly. The policy of insurance on the face of it states that the insurance company is contracting with John Holman & Sons as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of the policy does, may, or shall appertain in part or in all. That is a common form which has often received judicial consideration and interpretation. On the face of it a large number of persons might be included. But on the authorities it appears to me that it has long been decided, and is settled law that it is not every person included in the wide terms of the policy who is of right entitled to the benefit of the insurance as against the insurer. Only those persons are entitled on whose behalf the policy was in fact effected. In some of the cases which establish this the expressions used are that only those are entitled who at the time the policy was effected were the persons "contemplated" as being, or "intended" to be, covered by the policy; but I think these expressions mean what I have stated. Now I need not consider the question, if there be no facts admitted or proved to show on whose behalf the policy was in fact effected, whether any one who comes within the wide terms of the policy could not properly sue on it; for, in my opinion, in the present case there are facts which enable me to come to a conclusion as to the persons entitled to sue on the policy. It is admitted that the policy was in fact taken out by the brokers on the instructions of the agents of the owners of the ship. Now it is not suggested on behalf of the charterers that they ever gave any instructions to the brokers; and when I look at the terms of the policy I find it is such a policy as the owners might well take out for themselves without regard to anyone else. This being so, the conclusion I draw from the above facts, in the absence of any other sufficient facts established leading to the opposite view, is that the owners on whose behalf the brokers were instructed were the persons, and the only persons, on whose behalf the policy was, as a matter of fact, effected, and therefore the only persons entitle to sue upon it. This leads me to a consideration whether there are any other circumstances in this case sufficient to prevent the above *primâ facie* view being maintained. The only circumstances relied on by the plaintiffs in the charter-party, and in particular clauses 17 and 22. As to this I can only say that, after a careful consideration of that document, and of the two clauses in particular, I cannot come to the conclusion that by the charter-party the owners contracted with the charterers that they, the owners, would effect an insurance on the ship on behalf of the charterers as well as on behalf of themselves. Nor do I feel able to infer from this charter-party that the policy in question was or ought to be treated as being taken out on behalf of the charterers. And it is satisfactory to know from the proceedings in the United States of America that this view appears to have been for some years the view taken alike by the owners and by the present plaintiffs. I think that on these grounds the appeal fails.

STIRLING, L.J.—I am of the same opinion, and I cannot usefully add anything.

Solicitors, *Thorne & Welsford; Walton, Johnson, Bubb & Whatton.*

From Chan. Div.
Vaughan Williams, Romer, and Cozens-Hardy, L.JJ. } Nov. 29, 30.

SAUNDERS v. SHAFTO (a.)

Jointure—Power—Bargain between husband and wife—Fraud on power.

The fact that consideration is given by a wife to a husband to induce him to exercise a power of jointuring in her favour does not invalidate the execution of the power, provided that the wife receives the jointure in full and no part of it is diverted from her under the bargain.

Baldwin v. Roche, 5 *Ir. Eq. Rep.* 110, *approved and followed.*

Whelan v. Palmer, 36 *W. R.* 587, *overruled.*

This was an appeal from a decision of Kekewich, J.

By his will, dated the 8th of August, 1851, James Delaval Shafto devised his lands and hereditaments to the use of his uncle Charles C. Shafto for life, then to the use of his uncle W. H. Shafto for life, then to the use of William Henry Shafto, the son of the said W. H. Shafto, for life, and after his death to the use of the first and other sons of the said William Henry Shafto begotten in the testator's lifetime in tail male, with divers remainders over. And he declared that it should be lawful for each tenant for life under the said will, whether in actual possession of the said hereditaments or not, either in contemplation of marriage or after marriage, by any deed or deeds revocable or irrevocable, and executed by such tenant for life in the presence of one witness or more, to charge the said hereditaments with the payment of any annual sum not exceeding £300 to any woman whom he should marry for her life to be in bar of dower and freebench.

The testator died in 1857. His uncles predeceased him, and William Henry Shafto became tenant for life under the terms of the will. He married the plaintiff in 1868. In 1871 he left her and never returned to her, and they never lived together after 1871.

In 1875 the plaintiff presented a petition for divorce against him on the ground of desertion and adultery; a decree *nisi* was granted, but the Queen's Proctor intervened and the decree was rescinded.

By an indenture of the 28th of August, 1882, made between William Henry Shafto and the plaintiff, which recited the will, the death of the testator, that there was no charge on the property, and that William Henry Shafto was desirous of exercising his power of appointment given by the will in favour of his wife, Eliza Shafto, he as tenant for life and in exercise of the power and of every other power and estate him thereunto enabling irrevocably charged the property then or thereafter to become subject to the uses of the will with the payment to his said wife if she should survive him for her natural life of the yearly sum of £300 for her sole and separate use, to be paid by equal quarterly payments free from all deductions, the first payment thereof to be made three months after his decease.

William Henry Shafto died on the 27th of September, 1902, and the defendant thereupon became tenant for life in possession of the settled estates. The defendant refused to admit the plaintiff's right to a charge or to make any payment in respect thereof.

In September, 1903, the plaintiff married a Mr. Saunders, and in February, 1904, she brought the present action for declaration that she was entitled to a charge.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

It was proved at the trial that the deed of August, 1882, was executed in pursuance of a bargain between William Henry Shafto and the plaintiff that she should give him £50 in return for his creating the charge. Actuarial evidence was given to the effect that, considering the ages of William Henry Shafto and the plaintiff, the reversionary charge of £300 a year was not worth so much as £50 in August, 1882.

Kekewich, J., held that the transaction was a corrupt bargain and a fraud on the power, and gave judgment for the defendants.

The plaintiff appealed.

Stewart Smith, K.C., and *Martelli.*—There has been no fraud on the power. A power of jointuring is on a different footing from a power to appoint among children, and provided that it is not exercised for the husband's benefit, it is no objection that the wife gives consideration for it. The jointure must not go to the husband, but a bargain does not invalidate the appointment even though the husband gets a benefit by it.

They cited *Tyrconnell* v. *Duke of Ancaster*, Amb. 237; *Baldwin* v. *Roche*, 5 Ir. Eq. Rep. 110; *Aleyn* v. *Belchier*, 1 Eden 132; *Lane* v. *Page*, Amb. 233; *Daubeny* v. *Cockburn*, 1 Mer. 626; *Rowley* v. *Rowley*, Kay 242; *Whelan* v. *Palmer*, 36 W. R. 587, 39 Ch. D. 648.

Warmington, K.C. and *Jarvis*, for the defendants.—In this case the wife paid the husband more than the reversionary jointure was worth. The result is that he took the entire benefit of the jointure. If the appointor cannot exercise the power directly for his own benefit he cannot do so in directly.

They cited (in addition to the cases already mentioned) *Topham* v. *Duke of Portland*, 11 W. R. 507, 1 De G. J. & S. 517; *In re Turner's Settled Estates*, 33 W. R. 265, 28 Ch. D. 205.

No reply was called for.

VAUGHAN WILLIAMS, L.J.—This is an appeal from a decision of Kekewich, J., that an appointment made in 1882 by a tenant for life, having a power of jointuring of £300 a year, of the whole amount to his wife, in consideration a present payment to him by her of £50 was invalid. Kekewich, J., arrived at this conclusion upon the basis that there was a corrupt bargain between the husband and wife—a bargain which he thought was intended to benefit the husband solely. The evidence upon which he came to this conclusion was this. There was correspondence between the husband and wife by which it appeared that the husband said that he would only execute this power to jointure in favour of his wife if she would pay him the sum of £50. Then there was the evidence of an actuary that £50 was the full market value of the annuity secured by the jointure, having regard to the respective ages of the husband and the wife. Kekewich, J., came to the conclusion that that made it an arrangement solely for the benefit of the husband, and that, for that reason, it was a corrupt bargain and fraud upon the power. I cannot agree with the learned judge's decision in this case. In his judgment he fully recognized the distinction between the execution of a power of jointuring and the execution of a power to appoint in favour of children; but he nevertheless came to the conclusion that this execution of the power to jointure by the husband, being solely for the benefit of the husband, was a fraud upon the power. If the bargain made between the husband and the wife had been a bargain dealing with the actual jointure itself, a bargain under which the wife only got part of the sum secured by the jointure, and the residue of it was paid to some nominee or creditor

of the husband, I should have entirely agreed with the decision of Kekewich, J.; but the learned judge seems to have thought that, inasmuch as the money paid by the wife was, according to the evidence of the actuary, the full value of that which she was to get, it placed the case upon the same level as if that which had been the subject of the bargain had been a disposition of a part of the jointure itself. However much one is to look at substance and not at form, I cannot agree with that conclusion.

I think that, before I deal with the case generally, this is perhaps a convenient moment to say that I think that Kekewich, J., was to a large extent following his own decision in the case of *Whelan* v. *Palmer*. In my opinion that decision cannot be supported any more than the present decision can be supported, because, to my mind, it neglects, as this decision seems to me to do, the distinction between dealing with the jointure itself and a bargain by which, in return for the giving of a consideration by the wife, she is left entitled on the death of her husband to receive the whole of the jointure. I think, therefore, that our decision must be taken as affecting not only the present case, but also the case of *Whelan* v. *Palmer*.

Now in the present case we have had our attention called to an authority which practically disposes of the case, if it is one which we ought to follow. The case which I am referring to is *Baldwin* v. *Roche*. In one sense this decision in the Irish courts does not bind us, although it is a case which, having regard to the eminence of the judges who were parties to the judgment, we should pay the very greatest attention to. But there is a sense in which it is binding on us in a very great degree, because it is referred to in Sugden on Powers as an authority which is in accordance with the law. The edition that I have before me is the eighth, published in the year 1861. The case is also referred to in Farwell on Powers (2nd ed.), p. 434, and is there also mentioned as a binding authority. It is plain that an authority of this sort is one which may have been, and probably has been in fact, acted upon by conveyancers and others as binding, and it would be a very serious thing now, more than forty years from the date of Lord St. Leonards' book approving so distinctly of this decision, to say that we question it. Excepting this decision, to which I have called attention, of Kekewich, J., there has been no decision whatsoever in which this case of *Baldwin* v. *Roche* has ever been questioned, and even in *Whelan* v. *Palmer* perhaps it is not right to say that it was questioned.

I propose in the first instance to call attention to the case first referred to in Sugden on Powers (8th ed.), p. 610. That is the case of *Lane* v. *Page*. It is a case in which the bargain made was one affecting the jointure itself, and part of the jointure was to go in payment of a creditor of the husband, of course after the husband's death, and the residue of the jointure was to go to the wife. Lord Hardwicke held in that case that the jointure was good as far as the wife's portion was concerned, but bad in so far as the portion going to the husband was concerned. But although we have not in the present case to deal with any severance of the jointure such as that which had to be dealt with in that case, yet *Lane* v. *Page* is an authority in this way — that it is quite plain that there there was a bargain between the husband and the wife, and Lord Hardwicke held that notwithstanding the bargain between the husband and the wife the jointure stood so far as that portion of it was concerned which the wife was to take. It may be convenient at this moment to say one word about some comments that Sir William Grant made in *Daubeny* v. *Cockburn* upon that case, Sir William Grant took the view that if the execution of the jointure was fraudulent in one respect, it was bad altogether, and he did not approve of the decision of Lord Hardwicke, which held that the jointure stood as to part and was bad as to the residue. But we need not trouble with that case at all. Every one reading the judgment of Sir William Grant must be struck with the force of his reasoning, but it does not touch the case that we now have to deal with. Having made those observations upon *Lane* v. *Page* and *Daubeny* v. *Cockburn*, I think I may pass to the judgment in *Baldwin* v. *Roche*, only observing that in his observations in *Rowley* v. *Rowley*, Wood, V.C., recognizes the authority of *Lane* v. *Page*, although the case which he had to deal with was not the case of a jointure, but the case of a power of appointment amongst children.

Now, the case of *Baldwin* v. *Roche* is a remarkable one. I do not think I can state it better, or put it more shortly, than it is put in the marginal note: "Tenant for life, with a power to jointure, marries, but does not exercise the power. His wife was seised of real estate for the term of her life, which on the marriage was settled to the use of the husband for the joint lives of himself and his wife, remainder to the wife for her life. The husband afterwards became indebted, and agreed with his wife and creditor that he would exercise the power of jointuring in her favour, and that she should grant to the creditor an annuity for the term of her life equal in amount to the jointure to be charged upon her estate, and to become payable upon the death of the husband, which agreement was carried into execution. The husband died. Held, that the execution of the power of jointuring was not a fraud upon the remainderman."

Before I read some observations of the judges in this case I would point out what a strong decision it is, and how completely it covers the present case, because in that case, as in this, the execution of the power of jointuring was an execution which took place after the marriage, and not in pursuance of any ante-nuptial agreement; moreover, the consideration which the wife gave was equal in amount to the jointure. Under these circumstances, what do the judges hold? Did they hold that the fact that the wife gave a consideration to the husband—that is to say, to the husband's creditor, at the instance of the husband, for executing the power in her favour—rendered the bargain corrupt and a fraud upon the remainderman? Not at all. They came to exactly the contrary conclusion. I will first read a word or two which fell from Lefroy, B., in the course of the argument. He says: "In both those cases" (that is, the cases of *Lane* v. *Page* and *Aleyn* v. *Belchier*) "the whole contract related to the jointure, and nothing else." Of course, in the present case there is no contract relating to the jointure whatsoever. The wife gets the jointure. "How do you answer the common case of a settlement where the husband gets a fortune with his wife, applies it in payment of his own debts, and in consideration of it executes the power of jointuring?" The answer which is made to that—an answer which the judges do not find satisfactory—is simply this: "The evidence shows that, though not in form, yet in substance the contract of the parties was, that the husband's debt should be paid out of the jointure." That answer was not thought sufficient, and it seems to me for the obvious reason that it still left it an absolutely true proposition that the wife was to receive the jointure in full, and no part of it was under this bargain to be taken from her. Brady, C.B., says this: "This case has been put by the counsel for the defendant, on the only ground upon which

the claim can be resisted—namely, that the court ought to look on this transaction, not as a grant of a jointure to the wife, but as the grant of an annuity to the creditor of the husband; and if that were the whole of this case, it seems to me that it would fall within the authorities. But these authorities only go to this extent; that in the execution of a power of jointuring, which is given for the benefit of the wife, it shall not be so executed, as to be the means, colourably, of conveying an interest" (and then these words are in italics) "*in the jointure itself* to the creditor of the husband. If the intention of the parties really is that the jointure shall go to some third person, such intention cannot be effected by an execution of the power; for such execution of the power is not a grant of a jointure at all." Then he says: "But is that the case here?" I will refer to one passage in the judgment of Richards, B. He sets out what he conceives to be the bargain in this case between the husband and the wife: "I will suppose that the whole of this transaction was spread out upon the face of the jointure deed, and then it would run thus: That whereas the husband was indebted to Gash, and whereas his wife was entitled to a certain property, and was desirous to secure thereout the debt due to her husband's creditor, and that the husband was desirous of doing the same; but that if the wife did so she would be left without any adequate provision, and, therefore, the husband agreed to secure to her a jointure charged on his lands; and, therefore, in consideration of the wife making her own property liable to the payment of this debt, the husband exercises his power to jointure, and charges the jointure upon the estate of which he was merely tenant for life. What is there fraudulent or against conscience in such a transaction? What equity has the remainderman, who takes the estate subject to the capricious exercise of that power, to complain? How is he prejudiced? I do not see how." The only other thing that I wish to call attention to is a short passage in the judgment of Lefroy, B. He says this: "Mr. Deasy properly admits that there is a difference between a jointuring power and a power to appoint amongst children. A jointuring power is one by which the husband may take a benefit; not a benefit by perverting that which is the subject-matter of the power, to a purpose which the donor of the power did not intend, but by applying it to its proper use, in consideration of his getting something, which he is at liberty to get, for his own benefit. It is very different from a power to appoint to children." I think that, having regard to the passages which I have just read from the judgments in that case, it is clear that, if we follow it, it absolutely disposes of the present appeal. In my judgment we ought to follow that case, first, because I think the reasoning of the learned judges is sound; secondly, for the reason that I have already given—that it is a case which has not been questioned during these forty odd years, and which probably has been acted upon again and again by conveyancers and others. Under these circumstances I think that upon the authority of that case we ought to allow this appeal, which will be, of course, with the usual consequences with regard to costs here and below.

ROMER, L.J.—I am of the same opinion. A power to jointure is a somewhat peculiar power, and differs in many obvious respects from the power given to a tenant for life to appoint amongst children or amongst a special limited class. It has been accordingly held that while an appointment by way of jointure (as the result of a bargain between husband and wife or between intended husband and wife) that part of the jointure shall go or be for the benefit of the husband's creditors or a stranger is bad to the extent of that part, yet the rest of the bargain may stand so far as the jointure is to be enjoyed by the wife herself. Probably one of the reasons for this view of the courts was, that to hold otherwise would have been to invalidate the bargains so frequently made by which the husband and wife have contracted on a settlement that the wife should get a jointure on consideration of the husband obtaining an interest in her property. The courts, very naturally, apparently have shrunk from such a conclusion, and accordingly the rule that the wife might hold a jointure intended to be enjoyed by herself, though she has obtained it by a bargain with her husband, and given him or his creditors as a consideration some interest in her property, has long been recognized. It has been recognized from very early times, from *Lane* v. *Page* down to the present time, with the exception of and until the decision of Kekewich, J., in the present case, and in *Whelan* v. *Palmer*.

After what my lord has said about the cases, it does not appear to me necessary to go through the authorities. All I can say is that I think the rule I have referred to has been so long recognized and acted upon that it ought not to be departed from, and in my opinion the two decisions of Kekewich, J., to which I have referred were wrong. The present case clearly comes within the rule I have referred to, for the whole of the jointure is to be enjoyed by the wife. The circumstances that the husband and wife were separated for so long, and that she had commenced divorce proceedings against him, are not circumstances which deprived the wife of her position as such or prevented her from being a proper object of the power of jointuring, nor do I think they are circumstances which, from a legal point of view, prevent the present appointment from being good, or enabling her to enjoy the benefit of the rule to which I have referred.

It follows that the appeal must succeed, and accordingly that there ought to be a declaration that she is entitled to the jointure, and an account of what is due for arrears, and an order for payment. Probably it will be sufficient if liberty to apply for a receiver is given, if that be necessary, and, of course, the defendant must pay the costs here and below.

COZENS-HARDY, L.J.—I am of the same opinion, and I have very little to add. I agree with what has been said by my lord and Romer, L.J., that a power to jointure is peculiar. It is so peculiar that I am not aware of any power which stands on precisely the same footing. The result of the authorities seems to me to be that the remaindermen cannot complain so far as the appointment of a jointure is really for the benefit of the wife, in this sense—that she will take the jointure itself free from any obligation to hand over part of the jointure to anybody else. It is no objection to the validity of the jointure that the husband receives a consideration for exercising the power. That that is plainly so in the case of an ante-nuptial bargain cannot be doubted. *Lord Tyrconnell* v. *Duke of Ancaster* is one amongst many authorities which show that where, in consideration of the husband getting (I think it was £10,000 in that case) part of his intended wife's property, he agrees to execute a jointure power, that will be held valid. What difference can there be if the bargain is not ante-nuptial but post-nuptial, made not between the intended husband and the intended wife, but between the husband and a wife who is now in a position to make the contract. I cannot see what difference in principle can be made, nor do I think Kekewich, J., himself thought there was any real difference. His view seemed to be that the

quantum of consideration given by the wife was a matter so material as to enable the court to say that there was no real bargain. With great respect to the learned judge, I cannot follow that. If the wife may make a bargain with her husband in this matter the court has really nothing to say to the question whether she has paid more or less than the actuarial value for that which she acquires by the exercise of the power. I will only say that I think the Irish case was well decided; but, whether it was well decided or not, sixty years have elapsed. It has been quoted without disapproval, and I think I may say with approval, both by Lord St. Leonards in his book on Powers and by Farwell, J., in his book on Powers. I therefore agree that the appeal ought to be allowed.

Solicitors, *King, Adams, & Co.; James Johnstone.*

High Court of Justice.

Chan. Div.
Kekewich, J. } March 31.

In re GILLING (DECEASED).
PROCTOR *v.* WATKINS. (*a.*)

Husband and wife—Deed of separation—Covenant to pay annuity—So long as she shall continue to live separate and apart—Death of husband.

A husband covenanted in a deed of separation to pay his wife an annuity of £150 per annum during her life if she should so long continue to live separate and apart.

Held, that the annuity ceased to be payable on the death of the husband, as she could not be held to live separate and apart after her husband's death.

Adjourned summons.

The question for decision in this case was as to the construction of a clause in a deed of separation.

The deceased, Walter Gilling, having had differences with his wife, Annie Marie Gilling, on the 4th of June, 1887, entered into a deed of separation with her, whereby they mutually agreed to live separate from each other for the future upon the terms and conditions thereinafter expressed.

The deed contained a recital that "the said W. Gilling, in consideration of such separation, has agreed to allow and pay his said wife the sum of £150 per annum payable quarterly for her maintenance, clothing, and all other necessaries during the continuance of such separation," and provided "that in pursuance of this agreement and in consideration of the premises they, the said Walter Gilling and Annie Marie Gilling, his wife, thereby mutually covenant and agree that they and each of them will henceforth live separate and apart from the other upon the terms in this indenture hereinafter contained. . . . And the said W. Gilling covenants with the said A. M. Gilling . . . that he, the said W. Gilling, will pay or cause to be paid unto her, the said A. M. Gilling, for her sole and separate use and without power of anticipation by the said A. M. Gilling, by quarterly instalments during the life of the said A. M. Gilling if she shall so long continue to live separate and apart as aforesaid, the full sum of £150 per annum (being the yearly allowance hereinbefore mentioned) for the maintenance, clothing, and other necessaries of the said A. M. Gilling."

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

The deed also contained covenants by the wife for the protection of her husband against any actions by the wife or any debts contracted by the wife "during the continuance of the said separation."

The wife lived separate and apart from her husband, and Walter Gilling paid the quarterly instalments of the annuity down to the date of his death on the 4th of July, 1901, and from that date the executors of Walter Gilling continued to pay the annuity until the 25th of December, 1903.

By his last will, dated the 28th of January, 1901, W. Gilling appointed his son Geoffrey Marston Gilling and James Herbert Proctor to be the executors and trustees of his will, and also bequeathed the residue of his estate to his said son Geoffrey Marston Gilling.

Annie Marie Gilling married again on the 7th of December, 1901, and became the wife of William Watkins.

In November, 1901, Geoffrey Marston Gilling agreed to purchase from Annie Marie Gilling her annuity for the sum of £1,500, and on the 31st of December, 1903, paid to her the sum of £1,000 on account of such purchase-money, since that date neither the annuity nor the balance of the purchase-money had been paid.

This summons was taken out by the said J. H. Proctor, one of the executors, under the will of Walter Gilling, for the determination of the question whether the said annuity of £150 ceased to become payable on the death of the said Walter Gilling, or whether the executors of the said Walter Gilling are bound to provide for the payment of the said annuity out of the estate of the said Walter Gilling.

Pepys, for the trustee and executor of the will of Walter Gilling.

Clauson, for the wife, Annie Marie Watkins.—Upon the true construction of this deed the annuity is payable during the lifetime of the wife. The covenant is not, as usually found in precedents, to pay the annuity during the joint lives of the husband and wife, but to pay it during the life of the wife. [KEKEWICH, J.—So long as she shall live separate and apart.] The only event on which the annuity is to cease is the event of the husband and wife coming together again. In *Charlesworth* v. *Holt*, 22 W. R. 94, L. R. 9 Ex. 38, an annuity granted by a deed of separation to a wife was held to be payable notwithstanding the marriage had been dissolved owing to the wife's adultery.

Petersen, for the residuary legatee, was not called upon to argue.

KEKEWICH, J.—Notwithstanding the novelty of the question raised in this case, I have no difficulty in construing the words creating it against the lady. The document to be construed is a deed of separation, and one is entitled to look at the purview and object of such deeds in order to ascertain what was the intention of this deed. The intention was clearly to provide for the wife during the continuance of the coverture. That was clearly the first object of the deed. Separation deeds often go far beyond that, but this is a plain deed for the purpose I have named. The words are quite clear in this respect, that the annuity is to be paid to the wife for her sole and separate use during her lifetime if she shall so long continue to live separate and apart for her maintenance and other necessaries. The covenant does not provide for a payment on a condition, but for a conditional payment to the wife so long as she shall fulfil the condition to live separate and apart from her husband, but she cannot be said to live separate and apart from her husband after he is dead,

therefore she cannot fulfil that condition upon which the payment of the annuity depends. The case of *Charlesworth* v. *Holt* has been referred to, but that was a different case from the present one, and turned upon the construction of the particular words in that document. There the husband covenanted to allow his wife an annuity during the joint lives of himself and his wife and so long as they should live separate and apart, and it was held that the annuity was not put an end to by the wife's divorce, as there were no words in the separation deed limiting the husband's liability to the continuance of the marriage tie. The fact that in that case both the husband and the wife were alive and lived separate and apart distinguished that case from the present case, where the annuity is payable so long as the wife continues to live separate and apart from her husband, which she cannot be said to do after her husband's death, and therefore I hold that the annuity ceased to be payable on the death of the husband.

Solicitors for the executors and residuary legatee, *Nash, Field, & Co.*

Solicitors for Mrs. Watkins, *Lanfear, Tanner, & Lanfear.*

Chan. Div.
Buckley, J. } March 29.

In re JACKSON AND HADEN. (*a*.)

Vendor and purchaser—Title—"Objection to title"—No title to minerals—Right to rescind—Completion with compensation.

Where a vendor is unable to show any title whatever to a portion of the property which he has agreed to sell, he is not entitled to rescind the contract under a condition contained in the contract enabling him to rescind in the event of the purchaser insisting on any objection or requisition as to title or evidence of title which the vendor shall be unable or on the ground of expense shall decline to remove or comply with. The total absence of title to part of the property will, however, enable the purchaser to take advantage of a condition that an omission in the particulars shall not annul the sale, but shall form the subject of compensation.

Adjourned summons.

This was a summons taken out under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9, by Harold John Haden asking for a declaration that he was entitled to insist upon completion of a contract for the sale to him by the respondents of certain property, with compensation in respect of the mines and minerals under the property, to which the vendors could not show any title.

By the contract, which was dated the 25th of October, 1904, the respondents agreed to sell to Harold John Haden for the sum of £510 "all that messuage or dwelling-house, with the yard, stable, coachhouse, garden, and appurtenances thereto belonging (including the wall on the eastern side of the premises, and the hedge on the northern side of the premises), situate and being at Dawley Brook, Kingswinford, in the county of Stafford, and known as Yewtree Villa, and now in the occupation of Harold John Haden."

A set of common form conditions were embodied in the contract, of which the following were material:

"(13) . . . If the purchaser shall insist on any objection as to title or evidence of title which the vendors shall be unable, or on the ground of expense shall decline, to remove or comply with, then, notwithstanding any intermediate or pending negotiations, or any litigation which the purchaser may have commenced, or any attempt to remove or comply with the same, the vendors shall be at liberty by notice in writing, signed by them or their solicitors, and delivered to the purchaser or his solicitor, to rescind the contract. . . .

"(14) Any error, misstatement, or omission in the particulars shall not annul the sale, but, if pointed out before the completion of the purchase, and not otherwise, shall form the subject of compensation which shall be allowed by the vendors or the purchaser as the case may require. . . ."

The vendors delivered an abstract of title by which it appeared that the mines and minerals under the property sold had been expressly reserved to former grantors by a conveyance dated in 1854, under which the vendors derived title.

The purchaser thereupon delivered a requisition stating that no abstract of the vendors' title to the minerals had been delivered, and asking for a supplemental abstract.

The vendors replied: "The purchaser is bound by the contents of the deed. It is also well known, and was known to the purchaser, that the mines and minerals are all reserved in the Kingswinford property."

As a matter of fact the purchaser did not know until delivery of the abstract that the mines and minerals under the property agreed to be sold were reserved, but, on the other hand he knew that the minerals under certain other parts of the Kingswinford property were not reserved. The purchaser insisted on his requisition, and on the 28th of November, 1904, his solicitors wrote to the vendors' solicitors offering either (*a*) to accept a conveyance including the mines and minerals upon the vendors showing a good title thereto, or (*b*) to accept the property without the mines and minerals at a proportionately reduced price, or (*c*) to permit the rescission of the contract upon payment of suitable damages.

On the 3rd of December the vendors gave notice of rescission under condition of sale 13, and the purchaser thereupon took out this summons.

Astbury, K.C., and *Whitmore L. Richards*, for the purchaser.—The vendor may not rescind under such a condition as this where he has no title at all: Dart, Vendors and Purchasers, vol. 1, p. 178; *Bowman* v. *Hyland*, 26 W. R. 877, 8 Ch. D. 588; *Nelthorpe* v. *Holgate*, 1 Coll. 203, 221; *Powell* v. *Powell*, 23 W. R. 482, 19 Eq. 422; *In re Monckton and Gilzean*, 32 W. R. 973, 27 Ch. D. 555; *Mawson* v. *Fletcher*, 19 W. R. 141, 6 Ch. App. 91, 93; *In re Deighton and Harris*, 46 W. R. 341, [1898] 1 Ch. 458. What has occurred is that there has been an omission in the particulars, and the purchaser is therefore entitled to claim completion with compensation under condition 14.

They also referred to *In re Jackson and Oakshott*, 28 W. R. 794, 14 Ch. D. 851, 855.

Mark Romer, for the vendors.—This is an "objection or requisition as to title": *Mawson* v. *Fletcher*. It is an objection to title in terms, because the purchaser's objection is that the vendors' title is bad, in that they cannot make a title at all. Assuming the objection to be an objection to title, the vendors are entitled to rescind: *Heppenstall* v. *Hose*, 33 W. R. 30; *Ashburner* v. *Sewell*, 40 W. R. 169, [1891] 3 Ch. 405; and *In re Deighton and Harris*. Assuming that the vendors are not entitled to rescind, this is not a case where the purchaser can compel the vendor to complete with compensation. It would not be fair to make the

(*a*.) Reported by H. H. KING, Esq., Barrister-at-Law.

vendors sell for, say £400, property which they have agreed to sell for £510. The vendors believed, when they entered into the contract, that the purchaser knew that they could not sell the minerals.

BUCKLEY, J., after stating the facts as above, and reading conditions of sale 13 and 14, continued: The fact is that the vendors had no title to part of the subject-matter of the contract for sale—namely, to the mines and minerals. Is condition 13 applicable? To my mind there is an essential difference between these two things, an objection to the sufficiency of the title shown, and an objection that there is a complete absence of title. You cannot find fault with what does not exist. It follows that the condition which refers expressly to objections as to title does not apply. Hall, V.C., in *Bowman* v. *Hyland* decided that a condition in a contract of sale that if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may rescind the sale does not enable the vendor to rescind where he fails to show any title whatever.

Assume that that means a total defect of title as to the whole of the property. Does the same rule apply where the defect is only as to a part of the property? I think it does, and for that I refer to *Mawson* v. *Fletcher*, L. R. 6 Ch. App., at p. 93, where Mellish, J., says interlocutorily, "It may be conceded that if there was a clear case of defect of title to part you would be entitled to specific performance with compensation." That case was one in which the Court of Appeal proceeded upon this ground. The vendors said that they had a title to the minerals; the purchaser insisted that they had not; and the question was, Has the vendor a title or not? That was a question which might involve a long and expensive inquiry, and the Court of Appeal said that the vendor was entitled to say "I will not go into that, I will rescind."

The vendors here knew they had no title, every body in the neighbourhood knew it, although the purchaser did not. *Mawson* v. *Fletcher* is no authority for saying that the rule applies where the vendor has no title. A third case to which I refer is *In re Deighton and Harris*, where Lindley, L.J., said this: "This is a case of vendor and purchaser, and it is one in which the vendor is not in the position of a man who agrees to sell property to which he has no title at all." He then refers to *Bowman* v. *Hyland*, the case I mentioned first, and the head-note to the case summarizes it by saying: "The ordinary condition of sale giving the vendor a power of rescission applies only where he has some title, not where he has none." I think myself that that is a perfectly sound principle. The objection is not to some defect in the title, but that there is no title. It seems to me, therefore, that condition 13 does not apply. Does condition 14 apply? It seems to me that it does. On the 28th of November the purchaser wrote to the vendors offering three alternatives, and the purchaser is entitled to have a conveyance of the property with compensation for the mines which the vendors are unable to convey to him.

Solicitors, *A. E. Ball*, for *Harwards & Co.*, Stourbridge and Birmingham; *Robbins & Billing*, for *W. Waldron*, Brierley Hill.

K. B. Div. (Warrington, J.) March 7.

VINDEN v. HUGHES. (a.)

Bill of exchange — Cheque — Negotiable instrument — Fictitious or non-existing person—Belief or intention of drawer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7 (3).

A cheque payable to the order of the payee was signed by the drawer under the erroneous belief, induced by the fraud of his clerk, that the sum for which the cheque was drawn was owing by the drawer to the person named as payee. There was in fact such a person as the payee. The clerk having forged the payee's name on the back of the cheque, a third person (the defendant) took it in good faith for value, and cashed it.

Held, that as at the time when the cheque was drawn the drawer believed that the name of the payee was inserted as part of a real transaction, and not as a pretence, the payee was not a "fictitious person" within the meaning of the Bills of Exchange Act, 1882, *s.* 7 (3), *and that, therefore, the cheque could not be treated as payable to bearer, and was not a negotiable instrument, and that the defendant must refund the money he had obtained by means of it.*

Bank of England *v.* Vagliano, 39 *W. R.* 657, [1891] *A. C.* 107, *distinguished.*

Action.

This was an action to recover from the defendant the proceeds of certain cheques which the defendant had received from the plaintiff's bankers after having cashed the cheques upon an indorsement forged by a clerk of the plaintiffs.

The plaintiffs were salesmen in Covent Garden Market who sold fruit and like produce for customers on commission. From 1896 to 1903 they had in their employment a cashier and confidential clerk named Cross. It had been the practice in the plaintiffs' business for Cross to fill up from time to time as they were wanted cheques payable "to order" with the names of the customers to whom money was due, and with the proper amounts. These cheques he then submitted to the plaintiff Vinden for signature, and after they were signed he sent them by post to the various customers in whose favour they were drawn. At certain times when Vinden was about to be away from business for some time he would sign a few cheques in blank and leave them with Cross for him to fill up and send off as required.

During the years 1901, 1902, and 1903, Cross filled up a number of cheques with the names of customers and various sums when either nothing was due to the customer named, or a sum less than that for which the cheque was drawn. These cheques Vinden signed, supposing that they were drawn for debts due to the payees, and believing that the ordinary practice of the business was being followed.

Having thus obtained these cheques, Cross forged the indorsement of the names of the payees, and took the cheques to the defendant, who was a draper in Brixton, and one of whose customers Cross was, and the defendant cashed the cheques for Cross, and then passed them through his banking account, and thus obtained payment upon them from the bankers of the plaintiffs. In this manner the defendant paid to Cross and obtained payment of twenty-seven cheques of amounts in all of some £487. Upon discovery in 1903 of the frauds, the plaintiffs dismissed Cross, and brought this action for the £487.

The defendant paid into court £20, being the amount of one cheque drawn in favour of a customer

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

to whom more than that amount was owing, but otherwise disputed his liability. The first cheque on the list was one for £20, made payable to T. H. Graves, who (as also were the other payees) was a real person.

No imputation was made upon the honesty and good faith of the defendant in the transaction.

Lush, K.C., and *Ashton Cross*, for the plaintiffs.—The cheques were not negotiable instruments, as the indorsements were forged and not real. The defendant, therefore, obtained no title to them, and must refund the money he obtained by means of them. T. H. Graves, the payee on the first cheque, was a real and not a fictitious person. The fact that Vinden was induced by fraud to sign the cheques does not make Graves a fictitious person: *Gibson* v. *Minet*, 1 H. Bl. 569; *Gibson* v. *Hunter*, 2 H. Bl. 288. *Bank of England* v. *Vagliano Brothers*, 39 W. R. 657, [1891] A. C. 107, was a different case, as there the bill was not drawn at all, the signature of the drawer being forged. In *Clutton* v. *Attenborough & Son*, 45 W. R. 276, [1897] A. C. 90, there was in fact no such person as the payee, and consequently he was "non-existing" within sub-section 3 of section 7 of the Bills of Exchange Act, 1882. Again, the defendant received the cheques under such circumstances as that his suspicions should have been aroused, and he ought to have made inquiries; he is not, therefore, a holder in due course: *Sheffield* v. *London and Joint Stock Bank*, 37 W. R. 33, 13 A. C. 333; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, 40 W. R. Dig. 412.

S. T. Evans, K.C., and *Bailhache*, for the defendant.—Graves was a fictitious person within section 7 (3). If the cheque had reached him he could not have given any title to sue on it by indorsing it to anyone. The name was a mere pretence, and therefore fictitious. "Fictitious" does not necessarily mean imaginary: see observations of Lord Herschell in *Bank of England* v. *Vagliano*, 39 W. R., p. 669, [1891] A. C., p. 152. The cheque, therefore, may under the section be treated as payable to bearer and negotiable; there was no need for the indorsement, and the defendant obtained a good title to the cheque. [Upon the question whether the defendant was put upon his inquiry they were stopped by the court.]

WARRINGTON, J.—The question I have to decide is whether the payees of certain cheques were "fictitious or non-existing persons" within the meaning of section 7 (3) of the Bills of Exchange Act, 1882. Independently of authority, it seems to me that "fictitious" does not mean fictitious in the abstract. The circumstances of the particular case must be looked at to see whether the name of the payee is that of a fictitious person. Now, when Vinden signed the cheque it was not a fiction to him then. It was intended to be and was to him a real transaction. He believed that he owed the sum of money represented by the cheque to the person whose name appears upon it, and he signed the cheque in that belief. It was only when he discovered that he had been imposed upon by his clerk that there was—I will not say a fiction, but that there was anything that was not real and in accordance with his intention in connection with the matter; and I think that I am entitled to say that the fraud perpetrated upon him has nothing to do with the construction of the Act of Parliament. The only thing to be looked at is the state of things at the time when the cheque was drawn and signed. Take the case of T. H. Graves. At the time the cheque was drawn Vinden intended to pay Graves the sum of £20, and I should have said that he was not at the moment a "fictitious person." *Clutton* v. *Attenborough* is not an authority to the contrary. There the payee was a non-existing person, and the learned lords who decided that case had not to consider the construction of the word "fictitious." In *Bank of England* v. *Vagliano* the facts were special and peculiar. The document was not drawn at all, the name of the drawer being forged, and there being no drawer in fact, the use of the name of a person as payee was a mere fiction, although the payee was in fact an existing person; and the expressions of Lord Herschell in that case are explained by that fact. The passages in his judgment relied on by the defendant would be satisfied by a case where the drawer drawing a cheque puts into it the name of a person who exists, but whose name is inserted by mere pretence. Vinden did not draw the cheque here as a mere pretence. He believed, and had reason to believe, that it was drawn for the purpose of being paid to the person whose name appeared thereon. I come to the conclusion that the names of the persons inserted as payees are not those of "fictitious or non-existing persons"; that the cheques therefore cannot be treated as payable to bearer; that the forged indorsement was no authority to the defendant to pay or take the cheque; and that accordingly he is liable to the plaintiff for the loss which has been occasioned. In this view it is not necessary to say whether the defendant is the holder in due course, but I think there was nothing to put him upon inquiry so as to render his payments to Cross other than *bonâ fide*. If so he would be a holder in due course.

Judgment for the plaintiff.

Solicitors, *Hervey, Smith, & Co.*; *J. T. Lewis.*

K. B. Div.
(Kennedy and Jelf, JJ.) Feb. 3.

BOYCE v. WHITE. (a.)

Election law—Municipal corporation—Election of disqualified candidate—Notice of disqualification—Right of unsuccessful candidate to take the seat—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *Schedule III., Part II., r.* 16.

Although the Municipal Corporations Act, 1882, *has declared the nomination of a person for the office of municipal councillor who at the time of the nomination is out of the United Kingdom to be void unless certain notice be given, nevertheless if he be elected by a majority of votes and no previous notice of the disqualification be given, the unsuccessful candidate is not entitled to take the seat vacated by the void election.*

Hobbs *v.* Morey, 52 *W. R.* 348, [1904] 1 *K. B.* 74, *followed.*

Special case stated by Jelf, J., upon a petition made in chambers under rule 47 of the general rules made for the effectual execution of Part IV. of the Municipal Corporations Act, 1882.

The respondent was elected by a majority of voters for the office of councillor of the Scarborough Corporation. The election was void under Schedule III., Part II., r. 16 of the above Act, which enacts: "The nomination of a person absent from the United Kingdom shall be void, unless his written consent, given within one month before the day of his nomination in the presence of two witnesses, is produced at the time of his nomination." No notice was given of the disqualification at the time of the election. Jelf, J., declared the election void and stated a special case whether it could be decreed that the appellant, the unsuccessful candidate, do take the seat thereby vacated. *Hobbs* v. *Morey* [1904] 1 K. B. 74, was not brought to the notice of the learned judge.

(a.) Reported by MAURICE. N. DRUCQUER, Esq., Barrister-at-Law.

The respondent did not oppose.

Corrie Grant, for the appellant.—This case is distinguishable from *Hobbs* v. *Morey*, because here the statute has declared the nomination void, *i.e.*, void from the very first. The case of *Brown* v. *Benn*, 53 J. P. 167, was under the same rule, and there Huddleston, B., seated the unsuccessful candidate. [KENNEDY, J.—Yes; but "Notice to the effect that votes given to the respondent would be thrown away was given on the 30th of October, and before the commencement of the poll, to the public, by posters." Here no notice was given at all.] Huddleston, B., did not base his judgment upon that fact. This is not the case of an imperfect nomination, but one absolutely void.

KENNEDY, J.—we are both clearly of opinion that this case is indistinguishable from the decision in *Hobbs* v. *Morey*, and it is unnecessary to now repeat the reasoning in that case. Here White was elected who was unqualified to go to the poll. He went to the poll and was returned, correctly so, as far as any voter was concerned, by a majority of votes. White does not dispute that his election was invalid. We can only declare that the election was invalid; we cannot declare that the petitioner was elected.

JELF, J.—I agree.

KENNEDY, J.—I do not think I can allow the respondent to appear on the question of costs, since, in the first instance, he did not appear on the petition. There will be costs for the applicant up to the time of the summons in chambers.

Solicitors for appellant, *Radford & Frankland.*

Solicitors for the respondent, *Jacques & Jacques*, for *Willoughby Williams.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Feb. 1.

CRICK v. NICHOLLS. (a.)

Weights and measures — Coal dealers — Bye-laws — Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21).

A bye-law was made by a county council under powers given to it by the Weights and Measures Act, 1889, *to the effect that coal dealers who offered coal for sale from their carts should carry scales and weights amounting to* 2 *cwt. A., a coal dealer, had in his cart sacks of coal weighing, some* 1 *cwt. and some* ½ *cwt.; there were also scales on the cart and a weight of* ½ *cwt.*

Held, that there was not a proper compliance with the bye-law, although it was possible to weigh any of the sacks of coal by means of the ½ *cwt.*

Special case stated by a petty sessional court held at Andover.

By powers given under the Weights and Measures Act, 1899, the County Council of Somerset passed a bye-law, duly approved by the Board of Trade, to the effect that coal vendors should carry on their carts accurate scales with weights amounting to 2 cwt.

On the 22nd of April, 1904, the respondent's cart contained sacks of coal weighing either 1 cwt. or ½ cwt., and scales with a weight of ½ cwt. only.

The appellant, an inspector of the said county council, thereupon took out a summons, but the magistrates refused to convict on the ground that the bye-law had been complied with, inasmuch as by means of the ½ cwt. weight the respondent could have weighed any sacks of coal on his cart.

C. A. S. Garland, for the appellant.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—I think the point is one to which we ought to give effect. The statute contemplates that there should be a means of checking the weight of the bags tendered for sale, and it is intended that the weights should enable the inspector to weigh any bag which he picks out. It is not contended that the weight of the 1 cwt. bag could not be ascertained by weighing it in two portions or what probably would be more feasible, by weighing a ½ cwt. bag and treating it as an equivalent weight. But I think there should be weights to enable the inspector to weigh the bags, and we consider the magistrates ought to have convicted. They have decided that the bye-law was complied with, and, being a decision on the merits of the case, it ought to go back. I do not think there ought to be a heavy penalty, as the man acted innocently. The suggestion that he did not carry the weights because it would have meant carrying less coal is no answer to the section. I think the case must go back for conviction.

KENNEDY and RIDLEY, JJ., concurred.

Case sent back for conviction.

Solicitors, *Leslie Field; Brownjohn & Co.*

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Kennedy, Channell, and Phillimore, JJ.) — March 18.

REX v. CHANDRA DHARMA. (a.)

Criminal law—Procedure—Penal statute, Construction of—Retrospective and prospective operation—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 5, *sub-section* 1—*Prevention of Cruelty to Children Act*, 1904 (4 *Ed.* 7, *c.* 15), *s.* 27.

The extension by a subsequent statute of the limit of time within which the prosecution of a statutory offence must be commenced, being a matter of procedure only, has a retrospective operation.

At the sessions held at Old Bailey, the 14th to the 16th January, 1905, the prisoner was convicted before Mr. Commissioner Rentoul of the offence of unlawfully and carnally knowing a girl more than thirteen years but less than sixteen years of age, under section 5, sub-section 1, of the Criminal Law Amendment Act, 1885, as amended by section 27 of the Prevention of Cruelty to Children Act, 1904. The offence was committed on the 15th of July, 1904.

At the trial counsel for the defence put the following submissions before the learned commissioner:

(1) That the proviso contained in section 5 of the Criminal Law Amendment Act, 1885, directs "that no prosecution shall be commenced for an offence under sub-section 1 of this section more than three months after the commission of the offence," and that the prosecution had been commenced more than three months after the commission of the offence, viz., upon the 27th of December, 1904.

(2) That although by section 27 of the Prevention of Cruelty to Children Act, 1904, "the limit of time mentioned in the second proviso [the proviso above set out] of section 5 of the Criminal Law Amendment Act, 1885, shall be six months after the commission of the offence," the said Act did not receive the Royal

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Assent until the 15th of August, 1904, and did not, in accordance with section 33, sub-section 3, thereof, come into operation until the 1st of October, 1904, both of such dates being subsequent to the date of the offence charged against the prisoner—viz., the 15th of July, 1904.

(3) That, having regard to the matters already set out, section 27 of the Prevention of Cruelty to Children Act, 1904, was not retrospective and did not apply to the offence of which the prisoner was convicted.

The learned commissioner convicted the prisoner, but submitted the following question for the opinion of the court: Whether the limit of time mentioned in section 27 of the Prevention of Cruelty to Children Act, 1904, applied to the prisoner's offence under section 5, sub-section 1, of the Criminal Law Amendment Act, 1885, or whether the second proviso of the last-named section alone applied.

Crompton Smith (*C. W. Nicholson* with him).—In *Mitchell* v. *Brown*, 1 Ellis & Ellis 267, it was held that although the offence in the first statute was not repealed in terms, yet it was in fact repealed by the later statute. [CHANNELL, J.—Your case is only authority that if provisions in two statutes are inconsistent, the later statute repeals the earlier.] [Lord ALVERSTONE, L.C.J.—Your real difficulty is this: Isn't this only a matter of procedure, and the operation therefore retrospective?] In penal statutes, more than in civil statutes, if there is a possibility of two constructions—one retrospective, the other prospective—the court is bound to accept the interpretation in favour of the latter. The latest case is *Tuck & Sons* v. *Priester*, 36 W. R. 93, 19 Q. B. D. 629, *vide* Lord Esher, at p. 638. *King* v. *Griffiths*, [1891] 2 Q. B. 145, is almost the only case of a criminal nature wherein the question of retrospective operation has been dealt with. [CHANNELL, J.—In that case there would have been no offence at all but for the statute.] [KENNEDY, J.—In this case there is actually an offence committed; the only point is, within what time must the prosecution be commenced.] [PHILLIMORE, J.—In some civilized countries you cannot prosecute for murder after ten years. Is no murder committed if the prosecution be not commenced within ten years?] By the Criminal Law Amendment Act, if the prosecution be not brought within three months, the man would be free. It would be a good defence to a subsequent prosecution. If the Prevention of Cruelty to Children Act be held retrospective it places this man in a worse position than it did at the time the offence was committed. The principle has been laid down for years and is found in Bacon's Maxims, rule 8.

Hutton, for the prosecution, was not called upon.

Lord ALVERSTONE, L.C.J. — We none of us have any doubt that the construction of the statute by Mr. Commissioner Rentoul is correct. I think, as stated in the House of Lords, the rule is clearly established that, under ordinary circumstances apart from special considerations appearing upon the face of the statute, alterations as to procedure are retrospective. It has been decided that where there was a shortening of the time the alteration was retrospective, and one can see no reason, if this is so, why the lengthening of the time should not be retrospective. I agree with the principles quoted from Maxwell's Interpretation of Statutes, p. 298, *et seq.* I think if a new right is created, or a right is taken away, or a new obligation or duty or disability imposed in respect to a transaction then passed, the statute could not have a retrospective operation, and if it could have been fairly and properly argued that an essential ingredient of the offence had been altered, then these provisions could not be applied to offences committed before the passing of the Act. In my opinion it would not be correct to describe the alteration of the limit of time from three months to six months as being an alteration of the character of the offence or of the mode of the defence. The offence is not altered, its character is not altered, the defence to be raised is not altered. The time within which the prosecution can be commenced is extended; that is merely a matter of procedure, and the defence ought not to prevail. The conviction must be affirmed.

LAWRANCE, KENNEDY, CHANNELL, and PHILLIMORE, JJ., concurred.

Solicitors for the defence, *Coburn & Co.*

Solicitors for the prosecution, *Moreton, Phillips, & Son.*

IN BANKRUPTCY.

K. B. Div. (B'gham, J.) — Jan. 17.

In re EASTGATE.

Ex parte THE TRUSTEE. (*a.*)

Bankruptcy—Property of bankrupt—Title of trustee—Goods obtained by bankrupt on credit without intention to pay for them—Contract induced by fraud—Right of creditor to take back goods—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44.

Where a bankrupt has obtained goods on credit without any intention of paying for them the vendor is entitled to treat the contract of sale as having been induced by fraud, and to disaffirm the contract and take back his goods after notice of act of bankruptcy, provided that he disaffirms the contract within a reasonable time of his discovery of the fraud.

Motion by the trustee in the bankruptcy for a declaration that certain goods sold by the respondent Bowling to the bankrupt on credit, and taken back by Bowling with notice of an available act of bankruptcy, formed part of the estate of the bankrupt, and for an order that they be delivered up to the trustee.

In February, 1904, the bankrupt, Eastgate, took a house at Sutton, Surrey, on the strength of false references, and proceeded to order goods from the tradesmen in the neighbourhood. Bowling, the respondent, supplied him with goods on credit to the value of £9 7s. 4d. between the 9th of March and the 15th of April.

On the 20th of April Bowling issued a summons in the county court for the price of the goods, but on the same day the landlord put in a distress for rent and found that the bankrupt had departed to avoid his creditors, thus committing an act of bankruptcy on or about that date.

On the 27th of April Bowling and some other creditors went to the house, and, having effected an entrance, took back the goods which they had supplied.

A bankruptcy petition was presented on the 4th of May, and a receiving order was made, and Eastgate was adjudged bankrupt on the 20th of May.

The bankrupt having been found guilty of frauds in another part of England, was sentenced to five years' penal servitude, and while serving that sentence he was charged by some Sutton creditors other than Bowling with obtaining credit by fraud, to which

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

charge he pleaded guilty at the Surrey Sessions on the 16th of August, 1904.

Clayton, for the trustee.—The bankrupt did not obtain these goods from the respondent by means of any fraud or false pretence, he obtained them on credit in the ordinary way; the property passed to him under a contract of sale. After notice of an act of bankruptcy the creditor could not disaffirm the contract. If the bankrupt had given him back the goods it would have been a fraudulent preference: *In re Fletcher, Ex parte Suffolk*, 9 Morr. 8. At the date of the commencement of the bankruptcy these goods were the property of the bankrupt, and consequently became vested in the trustee.

S. G. Lushington, for the respondent.—It is quite clear that at the time when the bankrupt obtained these goods he had no intention of paying for them, and that amounts to a fraudulent representation which will allow the vendor to disaffirm the contract even after he has knowledge of an act of bankruptcy. They were obtained by fraud and the trustee has no title to them: *Noad* v. *Green*, 15 M. & W. 216.

Clayton replied.

BIGHAM, J.—The question which I have to determine is whether at the time when Bowling took possession of these goods they formed part of the bankrupt's estate. I think they did not.

The bankrupt took a house at Sutton in February, 1904, and then began to make purchases in the neighbourhood on credit. In my opinion he never had the least intention of paying for any of the goods which he bought. He pretended falsely to the persons from whom he got the goods that he intended to pay for them when in reality he did not intend anything of the kind, and in that way he got possession of the goods.

In my opinion, as soon as the vendors found out that he had bought their goods without any intention of paying for them, they were entitled to treat the contracts as contracts obtained by fraud, and to disaffirm them within a reasonable time after the discovery of the fraud. In this case the sales took place between the 9th of March and the 15th of April. On the 20th of April, as Bowling did not get his money, he instituted proceedings in the county court to recover the price. He did not at that time know the circumstances. But a day or two later Bowling discovered that the bankrupt had absconded and committed an act of bankruptcy, and then for the first time found out the fraud. In my view he then disaffirmed the contract and, as he was entitled to do, he took back his property. The question now arises, did this property, at the time he took it, belong to the bankrupt's estate? The trustee acquires only the interest of the bankrupt in property he finds in the bankrupt's possession, he takes it subject to the rights of third parties. This property was subject to the vendor's right to disaffirm the contract of sale and retake possession of the goods.

Application dismissed.

Solicitors for the trustee, *Spence, Gibson, & Co.*

Solicitors for respondent, *Parker, Garrett, Holman, & Howden*, for *Rose*, Sutton.

Court of Appeal.

From K. B. Div. (In Bkcy.) (Vaughan Williams and Stirling, L.JJ., and Barnes, P.) } March 3, 11, 13.

In re CARTER & ELLIS.
Ex parte SAVILL BROTHERS (LIMITED). (*a.*)

Bankruptcy—Lessee—Disclaimer—Mortgage by sub-demise—Vesting order—Liabilities of mortgagee—Discretion of court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55 (1) (2) (6)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

The intention of the Legislature in enabling the trustee of a bankrupt to disclaim onerous property is to interfere as little as possible with the rights and liabilities of third parties. In exercising the wide discretion given to it, in the case of a disclaimer of leasehold property, by section 13 *of the Bankruptcy Act*, 1890, *the court should give effect as far as possible to this intention, and see that its discretion is so exercised that not only do the sub-lessees, or mortgagees by sub-demise, gain no advantage, but also that no injustice is thereby done to the landlords.*

This was an appeal from a decision of Mr. Registrar Giffard.

By seven indentures of lease, each dated the 1st of March, 1904, made in pursuance of a previous building agreement the Coopers' Company demised to Messrs. Carter & Ellis seven messuages in Beckton-road, West Ham, for, in each case, a term of ninety-nine years from the 29th of September, 1903, at a small ground-rent, the rents varying from £4 10s. to £3 10s.

Any assignment of the leases was to be registered with the clerk of the lessor company, but, except for that, there was no restriction on the right of the lesses to assign.

By indenture of the 1st of March, 1904; Carter & Ellis demised the several messuages to Savill Brothers (Limited) for the residues then unexpired of the several terms of ninety-nine years except the last day of each term by way of mortgage for securing the sum of £1,864 11s. 1d., and interest.

On the 24th of March, 1904, a petition in bankruptcy against Carter & Ellis was filed; on the 12th of April a receiving order was made against them, and on the 19th of April they were adjudged bankrupts. The official receiver, the trustee in the bankruptcy, on the 10th of November, 1904, disclaimed all interest in the several leases of the 1st of March, 1904. Savill Brothers made no application for an order vesting the property in them and making them subject to the same liabilities as the bankrupts were subject to under the leases at the date of the filing of the petition. The registrar, on the 6th of February, 1905, upon the application of the lessors, made an order that unless Savill Brothers (Limited) should within the time mentioned "elect to accept and apply for an order vesting in them the premises disclaimed by the trustee, and making them subject to the same liabilities as the bankrupts were subject to under the leases in respect of the premises at the date of the filing of the petition, they should be, and were thereby, excluded from all interest in and security upon the said premises."

Savill Brothers appealed.

The houses built on the property were new houses, and the rent had been paid, and the covenants of the leases had been observed.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The lessees had made a second mortgage by deposit in favour of a Mr. Phillips, but he did not ask for any vesting order.

The following are the material sections of the Bankruptcy Acts:

Bankruptcy Act, 1883, s. 55: "(1) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee disclaim the property. . . . (2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights and liabilities of any other person." "(6) The court may on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just, and on any such vesting order being made the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order on such terms shall be excluded from all interest and security upon the property, and, if there shall be no person claiming under the bankrupt who is willing to accept such an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt."

Bankruptcy Act, 1890, s. 13: "The period of twelve months shall be substituted for each of the periods of three months and two months limited by sub-section 1 of section 55 of the principal Act, and such period of twelve months may be extended by the court. The court may, if it thinks fit, modify the terms prescribed by the proviso in sub-section 6 of the same section, so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease that had been assigned to him at a date when the bankruptcy petition was filed and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order."

Astbury, K.C., and *Hansell*, for the appellants.—We claim the benefit of section 13 of the Bankruptcy Act, 1890. That section was introduced to meet cases which were found to bear hardly upon mortgagees. In the present case unless the section is applied either the mortgagees will lose their security altogether or they will be liable for the whole period of ninety-nine years under the covenants in the lease as if they had been the original lessees. It is difficult to imagine any case in which the court would apply section 13 if not in the present. This case is distinct from *In re Walker*, 2 Morr. 60, 43 W. R. Dig. 15, where a similar application was refused, because in that case there had been breaches of the covenant prior to the bankruptcy, and the effect of an order vesting the leaseholds in the mortgagees as from the date of the bankruptcy would have been to deprive the landlord of his remedies in respect of those breaches.

They also cited *In re Finlay*, 37 W. R. 6, 21 Q. B. D. 475.

Upjohn, K.C., and *Wace*, for the respondents.—Section 13 of the Act of 1890 only gives the court a discretion to modify the terms prescribed by section 55 (*b*) if it thinks fit. It follows, therefore, that to induce the court to exercise such discretion the appellants must show good cause. There is no reason in the present case why the mortgagees should not be subject to the same terms and liabilities as were imposed on the bankrupt by the original lease.

Astbury, K.C., in reply cited *Doe* v. *Pyke*, 5 M. & S. 146; *Smalley* v. *Hardinge*, 29 W. R. 554, 7 Q. B. D. 524.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J., referred to the facts, and continued: The question that we have to determine is whether the order of the learned registrar, having regard to the state of things which are recited in the order, was a right order to make or not. The contention of the appellants is that the order which should have been made was an order in pursuance of section 13 of the Act of 1890 vesting the premises, the subject of the mortgage, in them subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy was filed. In my judgment, the order of the learned registrar was not the right order, and I think that the contention of the appellants is substantially right. Section 55 of the Bankruptcy Act, 1883, and section 13 of the Act of 1890, taken together, are not very easy to construe, and I can very well understand the difficulty that may have presented itself to the mind of the learned registrar when he was asked to apply these two sections to the state of things existing in the present case. I do not propose in this judgment to determine or to express any opinion upon anything beyond that which it is absolutely necessary to do in the decision of this case.

I propose, before dealing with the sections in detail, to say, generally, what the ground of any decision in this case is. I am of opinion that the intention of the Legislature in cases of disclaimer by a trustee in bankruptcy appears to have been, when providing for the relief of the trustee from liability in respect of onerous obligations, including the obligations arising under a lease, to do so with as little disturbance as might be by reason of the disclaimer of the rights and liabilities of third persons. That appears in sub-section 2 of section 55. The basis of my judgment

in this case is that the order made by the registrar does affect the rights and liabilities of the appellants in a way which is not necessary for the purpose of releasing the bankrupt and his property and the trustee from liability.

Under these circumstances I have to consider whether the order asked for by the appellants is an order which will really carry out the intention of the Legislature as declared in sub-section 2 of section 55, and do that without doing any injustice to the ground landlords. I think that such an order, putting the appellants in the position of assignees of the lease, is an order which will best carry out the declaration of intention by the Legislature, and is also an order which inflicts no injustice upon the ground landlords. At common law, if there was a lease and a sub-lease, and the lease for any reason whatsoever became extinguished, the sub-lease disappeared—the branch fell with the tree. But then the Legislature stepped in, and to some extent in the reign of George II., and finally by the Real Property Amendment Act, 1845, provision was made for preserving the rights of the sub-lessee in cases in which there was a voluntary surrender of the lease accepted by the landlords. Under the Acts of Parliament dealing with bankruptcy prior to 1869 there was no particular provision made for disclaimer whatsoever. The assignee in bankruptcy was not bound to accept a *damnosa hæréditas*, and the lease was left outside the property which passed to the representatives of the creditors. This led to a great deal of difficulty and litigation, and in 1869 provision was made for the first time for disclaimer, and, to put it shortly, that disclaimer was intended expressly to operate as if there had been a voluntary surrender by the disclaiming trustees. No doubt that provision was expressly put into the Act to preserve the rights of sub-lessees and others claiming under the lessee. But this was found not to work perfectly, and when the Act of 1883 was passed section 55 was substituted for section 23 of the Act of 1869, and the words about the disclaimer operating as a surrender are omitted from section 55. The Legislature did not content itself with merely making the declaration, which appears in sub-section 2 of that section, but made a further provision in the first clause of sub-section 6 to enable effect to be given to that declaration. Then, having dealt thus with onerous property generally, the proviso in sub-section 6 goes on to deal with the particular case of leases. If that sub-section had remained unmodified I think the order made by the learned registrar would have been perfectly right; but it became apparent, by reason of cases which came into court, that to make the underlessee, or other person claiming through the lessee, accept all the liabilities of the lessee or otherwise be excluded from all interest in and security upon the property might work injustice, and might be really a most grave departure from the declaration of the Legislature in sub-section 2 of section 55, that the disclaimer should not, except so far as necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights and liabilities of other persons; and that being so, the Legislature enacted the provision contained in section 13 of the Act of 1890.

I do not read section 13 of the Act of 1890 as a repeal of the proviso in sub-section 6 of section 55 of the Act of 1883, nor do I read it as making it obligatory upon the court in all cases of a character falling within the proviso in sub-section 6 of section 55 to make an order putting the sub-lessee in a position where he is subject only to the same liabilities as if the lease had been assigned to him at the date when the bankruptcy petition was filed. The court has always a discretion in the matter. I had, when sitting in the Court of Bankruptcy, to construe section 13 in *In re Walker*, and in that case, which was a case in which the real question at issue between the parties was whether or not the vesting order was to leave the person in whom the property was to vest subject to the liabilites accruing by reason of past breaches of covenant, I thought that it would be unjust to make an order that those persons should take the property subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed. If I recollect rightly, the suggestion in that case was of intermediate breaches between those two dates. I acted upon that view, but I should have declined to make the order contemplated by section 55 of the Act of 1883 if the lessor had not been willing to accept certain conditions which were embodied in my order. I do not mention that case as affecting this case further than this—that it was a case in which I was of opinion that section 13 did not make it obligatory upon me to make the vesting order as upon an assignment of the lease, but gave me discretion as to whether I would make the order or not. I was only willing to make the order if the person desiring it was willing on his part to accept some conditions which I thought essential to doing justice between the parties.

I wish to say, before parting with the discussion, of section 55 and section 13, that I am not satisfied at present that the person to whom the vesting order is offered at the time of the application of the landlord being heard is entitled to say that for all purposes the *onus* of proof must be thrown upon the landlord, and that for no purpose can the sub-lessee, or other person having an interest derived under the lease, be treated as an applicant. I do not know that I have to decide any such question, and I do not propose, therefore, to decide it; but I am not satisfied at present that the argument which was addressed to us as to the position of the sub-lessee is sound.

Now, asking myself the question whether the order vesting the property in the mortgagees by sub-demise, if it should be made in the shape contemplated by section 13 of the Act of 1890, would give to them anything more than they would have had if there had been no disclaimer. I am of opinion that, in substance, to make them now in the position of assignees of the lease would give them nothing more than they would have had if there had been no disclaimer at all. In these particular leases there is no restriction on assignment. There is a provision that the assignment is to be registered; but, apart from that, the lessee has an absolute right to assign, and it seems to me that if the lessee had assigned this lease to the mortgagees, the landlords could not have interfered or complained at all, and it seems to me further, that the position of the sub-lessees on becoming assignees of the lease would have been substantially identical with the position of a sub-lessee if an order is made in his favour under the powers of section 13 of the Act of 1890. But even if that were not the case (and I express my opinion most positively that it is the case), it is perfectly manifest that to make an order in the terms in which this order has been made would put the mortgagees by sub-demise in a very much worse position than they would have been if there had been no disclaimer. But I do not think that when one has considered in this way the position of the mortgagee by sub-demise, and arrived at the conclusion that no profit, no improvement in position, is being given to him by an order made under the powers of section 13, one has considered all that it is incumbent upon the court to consider, the court having, as I have already stated, a discretion

in the exercise of those powers. I think that, having that discretion, the court ought to go a step further and ask whether it may not be that, notwithstanding that the position of the mortgagee by sub-demise is not improved, yet some injustice would be done to the landlord. In my judgment, it is just as obligatory upon the court to see that no such injustice is done to the landlord by making the order as it is to avoid, if possible, giving a profit or advantage to the mortgagee. Asking myself the question in this case, I cannot see, having regard to the terms of these leases, that any injustice whatever is done to the landlords. Of course it is open to a landlord at the time when the lease is made to insert provisions which would put him in a better position than these landlords are in the event either of the lessee wishing to assign or of his becoming bankrupt. But the parties to this bargain have not chosen to insert any such provisions in the leases. Under those circumstances I come unhesitatingly to the conclusion that no injustice is done to the landlord in this case; and I think that when once we come to the conclusion that the mortgagees by subdemise obtained no undue advantage by an order under section 13—that is to say, no improvement in their position from what it was potentially under the terms of the leases and the subdemise—and also to the conclusion that no injustice is done to the landlords, it follows almost necessarily that our judicial discretion ought to be exercised by making the order which is contemplated by section 13.

The result, therefore, in this case is, that the order appealed against will be reversed, and that an order will be made vesting these leases in Messrs. Savill Brothers, subject only to the same liabilities and obligations as if the leases had been assigned to them at the date when the bankruptcy petition was filed.

With regard to Mr. Phillips, who is mortgagee by deposit, he is represented here by the counsel who represents Messrs. Savill Brothers, and he does not ask us to make any special order for his protection. I can quite understand that, because it seems to me that in substance the order for the vesting of this property in the mortgagees by subdemise as if they were assignees affords all necessary protection to Mr. Phillips as mortgagee by deposit.

STIRLING, L.J.—I have arrived at the same conclusion. I only mean to decide that this is a case in which the discretion which is given to the court by section 13 of the Bankruptcy Act, 1890, may be properly exercised in favour of the mortgagees, and I arrive at that conclusion upon consideration of all the circumstances of the case. [His lordship referred to the facts, observing that there was no question in the case of any right of the lessors to enter in respect of any breach of covenant, and that there was no evidence to show that due care had not been exercised by the lessors in granting the leases and by the mortgagees in making the advance. He continued:] That being so, the question we have to consider is whether the order made by the registrar ought to stand, or whether, in favour of the mortgagees, the discretion conferred by section 13 of the Act of 1890 is to be exercised. The position of the matter as it stood under the Act of 1883 was considered by the Court of Appeal in *In re Finley*, and Lindley, L.J., in his judgment, points out the striking result of the provisions of sub-section 6 of section 55 of the Act of 1883. He says: "Whether the application is made by the sub-lessee or by the original lessor, in either case the vesting order can only be made in favour of the sub-lessee subject to the covenants and conditions of the original lease; and if the sub-lessee will not take the property on those terms, which, of course, he need not do, then these consequences appear to follow: First, the sub-lessee will be excluded from all interest in the disclaimed property; whether the latter part of the proviso in clause 6 will apply will depend upon whether there is any such person as is there referred to. There may or may not be. If no vesting order is made, the lease will be determined under sub-section 2, the sub-lease will be determined under sub-section 6, and the lessor will take the property freed from both lease and sub-lease. This appears to us to be the logical consequence of the Act, and it is impossible not to see that it is a very startling result. It will very seriously affect the old practice of taking securities on leasehold property by way of sub-demise, the whole object of which was to prevent the mortgagee from becoming liable to the rent and to the covenants and obligations of the original lease. In that state of things the Act of 1890 was passed containing the provision in section 13.

Two things seem to me to deserve notice with regard to that section: First, the operation of the section is somewhat narrow in its scope. Lindley, L.J., in the passage in *In re Finley* which I have read pointed out that the provisions of sub-section 6 of section 55 of the Act of 1883 would seriously affect the practice of taking securities on leasehold property by way of sub-demise, and that the object of that mode of taking a mortgage was to prevent the mortgagee from becoming liable to the performance of the covenants. The mortgagee lending money only wanted good security for his money, and had no intention whatever of undertaking the performance of the duties of lessee. But the Legislature has not seen fit to give the court any power at all to put him back in his old position. His sole choice is between taking a vesting order making him subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and being made subject only to the same liabilities and obligations as if the lease had been assigned to him at the same date. The second point which deserves to be noticed I think is the very wide discretion which is given to the court. The court may if it thinks fit modify the terms prescribed by the proviso. No class of cases is pointed at in particular to which that section is to apply. There is no limitation on the discretion except that it is to be a judicial discretion.

That being so, what ought to be done in the present case? In the one case the lessors will get solvent tenants subject for a term of ninety-nine years, with the covenant for a payment of rent and the performance of other covenants which will in the end be more serious than the payment of the rent. In the other case they will only get persons who are solvent who will be responsible for the payment of the rent and performance of the covenants during the period when they occupy or continue to be assignees of the property, and who will be at liberty, as any other assignee of the bankrupt would be, to assign over as they may see fit without any restrictions.

Looking at all the facts of the case, I ask myself which seems to be the better justice of the two? I think that if the lessors were to get solvent tenants who happen to be a corporation, and whose personal liability therefore may be very readily enforceable during the period of ninety-nine years put in the position of their own tenant—the lessors having granted their lease and the mortagees having taken their mortgage on the same day—most people would say that the lessors were very lucky indeed. In my judgment the better justice in all the circumstances of this case is that we should exercise the discretion in favour of the

mortgagees and say that they are only to be made subject to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was presented.

Sir GORELL BARNES, P.—The appellants' contention in this case is that they ought to be at liberty to have a vesting order of the disclaimed property subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed. The opposing contention is that the appellants ought to take a vesting order making them subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed. The contention of the appellants appears to me in the circumstances of this particular case to be right. I cannot see that in this case any injustice will be done to the lessor by acceding to the appellants' contention, whereas the order as it stands imposes, in my view, unreasonable tems on the appellants and puts them in a position which is contrary to the intention of the provisions of sub-section 2 of section 55 of the Act of 1883. I therefore agree with the judgments which have been pronounced.

Appeal allowed.

Solicitors, *Sandilands & Co.; E. L. Boyce.*

From K. B. Div. (In Bkcy.). (Vaughan Williams, Romer, and Stirling, L.JJ.) — Feb. 3.

In re BUTTON.
Ex parte VOSS. (*a.*)

Bankruptcy—Petition—Secured creditor—Estimate of value of security—Proof in bankruptcy—Undervalue—Mistake—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6 (2), 7 (3).

If in a petition in bankruptcy, presented by a secured creditor, an estimate of the value of the security is given in accordance with sub-section 2 of section 6 of the Bankruptcy Act, 1883, *the court will not inquire into the correctness of the estimate, provided that the estimate is genuine and not a mere sham. But the secured creditor cannot take any benefit from the administration in bankruptcy except on the basis of the estimate. Whether he may amend his estimate upon proof of mistake as to value,* quære.

Ex parte Taylor, In re Lacey, 13 *Q. B. D.* 128, *and* In re Vautin, Ex parte Saffery, 48 *W. R.* 96, *discussed.*

This was an appeal by a debtor from a receiving order.

On the 31st of March, 1904, the debtor gave William Voss a promissory note for £300 for money lent, and he also charged certain leasehold premises in Bethnal Green in favour of Voss as security for the loan.

On the 7th of October Voss obtained judgment against the debtor on the promissory note for £300 with interest and costs.

On the 4th of November Voss served a bankruptcy notice on the debtor for payment of the amount of the judgment debt. The debtor failed to comply with this notice, and on the 29th of November Voss presented a bankruptcy petition against him for £316 18s. 2d. Voss stated in the petition that he held security for the debt, and that he estimated the value of his security at £265, thus leaving a balance of £51 odd unsecured. The debtor, in an affidavit filed in opposition to the petition, stated that the value of the security was not less than £600, and he asked for an adjournment to arrange a transfer of the security or satisfy the claim.

The petition came on for hearing on the 20th of December, and was adjourned by consent till the 3rd of January, 1905, upon the terms of an agreement whereby the debtor agreed to pay Voss £50 and the costs of his petition, and to pay the debt of another creditor who had also filed his petition, and whose petition came on for hearing concurrently with Voss's petition; and the debtor admitted Voss's debt and undertook not to oppose the petition at the adjourned hearing.

On the adjourned hearing of the 3rd of January, 1905, the debtor attempted to raise the question as to the sufficiency of the petitioning creditor's debt, but the registrar held that he was precluded from doing so by the terms of the agreement for adjournment, and he made a receiving order.

The debtor appealed.

Upon the appeal further affidavit evidence was adduced on both sides as to the value of the security.

The debtor's surveyors fixed the value of the security at from £480 to £560, the petitioning creditor's surveyor at £250.

Tindale Davis, for the debtor.—There is no good petitioning creditor's debt, because if the security were properly valued it would cover the debt. A petitioning creditor may value his security under section 6 (2) of the Bankruptcy Act, 1883, and then rest on his security without proving; or if he does prove there is nothing to bind him to his valuation. It is submitted *Ex parte Taylor, In re Lacy,* 13 Q. B. D. 128, 32 W. R. Dig. 21, was wrongly decided, because the Divisional Court in that case assumed that the bankruptcy rules apply to the valuation in the petition, whereas they only a ply to the valuation in the proof: *In re Vautin, Ex parte Saffery,* 48 W. R. 96, [1899] 2 Q. B. 549. The result is that a petitioning creditor may obtain a receiving order by undervaluing his security and then decline to take any further proceedings in the bankruptcy, and so ruin the estate. Such an undervaluation is, therefore, "other sufficient cause" within section 7 (3). The case is also within section 7 (3) because the petitioning creditor put pressure on the debtor and obtained an unfair advantage for himself.

In re Otway, [1895] 1 Q. B. 812, 43 W. R. Dig. 17; *Moor v. Anglo-Italian Bank,* 27 W. R. 652, 10 Ch. D. 681; *In re Pogose,* 30 W. R. 930, 20 Ch. D. 289, were also referred to.

Frank Mellor, for the petitioning creditor.

VAUGHAN WILLIAMS, L.J.—Having regard to the contents of these affidavits it seems to me impossible to say that the creditor has not complied with the requirements of sub-section 2 of section 6 of the Bankruptcy Act, 1883, in the case of a petition by a secured creditor. Sub-section 2 is as follows: [His lordship read the sub-section, and continued:] It seems to me that the petitioning creditor has in fact complied with the provision as to valuation of his security; he has given an estimate, and it is admitted that his estimate is such that it is impossible to say that it is a mere sham, or not a substantial estimate. It was urged upon us that the registrar should, when a petitioning creditor estimates his security, inquire whether the estimate is right. I think the intention of this sub-section, which throws on the creditor the duty of making an estimate, was to avoid the necessity for any such inquiries. It is said that that is not likely to have been the intention of the Legislature, because it would enable a malicious or

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

unscrupulous creditor to make a fictitious estimate or undervalue his security and obtain a receiving order upon that estimate, though in truth and in fact his debt was fully secured or was so much secured that the balance would be insufficient to support a bankruptcy petition. The answer is that the petitioning creditor makes the estimate at his own risk, and though when the bankruptcy comes about sub-section 2 of section 6 may not apply, as was stated by Wright, J., in *Re Vautin, Ex parte Saffery*—and I am inclined to think it would not apply—yet when he comes in to prove the petitioning creditor is bound in this sense, that he cannot take any benefit in the administration in bankruptcy except on the basis of the estimate which he made in his petition. I very much doubt whether he ought in any circumstances to be allowed to amend his valuation and come in. It may be that he is not bound in the sense that the trustee is entitled to redeem the property at that valuation, but that is something which is not the act of the petitioning creditor. In my opinion the moment when we arrive at the conclusion that the estimate is a real estimate and not a sham we ought not to go into the question as to what is the true value after the declaration of the estimated value. There is also the further point as to whether the debtor could in this case go into the question at all, whether the petitioning creditor had complied with the statute, because it was said that he was precluded from doing so by the terms of the consent order. In my judgment the registrar ought always to be careful, although there is a consent that a receiving order is not made in such circumstances that the other creditors might be prejudiced. That, I understand, was the ground of the decision in those cases in which the judgment has proceeded on, that or some other estoppel. In circumstances like that the court has always held that it ought to refuse to make the receiving order, as that would be a case coming under the words "for other sufficient cause" in sub-section 3 of section 7. There is only one other matter to be dealt with in the second point that was made. It was said that the receiving order ought not to be made in this case because the creditor, by getting such an agreement as was embodied in the consent order, was using the bankruptcy law for a purpose for which it was not intended. I am aware that anyone who has any extensive experience of bankruptcy proceedings knows that a petitioning creditor constantly makes use of bankruptcy proceedings for the very purpose of extorting twenty shillings in the pound for himself from a debtor who has a large number of creditors, with the result that they find themselves in a very disadvantageous position if that position is prosecuted. Therefore I think that we should always look with some care at a case where an agreement is obtained as a condition of the adjudication of the petitioner, to see whether the petitioning creditor is obtaining any advantage for himself which he ought not to obtain over the other creditors. But though that is so no one would say that every adjudication to give the debtor an opportunity of paying the debt is contrary to the intention of the Bankruptcy Act. That may be perfectly fair. The Legislature and those who drafted the rules have taken effective means to prevent this abuse from frequently occurring. Under rule 169 of the Bankruptcy Rules, 1886-1890, after the expiration of one month from the day appointed for the first hearing of the petition no further adjournment can take place except on certain specified grounds or for some other sufficient reason to be stated in the order for adjournment. The result is that on the whole I think that there is nothing in the present case to justify us in saying that the process in bankruptcy was improperly used in order to make it right for us to allow the appeal. The appeal will therefore be dismissed.

ROMER, L.J.—I have come to the same conclusion for the same reasons, and I have nothing to add.

STIRLING, L.J.—I am of the same opinion, and for the same reasons. I only wish to add a few observations on the important question which has been argued as to the effect of the estimate by the creditor of the value of his security in his petition. The statute requires a secured creditor either to give up his security for the benefit of the creditors or to give an estimate of the value of his security. It was said that if the petitioning creditor gives an estimate of the value of his security he is not bound by it, but can, when he comes in to prove his debt, without saying that he made a mistake at the time of presenting his petition, prove for his debt, putting his security at a different value. I cannot agree. If he states that he is willing to give up his security for the benefit of the creditors if the debtor is adjudged bankrupt, and he is adjudged bankrupt, the creditor is not allowed to prove unless he does give up his security, and if he gives an estimate of its value it would lead to serious consequences and would be most unjust if he were allowed to depart from that estimate without evidence of mistake and prove on a different footing—that is to say, if in the same bankruptcy proceedings he were allowed to depart from his own valuation. It is in that sense that I understand the decision in *Ex parte Taylor, In re Lacey*.

I should be slow to depart from the decision given twenty years ago of two very eminent judges, Cave, J., and Smith, L.J., of whom the former had a special knowledge of the bankruptcy law. I should feel no doubt about it but for the fact that I see there is a difficulty which might occur, and which was pointed out by Wright J., in *In re Vautin, Ex parte Saffery*. Suppose a petitioning creditor after obtaining an adjudication takes no further step in the bankruptcy and holds his security, I have great difficulty in seeing how his estimate is in that case to be enforced against him. I see the difficulty that Wright, J., did, and I feel the force of his observation, that there is nothing in the Act about that, but all that there is goes to show, and justice requires, that a creditor coming in to prove should be bound by his valuation of his security. I reserve the question which may arise, whether he is entitled to alter his estimate if he proves that it was made under a mistake as to the value. That is a point which Wright, J., has decided, but I prefer to reserve consideration of the question until it arises. I certainly agree that this appeal must be dismissed.

Solicitors, *M. Edwards, Williams, & Co.; R. Voss & Son.*

From K. B. D. (In Bkcy.).
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Dec. 16, 19.

In re FLEW.
Ex parte FLEW. (*a.*)

Bankruptcy — Scheme of arrangement — Consent of creditors—Reasonable security—Speculative scheme—Approval by court—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3 (9).

Though the court is reluctant to refuse to approve a scheme which has been passed unanimously by the creditors, it is always open to the court to consider whether

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the scheme is or is not for the benefit of the creditors, and if the scheme appear to the court to be of too speculative a character the court may withhold its approval, notwithstanding that the creditors are unanimous in support of the scheme. Where the court refuses to approve a scheme an immediate adjudication of bankruptcy against the debtor will only be made in very exceptional circumstances.

This was an appeal from the refusal of the registrar to approve a scheme of arrangement by debtors with their creditors. The debtors were F. R. Flew and J. P. Flew, who carried on business as builders.

On the 15th of July, 1904, a receiving order was made against them on the petition of a creditor. At the adjourned meeting of creditors, held on the 23rd of August, a resolution was passed by a proper majority accepting a scheme of arrangement proposed by the debtors. The scheme provided for the vesting in a trustee to be appointed by the creditors of all property of the debtors which would become divisible if they were adjudged bankrupt. The trustee was to administer the property as if there had been a bankruptcy, and he had been appointed trustee therein. On approval of the scheme by the court the trustee was to pay in full all Board of Trade and court fees then due, including the fees and expenses of the official receiver. He was then to pay in full all preferential debts directed by the Bankruptcy Act, 1883, and the Preferential Payments in Bankruptcy Act, 1888, to be paid in priority to other debts.

Clause 4: "To pay to all their unsecured creditors in respect of all debts provable under the receiving order made against the debtors, and in full satisfaction and discharge of the same a composition of 20s. in the pound, payable in instalments of not less than 2s. 6d. in the pound, as and when the realization of the debtors' assets will allow." By clause 6, on the approval of the court, the receiving order was to be discharged. By clause 7, five persons therein named were to be appointed a committee of inspection. "8. That in consideration of this scheme and upon approval thereof by the court, and only in such case, the mortgagees (under specified mortgages of property belonging to the debtors) agree not to foreclose for a period of twelve months from the date of such approval, provided the same is obtained on or before the 31st of October, 1904, and in the event of the above-named trustee realizing or attempting to realize the said properties, to assist him so far as they can to realize the same as far as possible in the interests of the unsecured creditors, subject, nevertheless, to the payment in full to the mortgagees of all moneys owing under their security." "9. That upon the approval by the court of this scheme, and only in such case, family creditors having claims amounting to £820, whilst reserving their rights to prove and vote at meetings of creditors or upon this scheme, are prepared to postpone their claims to dividend until all other unsecured creditors have received 20s. in the pound."

By his report, dated the 20th of October, 1904, the official receiver reported that proofs had been made by sixty-nine joint creditors for sums amounting to £5,281 17s., and that he estimated that the total ranking joint indebtedness would amount to £5,391 4s. 8d. This estimate was, however, formed upon the assumption that none of the creditors regarded by the debtors as fully secured would seek to rank for dividend. The preferential debts amounted to about £151.

The joint assets were returned, as estimated, to produce about £29,910, but in his view there was no possibility of any such amount being realized. He reported that the debtor's assets were not of a value equal to 10s. in the pound on the amount of unsecured liabilities; that the debtors had omitted to keep proper books of account; that the debtors had brought on their failure by rash and hazardous speculations. "And with regard to the debtors' proposal, that it cannot be regarded as reasonable or as providing the security required by section 3, sub-section 9, of the Bankruptcy Act, 1890—*i.e.*, reasonable security for payment of not less than 7s. 6d. in the pound on all the unsecured debts provable against the debtors' estate."

The debtors' application for the approval of the scheme was supported by sixty-seven creditors whose debts amounted to £5,315 4s. 4d. out of a total of seventy-eight creditors whose debts amounted to £5,505 15s. 11d.

The registrar refused to approve the scheme (1) because the agreement of some creditors to stand by until a certain event as to certain debts had occurred, and as to other debts to abstain from foreclosure for twelve months brought the case within the decision in *In re Pilling*, 51 W. R. 465, [1903] 2 K. B. 50; (2) because the scheme was too speculative.

The debtors appealed.

By section 3 of the Bankruptcy Act, 1890, sub-section 9: "If any facts are proved on proof of which the court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than 7s. 6d. in the pound on all the unsecured debts provable against the debtor's estate."

Muir Mackenzie, for the debtors.—There being here a reasonable commercial probability that the unsecured creditors will receive 7s. 6d. in the pound, there is "reasonable security" within section 3, sub-section 9, of the Bankruptcy Act, 1890: *In re Bottomley*, 10 Morr. 262. The creditors are the best judges of what is for their benefit, and they are practically unanimous.

Carrington, for the creditors.

Sir R. B. Finlay, A.G., and *S. G. Lushington*, for the official receiver, were not called upon.

VAUGHAN WILLIAMS, L.J.—I think that this appeal must be dismissed. I propose to base my judgment on one point, and on one point only. [His lordship read sub-section 9 of section 3 of the Bankruptcy Act, 1890, and continued:] In my judgment in this proposal there is no such security as is there referred to.

I am of opinion that this scheme is a very speculative scheme indeed, and that it does not provide reasonable security even for 7s. 6d. in the pound. I am quite aware that the learned registrar in his judgment said that as there was a proposal to pay here 20s. in the pound, it may be he had not to decide what is the meaning of "unsecured debts provable against a debtor's estate" in the sub-section. But, in my judgment, we are bound to consider amongst other matters what sort of security is afforded here. Generally speaking, where there is an estate, and especially where there is an estate which may require a considerable expenditure of money to realise, the court would be reluctant to disapprove or refuse to approve any scheme that was passed by the creditors unanimously, or practically unanimously, because *primâ facie* the creditors are the people who are most interested and most able to judge whether a scheme is for their benefit or is not for their benefit. That is the course that the court would generally adopt in these cases. But as it seems to me that it is always open

to the court to consider whether the scheme is for the benefit of the creditors or not, although according to the general practice as I understand it the court is very reluctant to overrule the wishes of the creditors in respect of an estate in the realization of which they, and they alone, are interested. This case is obviously one to which, if the scheme had been for the payment of anything less than 20s. in the pound, subsection 9 of section 3 of the Act of 1890 would necessarily have applied, and under these circumstances it seems to me that we ought to affirm the decision of the learned registrar and dismiss this appeal. There are other points which are discussed in the judgment of the learned registrar such as the question of the conditional withdrawal of the debts of certain persons interested, mortgagees and what are called "family creditors." It is not easy, to say the least, for anyone to get a scheme approved in a case in which the debtor himself is party to this sort of conditional arrangement. The case of *In re Pilling* makes it difficult to do so, but I do not go the length of saying that in no case would it be possible, if the court thought it had full disclosure of all the facts and all the negotiations for a scheme to be approved.

Therefore, for the reasons I gave at the beginning of my judgment I think that this appeal must be dismissed.

ROMER, L.J.—I also think that this scheme (if it can be properly called a scheme) is one that the court ought not to sanction. I say this for the reasons given by my lord, and also because I think there is a good deal in what Mr. Registrar Giffard in his very careful judgment said—namely, "What the creditors will risk is sufficiently clear. The whole of the assets will be put out of the reach of the court, while the debtors through their trustee continue to carry on a speculation which the official receiver has already described as 'rash and hazardous,' and as contributing to bringing about their insolvency."

COZENS-HARDY, L.J.—I agree.

Lushington, for the official receiver, asked that an immediate adjudication of bankruptcy might be made against the debtors under section 20 of the Bankruptcy Act, 1883, and referred to *Re Burr*, [1892] 2 Q. B. 467, 40 W. R. Dig. 16.

VAUGHAN WILLIAMS, L.J.—We think that such an order ought to be made only in the most exceptional circumstances.

Solicitors, *T. Blanco White; Solicitor to Board of Trade.*

High Court of Justice.

Chan. Div. } March 23.
Farwell, J. }

In re TURNBULL.
SKIPPER *v.* WADE. (*a.*)

Will—Legacy—Gift of duty—No residuary estate—Settlement estate duty—Finance Act, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.

A testatrix gave various legacies "free from duty." Her estate was insufficient to pay the legacies in full and there was no residuary estate. Held that the duties were to be considered legacies, and that all legacies should abate in proportion together. Also that a bequest of a legacy free from duty included payment of settlement estate duty; and that a legacy to her husband with a declaration that if he predeceased her, the legacy should vest in his representatives, to be dealt with as part of his personal estate, as if he had died after testatrix, carried legacy duty on disposition of such gift by the husband in his will.

In re Wilkins, 33 *W. R.* 42, 27 *Ch. D.* 703; Farrer *v.* St. Catherine's College, Cambridge, 21 *W. R.* 643, 16 *Eq.* 19; In re Bridger, 42 *W. R.* 179, [1894] 1 *Ch.* 297, *approved of.*

Finance Act, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *discussed.*

Summons.

A testatrix, Mrs. M. E. Turnbull, who died in November, 1903, by her will dated the 28th of June, 1893, bequeathed the following legacies: To her husband £50,000, with a declaration that if he died before her the said legacy should not lapse but vest in his representatives, to be dealt with as part of his personal estate, as if he had died immediately after her; to her nephew, F. M. Skipper, £16,000; to her niece, H. M. C. Skipper, £15,000 for her life, without power of anticipation with remainder to her children as she should by deed or will appoint; to her stepniece, V. G. P. Skipper, £3,000. The total pecuniary legacies bequeathed by the will amounted to £123,000, and were all directed to be paid "free from duty." The estate of the testatrix was estimated at £116,000, a deficiency of £7,000 on the aggregate of the legacies alone. There was thus no residuary estate for the payment of duties.

After the date of the will the said V. G. P. Skipper married, and her marriage settlement contained a provision for the settlement of after-acquired property.

In 1895 the said H. M. C. Skipper married, and in 1904 trustees were appointed of the legacy of £15,000 settled upon her and her children. The husband of the testatrix predeceased her leaving a will.

Legacy duty was ascertained to be payable upon the legacy to the husband's representatives at the rate of 10 per cent., upon the legacy to V. G. P. Skipper, and upon the legacies to F. M. Skipper and to H. M. C. Skipper and her children at 3 per cent.

The questions sought to be determined by this summons included the following, all depending on the construction of the direction in the will that all legacies were to be "paid free from duty": (1) Whether the duties given were themselves legacies, and, if so, how the amount payable to each beneficiary was to be ascertained. (2) Whether the direction included settlement estate duty. (3) Whether the 10 per cent. legacy duty payable in the events which happened on the legacy given to the representatives of the testatrix's husband was included in the direction to pay free from duty.

Upjohn, K.C., and *R. J. Parker*, on the first point, for the trustees of the £15,000 legacy settled on H. M. C. Skipper (Mrs. Dundas), argued that a direction to pay free from duty was a direction to pay out of some fund not a legacy—that is to say, out of residue. As there was no residue the gifts of duty failed *pro tanto*: *Wilson* v. *O'Leary*, 17 Eq. 419; Hanson's Death Duties (4th ed.), 464.

Jenkins, K.C., and *Beebee*, for the trustees of the marriage settlement of V. G. P. Skipper (Mrs. Lane), maintained that the proper plan was to first of all pay all duties and then apportion the balance rateably according to the amounts of the actual legacies originally given: *In re Wilkins*, 33 W. R. 42, 27 Ch. D. 703; *Farrer* v. *St. Catharine College, Cambridge*, 21 W. R. 643, 16 Eq. 19 (not cited in *In re Wilkins*).

Maughan, for the executors.

Jessel, for Mr. Skipper.

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

FARWELL, J., in giving judgment on this point, referred to *Noel* v. *Lord Henley*, 7 Price 253, 26 R. R. 660, and said that in *Farrer* v. *St. Catharine College, Cambridge*, Lord Selborne held that duty given as in this case is a pecuniary legacy which must abate accordingly. The right principle was that laid down by Pearson J., in *In re Wilkins*, though his arithmetic was open to question; namely to treat the duty as a legacy and let all the legacies abate proportionately.

Upjohn, K.C., and *R. J. Parker*, on the second point, as to whether the direction to pay included settlement estate duty, argued that it was payable. Under the Estate Duty Act of 1896, s. 19, it is a "duty." Kekewich, J., had held it payable in *In re Lewis*, [1904] 2 Ch. 656, though in *In re Cayley*, 53 W. R. 144, [1904] 2 Ch. 781, Eady, J., had not followed this case. [*In re Bridger, Brompton Hospital* v. *Lewin*, 42 W. R. 179, [1894] 1 Ch. 297, was also referred to.] Though the duty was only imposed by the Finance Act of 1896, the imposition of a new duty does not stop the court from finding in a will made before the Act imposing it an intention to include the new duty in the case of such a direction as was to be found in this will: *In re Maryon-Wilson*, 48 W. R. 338, [1900] 1 Ch. 570; Theobald on Wills, p. 359. "Free from duty" meant free of all duty payable when the legacy was handed over. The will speaks from the death of the testatrix, and intends to give the beneficiary a net sum.

Jenkins, K.C., for the purposes of construction you must regard the law in force at the time when a will is made. This will was made before the Act of 1896, and must be so construed. *Jones* v. *Ogle*, Sau. & Sc. 1, where husband and wife took as one person after 1882 in a will made before the Married Women's Property Act of 1882. Both *In re Lewis* and *In re Cayley* were cases of wills made after 1896. The nature of the further duty imposed by the Act of 1896 was that it was paid by the executors, not as executors, but as trustees for the legatees, out of the legacy. This was merely a device for collection, not for computation. The words in this will were not "free from all duties," but "free from duty," and would not cover this case if you applied *In re March, Mander* v. *Harris*, 32 W. R. 941, 27 Ch. D. 166.

Butcher, K.C., and *Austen-Cartmell*, for the representatives of the husband, said that the question turned on words in the Finance Act of 1896, s. 19, which also were in the Act of 1894, s. 14—namely, that settlement estate duty shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy in exoneration of the rest of the deceased's estate. An "express provision" was discussed by Kekewich, J., in *In re Parker-Jervis*, 47 W. R. 147, [1898] 2 Ch. 643. The words "free from duty," speaking of legacies, meant primarily "free from legacy duty," and were not an express provision as to settlement estate duty, which was of a different nature and imposed in place of further estate duties in the future. Settlement estate duty is chargeable, not on this succession, but on a future one. It arises under the Act of 1894, and is only made immediately payable by the Act of 1896. Thus the later Act is not to be construed as changing the nature of the duty.

FARWELL, J.—The testatrix has said that all legacies are to be free from duty. The will is dated in 1893, before the Finance Acts of 1894 and 1896, under which settlement estate duty is payable. But it was laid down in *In re Bridger* that section 24 of the Wills Act, which enacts that a will speaks from the death of the testator, applied so as to give a larger sum to the legatee than would have been his at the date of the will in that case. I consider that I am bound to follows Lord Davey and read the will as made at the date of death. The words "free from duty" mean paid free from all duty. The settlement estate duty is charged upon the legacy and must be paid by statute before handing over the legacy. One duty is the same as another for this purpose. The executors must discharge the duty before they can pay the legacy. I can make no differences between the various duties payable, and I hold that the settlement estate duty is a legacy like the rest of the duties.

R. J. Parker, on the third point, argued that the legacy to testatrix's husband was payable as if he had died immediately after her. If he had survived her no duty would have been payable on the legacy to him. As it was before handing over the £50,000 to his representatives for distribution, 10 per cent. legacy duty was payable. The words of the will could not be held to cover this payment.

FARWELL, J.—This is in its essence a legacy to the husband's estate. I cannot cut down the generality of the direction to pay "free of duty." The distinction proposed is too subtle for me. All the legacies are given free of duty, and this is a legacy.

Solicitors for the executors, &c., *Busk, Mellor, & Norris*.

Solicitors for Mr. Turnbull's representatives, *Corbould, Rigby, & Co.*

Solicitors for Mrs. Lane's trustees, *A. Campbell Wade*.

Chan. Div.
Buckley, J. } April 7.

In re TAYLOR.
MATHESON *v.* TAYLOR. (*a.*)

Company—Bonds—Interest payable out of net earnings as and when available—Proceeds of sale—Capital or income—Tenant for life and remaindermen.

A settlement comprised bonds which carried cumulative interest at six per cent., payable "as and when earned out of any net earnings of any year remaining after interest on 'certain bonds, which constituted a prior charge, "shall have been paid for such year, and if in any year the net earnings so remaining available shall not be sufficient to pay such interest in full there shall be paid any part thereof earned and available, and any deficiency shall not be waived but shall be paid . . . out of the net earnings of any subsequent year or years as and when there shall be any net earnings available for such purpose." Upon a sale of the bonds by the trustees,

Held, that the whole of the proceeds of sale of the bonds was capital money, and that the tenant for life under the settlement was not entitled to any part thereof as arrears of income.

Adjourned summons.

This was a summons taken out by the trustees of the settlement made upon the marriage of the late Mrs. H. N. G. Taylor, asking how, if at all, the proceeds of sale of certain mortgage bonds ought to be apportioned as between capital and income.

The settlement was an ante-nuptial one, dated the 12th of May, 1899.

Part of the property brought into settlement consisted of fifteen second mortgage 6 per cent. Gold Bonds of the Mexican National Railroad Co., the trusts declared of which property were, shortly (after the marriage), for the benefit of the wife for her life, then for her husband (the defendant Walter Taylor) for his life if he should survive her, then for the

(*a.*) Reported by H. H. KING, Esq., Barrister-at-Law.

children of the marriage as the wife should appoint, with an ultimate remainder in favour of the wife's next-of-kin.

Mrs. H. N. G. Taylor died intestate on the 22nd of May, 1902, and administration of her estate was granted to her husband, Walter Taylor, on the 31st of July, 1903.

The interest on the bonds was in arrears in 1899, and in or before March, 1902, no interest having been paid in the interval, a reorganization scheme came into operation, under which a new company was formed to take over the assets of the old company, the holders of bonds in the old company being given the right to take certain benefits under the scheme in exchange for their bonds, which were to be deposited.

The trustees did not deposit the bonds they held, but sold them on the 8th of March, 1902, for £2,700. The question thereupon arose whether Walter Taylor, as legal representative of his wife, or as the present tenant for life, was entitled to any part of this sum as arrears of income. The terms of the bond sufficiently appear from the judgment.

Buckmaster, K.C., and *G. P. C. Lawrence*, for Walter Taylor.—The £2,700 should be apportioned. The fact of there being no profits in any year does not destroy my right to income from the bonds, it only suspends it. My right to income is not contingent on there being profits. The debt due under the coupon is due year by year, and the right to receive that debt remains until payment is made. The proper apportionment would be as in *In re Atkinson*, [1904] 2 Ch. 160.

Astbury, K.C., and *J. I. Stirling*, for the remainder-men.—There was not a legal accruing debt in each year. The tenant for life has not suffered the loss of any debt which she was legally entitled to recover. The bonds never carried interest, but only an opportioned part of profits if earned.

They referred to *Bouch* v. *Sproule*, 36 W. R. 193, 12 App. Cas. 385, and *In re Armitage*, [1893] 3 Ch. 337.

T. H. Wright appeared for the trustees.

BUCKLEY, J.—The bonds as to which the question arises were the subject of a tenancy for life, which came to an end on the 22nd of May, 1902. It is admitted that down to that date there were not in existence any net earnings such as are referred to in the bond. In other words, it is admitted that the fund out of which the interest was to be paid was at that time non-existent. The question is whether in that state of things the tenant for life was entitled to any and what part of a sum of £2,700 for which the bonds have been sold. It is obvious that that sum included all expectations of anything which might be payable under the bond; it included the arrears (if that word is applicable in any proper sense) of interest on the bonds, as well as the principal money secured by them, and if there were arrears which accrued during the tenancy for life, I have no doubt that an apportioned part of that sum ought to be paid to the tenant for life's estate; but in my judgment there were no such arrears. The question falls to be decided, I think, on an examination of the bond. The bond was one under which interest was to be paid as and when earned, out of any net earnings of any year remaining after paying the interest on certain first mortgage bonds; so that interest was payable only out of a fund, and as and when that fund came into credit. It seems to me plain from that that until there was a fund there was no debt at all in respect of the interest. The bond went on to provide that if and when in any year there were any net earnings available for payment of the interest which should not be sufficient to pay such interest in full there should be paid any part thereof earned and available, and any deficiency should not be waived but should be paid to the holder thereof out of any subsequent year or years as and when there should be any net earnings available for such purpose. The coupon which is attached to the bond is, if possible, more plain, and is an express obligation to pay the bearer six months' interest, "such interest to be payable only as and when earned out of any net earnings available therefor."

It seems to me that under that instrument there was no interest payable at all as income of a year in which there was no fund available for its payment. Suppose that in the year 1904 there was no fund available and that the tenant for life died on the 31st of December, 1904. There was no income, I apprehend, payable to that tenant for life, because the obligation is to pay out of a fund, and there was no such fund. If in the year 1905 a fund came into existence, the interest calculated for the year 1904 would become payable, I agree, but it would be income of the year 1905 and not income of the year 1904; and if a second tenant for life were in enjoyment of the property in 1905 that tenant for life and not the previous tenant for life's estate would, it seems to me, take that interest. It all turns on this: there is no obligation in this instrument to pay interest; there is only an obligation to pay interest out of a fund, and there is no obligation to pay until there is such a fund; and if there is no such fund during the existence of a tenancy for life, then the tenant for life, as it appears to me, is not entitled to any interest. Under these circumstances it seems to me that the tenancy for life which came to an end on the 22nd of May, 1902, down to which date there was no fund, is not entitled to anything as arrears of income; and the sum which has been received for the purchase-money of the bonds is not apportionable.

Solicitors, *Freshfields; Hind & Robinson.*

Chan. Div. } April 1.
Buckley, J. }

In re NORTH OF ENGLAND STEAMSHIP CO. (LIMITED AND REDUCED).* (*a.*)

Company—Special resolution—Notice of two meetings given by one document—Clause in articles of association—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

The articles of association of a company contained a clause providing that "whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting."

Held, that a notice so given was not, as regards the second meeting, in accordance with the provisions of section 51 *of the Companies Act,* 1862.

Petition.

This was a petition presented by the above-named company praying that a reduction of capital to be effected by a special resolution of the company might be confirmed by the court.

On the 4th of February, 1905, a notice in writing was given to the members of the company that an

* Reversed by Court of Appeal.—[ED., *W.R.*]

(*a.*) Reported by H. H. KING, Esq., Barrister-at-Law.

extraordinary general meeting of the company would be held on the 15th of February, at the place and time in the notice mentioned, at which the subjoined resolution (which was a resolution for the reduction of the company's capital) would be proposed. The notice also stated: "Should such resolution be duly passed by the required majority, the same will be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting of the company which will be held on Friday, the 3rd day of March, 1905, at the same time and place." Article 70 of the articles of association of the company provided that seven clear days' notice should be given to members of any meeting of the company, and that whenever it was intended to pass a special resolution the two meetings might be convened by one and the same notice, and it should be no objection to such notice that it only convened the second meeting contingently on the resolution being passed by the requisite majority at the first meeting.

The resolution was passed by a three-fourths majority at the meeting held on the 15th of February, and was confirmed by a majority of the meeting held on the 3rd of March.

Martelli, for the petition.—The special resolution was validly passed and confirmed, having regard to the special terms of article 70. In *Alexander* v. *Simpson*, 38 W. R. 161, 43 Ch. D. 139, where the Court of Appeal held that one notice could not extend to both the meetings, there was no such special article, and the decision turned on article 52 in that case. Here the question is on section 51 of the Companies Act, 1862, which says that a notice is duly given if given in the manner prescribed by the regulations, and that manner is prescribed in this case by article 70.

BUCKLEY, J.—Section 51 of the Companies Act provides: "Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held whenever such notice is given and meeting held in manner prescribed by the regulations of the company." The regulations of this company contain a provision that "whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting." It is necessary, therefore, to determine whether section 51 of the Act of Parliament allows a contingent notice of a meeting. The language of the notice which was sent out here is, I think, identical with, or at any rate substantially, as Mr. Martelli admits, in the words of the notice given in *Alexander* v. *Simpson*. It runs thus: "Should such resolution be duly passed by the required majority, the same shall be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting of the company, which will be held on Friday, the 3rd of March." That is to say, it is a notice that only in a contingency—namely, that of the resolution being passed at the first meeting—will there be a second meeting at all. The question therefore is, whether that is a compliance with section 51. The decision of the Court of Appeal in *Alexander* v. *Simpson* was simply on the articles of association; it was not necessary to go back to the statute, and the Court of Appeal held that the regulations of the company had not been complied with. I desire to point out why. The relevant article there was article 52, which said that seven days' notice in writing should be given to the members before every general meeting. What the company did was to give exactly such a notice as has been given in this case, and Bowen, L.J., at p. 148, says: "If that paragraph is to be read as a notice that the subsequent extraordinary general meeting of the company would only be held on that day in the event of the passing of the resolutions at the former meeting, it is obvious that it would not be a good notice, because it would leave a shareholder who got the notice in ignorance whether or no the general meeting of the 29th of July was to be held." That is to say, the court was of opinion on the document in question in that case—namely, the articles of association, that notice of a contingent meeting was not, within article 52, notice of a meeting. That being so, it was not necessary to go on to determine the question which I have to determine here—namely, supposing you have complied with you articles, have you complied with the statute? That point I have now to decide.

The document upon which I have to decide it is the Act of Parliament, which says: [His lordship again read the provision at the end of section 51 of the Act.] On the construction of that enactment, with the assistance of the decision of the Court of Appeal in *Alexander* v. *Simpson*, is it giving notice of a meeting to give notice of a contingent meeting? *Alexander* v. *Simpson* decides plainly that it is not. Of course it is sought to get over that by saying that the section says "in manner prescribed by the regulations," and that these regulations do provide for notice of a contingent meeting. But does that get over the difficulty? Certainly not; because the Act of Parliament says that that of which you must give notice is a meeting. You may give notice of a meeting as your regulations provide; the Act does not allow you to give notice of a contingent meeting as your regulations provide. Therefore the point here is exactly the same as in *Alexander* v. *Simpson*, but it arises under the Act of Parliament, and not under the regulations. Of course the articles cannot enlarge the Act of Parliament. I desire only to add that this is not mere pedantry, but is, to my mind, a matter of substance. A special resolution is a serious and solemn thing. The Act of Parliament provides that it shall be submitted to two meetings. The notice of the second meeting ought to be an efficient and effectual thing. The Act of Parliament must have intended to contemplate this: that persons possibly might stay away from the first meeting because they knew they could come and object at the second meeting. The second meeting is not a mere form at all; it is a solemn reality which the Act of Parliament requires, and I think it is not giving due effect to the Act of Parliament to endeavour to give the go-by to the second meeting by an article such as that in the present case, the effect of which is that after the first meeting has been held nobody will know whether there is to be a second meeting or not unless they make inquiry and find out in some way what the result of the first meeting has been.

I therefore hold that the special resolution has not been passed in the manner provided by the Act of Parliament. I think the point is governed by *Alexander* v. *Simpson* when applied to a different state of facts. I therefore dismiss the petition.

Solicitors, *Gibson & Weldon*, for *Bertrand Watson*, Stockton-on-Tees.

Chan. Div. } Feb. 17; March 9, 16, 18.
Joyce, J. }

In re JONES & ROBERTS. (*a.*)

Solicitor—Lien—Country solicitor and town agent—Trustee in bankruptcy—Right to production of documents in order to vouch bill of costs—Waiver of lien.

The town agent of a country solicitor who has given notice to the country client of his lien, has a right of lien upon all the documents which have come into his possession during the course of the proceedings for the whole amount of the costs due from the country client to the country solicitor; and this right of lien is not waived because the town agent has acted for the country client in obtaining an order to tax the country solicitor's bill of costs.

Motion to compel the London agents of country solicitors to produce certain documents which had come into their hands as agents in order to enable a bill of costs to be vouched and taxed.

Robbins, Billing, & Co., were formerly the London agents of Jones & Roberts, of Llanrwst, who were the solicitors of one T. Edwards in certain administration proceedings.

In the autumn of 1903, while those proceedings were pending, the country solicitors became bankrupt, and Walter Conway was appointed their trustee in bankruptcy.

In August, 1904, the trustee delivered to Edwards the bill of costs of the said Jones & Roberts, which included part of Messrs. Robbins, Billing, & Co.'s, agency charges, whereupon the London agents gave notice to Edwards not to pay the amount of the bill, and as the trustee would not undertake to pay what was due to them out of the proceeds of the bill, they presented a petition on behalf of Edwards for the taxation of the bill, and on the 25th of October, 1904, obtained an order to tax the said bill, and also that Edwards and the trustee should produce all books and papers in their possession. The trustee's solicitors then gave to the London agents notice to produce before the master all the books and papers in their possession necessary to vouch the said bill, and on the 9th of November the taxing-master ordered that the parties to the order of the 24th of October, and their solicitor, should produce all documents and papers necessary to vouch the the said bill. Thereupon Edwards gave notice of change of solicitor.

On the 13th of January, 1905, the trustee's solicitors obtained from the master a *subpœna duces tecum* which was addressed to and served upon a member of the firm of Robbins, Billing, & Co., commanding him to produce all the papers and vouchers in the list annexed thereto. He attended before the master, but refused to produce the documents in the *subpœna duces tecum* on the ground that he had a lien on them, not only for the proportion of the bill that was due to him as agent in that matter, but also for all costs due to him from his country solicitor. The trustee moved for an order that the member of the firm be ordered notwithstanding the lien claimed by him to produce before the taxing-master all the documents in his possession which might be necessary for the purpose of obtaining taxation of the said bill. It appeared that it was impossible to proceed with the taxation of the bill unless the documents were produced.

P. F. Wheeler, for the trustee.—The town agent had no general lien upon the papers for his costs, but only a particular lien in respect of particular items: *White* v. *Royal Exchange*, 1 Bing. 20; *Ward* v. *Hepple*, 15 Ves. 297; *Dicas* v. *Stockley*, 7 C. & P. 587. As against the lay client there was no such general lien, and even if there were it could not be insisted upon to prevent the production of the documents to the trustee in bankruptcy: *Ex parte Bramble*, 28 W. R. 676, 13 Ch. D. 885. There was a difference between producing documents and handing them over. A solicitor of a company might be ordered to produce to the liquidator in the winding-up documents relating to the company without prejudice to his lien for costs. *In re South Essex Estuary and Reclamation Co.*, 17 W. R. 275, L. R. 4 Ch. App. 215, which clearly marks the difference between the production of documents as asked for in this case and handing them over as in *In re Capital Fire Insurance Association*, 32 W. R. 260, 24 Ch. D. 408. The lien cannot be allowed so as to enable a solicitor to refuse to produce documents necessary for the taxation of the bills of the country solicitor and so to prevent the trustee from collecting the estate. A solicitor was bound to produce to a creditor of his client the documents in his possession belonging to his client, notwithstanding he had a lien upon them so as to enable the creditor to take steps to get in a mortgage debt due to the estate. In *In re Hawkes*, 46 W. R. 445, [1898] 2 Ch. 1, which was an administration action in which the conduct of the action had been given to a creditor, there was no privity of contract between the London agent and the lay client. The London agent could have no claim against the lay client, nor could he be liable to the lay client for negligence. The London agent received his retainer subject to the risk that if the country solicitor became banbrupt, he could only prove in the bankruptcy.

Robbins, Billing, & Co. appeared as solicitors for Edwards and obtained the common order to tax, which order required the production of all documents in the possession or power of Edwards and his solicitor; therefore they are, on this ground, estopped from relying on their lien. By obtaining the order to tax they have waived their lien and cannot now insist upon it: *Jacobs* v. *Latour*, 5 Bing. 130, where Best, L.C.J., said a lien was destroyed if the party entitled to it gave up his right to the possession of the goods. Lien was a right which could be taken away by very little. The trustee offered to give Robbins, Billing, & Co. all their out-of-pocket expenses and half the profit charges in the action to which the documents related.

R. Younger, K.C., and *Alan Macpherson*, for Messrs. Robbins, Billing, & Co.—The lien of the town agent as against the country solicitor was a general one and covered all costs due from the country solicitor in respect of agency business and disbursements generally; but as against the client the lien was only good to the amount to which the client was indebted to the country solicitor. The right of the lay client against the London agent was no greater than his right against the country solicitor. The trustee of the bankrupts has no greater right than the bankrupts had. As against the bankrupts the London agents are entitled to payments of, or security for, all sums due on the general account. The broad principle as laid down by James, L.J., in *Ex parte Newitt*, 29 W. R. 344, 16 Ch. D., p. 531, "is that the trustee in a bankruptcy takes all the bankrupt's property, but takes it subject to all the liabilities which affected it in the bankrupt's hands, unless the property which he takes as the legal personal representative of the bankrupt is added to by some express provision of the bankrupt law." In *Lambert* v. *Buckmaster*, 2 B. & C. 616, Abbott, C.J., held that

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

the solicitor had the same right of lien against the assignees that he had against the bankrupts. The Bankruptcy Act 1883, s. 49, showed what transactions are protected from passing to the trustee, and it was evident that all liens without notice of bankruptcy were preserved. *In re Johnson & Weatherall*, 36 W. R. 374, 37 Ch. D. 433, showed that the lien of a London agent against the country solicitor was a general one. *In re Capital Fire Insurance Association* decided that a winding-up order could not defeat a valid lien existing at the time when the winding-up petition was presented. The decision in *In re Hawkes* only applied to administration and other representative actions, and ought not to be extended. In *Lawrence* v. *Fletcher*, 27 W. R. 937, 12 Ch. D. 858, it was held that the London agent had a general lien against the country solicitor, which extended to all costs for all agency business and disbursements due from the country solicitor. Messrs. Robbins, Billing, & Co., would be willing to surrender the documents if the trustee would hand over to them all the money received by them from the client subject to the costs of taxation.

Cur. adv. vult.

JOYCE, J.—Jones & Roberts were solicitors in the country. Robbins, Billing, & Co. were the town agents of Jones & Roberts. Edwards employed Jones & Roberts in the country as his solicitors, and there were certain matters in which Robbins, Billing, & Co. acted as town agents for Jones & Roberts concerning the country client. Jones & Roberts became bankrupt, and Edwards wanting his papers, I suppose, acting through Robbins, Billing, & Co. as his proper solicitors, obtained the usual order for the taxation of the bill of costs of Jones & Roberts—obtained it, of course, against the trustee—and that order provided for the taxation in the usual way, and "that the trustee in bankruptcy do produce before the master all books, papers, and writings in their custody, or power relating to the matters hereby referred to, or any of them." In the proceedings on the taxation it became necessary to have certain papers in the hands of Robbins, Billing, & Co., the town agents of Jones & Roberts, and a *subpœna* was issued and served upon Mr. Robbins as to certain papers specified required for the taxation. Robbins appeared upon his *subpœna* but declined to produce the papers, claiming a lien for costs due to him from Jones & Roberts, including, among other things, costs which were chargeable against Edwards, the country client. Then the present application by motion was made to me for an order against Robbins "that he do produce the papers," and so on.

Now if there had been no bankruptcy of Roberts, and if the country solicitor had been the respondent on the order for taxation and had issued a *subpœna* and served it upon Robbins, then in the absence of special circumstances, none of which exist in the present case, I think it to be clear that the town agent would not be bound to produce the documents unless his lien was satisfied or secured. It was contended on behalf of the trustee, on the authority of *In re Hawkes*, 46 W. R. 445, [1898] 2 Ch. 1, that the production being required for the purpose of getting in a debt due to the bankrupt, and so indirectly for the purpose of administering the bankrupt's estate, Robbins was bound to produce the documents notwithstanding his lien. But I think that when the case of *In re Hawkes* and the other cases that were cited are looked at, no real authority for such a contention can be found, and that argument in my opinion fails.

Then it is said that Robbins, Billing, & Co. waived their lien through having acted as solicitors for Edwards in obtaining the order to tax; no authority has been cited for this proposition, and I do not follow the argument upon which it is based. I think it would very much astonish some of the large firms in London who transact agency business for country solicitors if they were told, that they lost their lien against the country solicitor by the mere fact of acting as solicitor for the country client in another matter and obtaining an order to tax; therefore I hold that there is nothing in that point. Robbins, Billing, & Co. having given notice to Edwards of their lien, it appears to me that they have as against the country solicitor a lien on the documents which they hold of the country client for the whole amount due from the country client to the country solicitor. This is so stated in all the text-books and is referred to in Daniell's Chancery Practice, p. 1693, and Cordery on Solicitors (3rd ed.), p. 360, supports that proposition. I am of opinion that there is nothing in the case of *Ward* v. *Hepple*, 15 Ves. 297, conflicting with this proposition. The whole thing was clearly stated, in my opinion, by Fry, J., in the case of *Lawrence* v. *Fletcher*, 27 W. R. 937, 12 Ch. D. 858. Early in the case I urged upon the parties that by consent some order ought to be made by which the lien of the town agents should be preserved, or their rights should be preserved, but yet the taxation might proceed, and the payment of the amount due from the country client be obtained. Mr. Younger offered, if his lien or rights were preserved as to the amount coming from the country client, to allow as against the town agent the costs and expenses without deduction of the taxation, and to allow those to be retained by the trustee in bankruptcy. On the other hand, Mr. Wheeler, on the part of the trustee in bankruptcy of the country solicitor, offered to make an arrangement to preserve the lien of the town agent, but only to the extent of the particular charges contained in the bill, which were for work done by the town agent for the country client through the country solicitor. Having regard to the cases which I have referred to in the text-books, in my opinion this offer falls short of what Messrs. Robbins, Billing, & Co., the town agents, are entitled to insist upon. Therefore, with reluctance, I must refuse this motion, and, considering the offer made by Mr. Younger, I must refuse it with costs.

Solicitors, *Jacques & Co.*, for *W. Thornton Jones*, Bangor; *Robbins, Billing, & Co.*

Chan. Div. } Jan. 11.
Warrington, J. }

SITWELL v. EARL OF LONDESBOROUGH. (*a.*)

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 10 (*iv.*); *ss.* 6, 7, *sub-sections* 2, 3—*Mines—Mining lease—Reservation of mining lease—Support to surface—Lease of power to let down surface—Tenant for life.*

Under section 6 *of the Settled Land Act*, 1882, *a tenant for life of settled land has power to grant a lease of a right to let down the surface of the land for mining operations.*

Sir G. Sitwell by his marriage settlement conveyed land of which he was owner in fee to uses under which he became tenant for life. The deed contained an exception from the conveyance of all mines under the land in question, with power to work the same. Any person exercising these reserved rights was to make reasonable

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

compensation to the trustees of the settlement for all damages caused to the inheritance, and also to the persons for the time being entitled to the surface of the land for damage to things upon the surface.

Held, that Sir G. Sitwell had no power under the exception to authorize lessees to work the mines so as to let down the surface of the settled land, but that as tenant for life he could, under section 6 of the Settled Land Act, 1882, grant a right to do so by lease.

By his marriage settlement of the 11th of July, 1888, Sir G. Sitwell, Bart., appointed and conveyed lands and hereditaments of freehold tenure except and reserved out of the appointment and conveyance, all mines of coal and ironstone and other mines, whether opened or unopened, lying and being in and under the said premises, together with full power to work, get, carry away, sell, and dispose of the same, and to do all such acts and things upon, in and under the said premises as should be necessary or expedient for all or any or the purposes aforesaid, but so nevertheless that no surface operations should be carried on within (*) of Renshaw Hall, and that no underground workings shall be carried on within (*) thereof, and so that the person or person exercising the rights and liberties thereby reserved should make reasonable compensation to the trustees or trustee for the time being of the said settlement (to be held by them or him as capital moneys arising from the exercise of the power of sale conferred on a tenant for life by the Settled Land Act, 1882) for all damages caused to the inheritance of the said premises by the exercise of such liberties, and also to the person or persons for the time being entitled to the surface of the said premises for all damage caused to growing crops or other things upon such surface, the amount of such compensation to be settled as therein mentioned, to the use of the said Sir G. Sitwell during his life without impeachment of waste, and after his death to certain uses therein set forth for securing a jointure rent-charge for his wife, and subject thereto to the use of the defendants the Earl of Londesborough and Sir William Henry Arthington Worsley for the term of 1,000 years, upon trust for raising portions for the settlor's younger children, and subject thereto to the use of his first and other sons by his said wife successively according to seniority in tail male, with remainder to the use of the settlor, his heirs and assigns. By the settlement the defendants were appointed trustees thereof for the purposes of the Settled Land Acts, 1882 and 1884, and it was declared that no part of the rent reserved on any mining lease within the meaning of the former Act, which should be granted pursuant to the said Act or otherwise should be set aside as capital money, but the whole thereof should go as rent and profits.

At the date of the settlement the plaintiff was owner in fee of the lands thereby settled, and he afterwards purchased the fee simple of other lands and minerals adjoining the settled lands.

In November, 1903, the plaintiff entered into a contract with the Rother Vale Collieries (Limited), to grant to that company a lease of the Barnsley seam of coal, lying party under the settled land and partly under the land purchased by him, and to authorize the lessees to work the seam without leaving any support to the surface except where there were buildings.

Upon the company raising an objection as to his power to do this, he took out a summons to determine the questions:

(1) Whether upon the true construction of the above-mentioned settlement the plaintiff, as the person absolutely entitled to the mines and minerals in and under the hereditaments settled by the said settlement, had power to work or to authorize other persons to work such mines and minerals without leaving any support for the said settled hereditaments, or so as to let down or otherwise injure the surface of the said settled hereditaments.

(2) If the plaintiff as the person so absolutely entitled had not such power, then that it might be declared that the plaintiff as tenant for life under the above-mentioned settlement had power to demise or grant to a lessee (in any lease made by himself as absolute owner of the said mines and minerals in and under the settled hereditaments) the right to work such mines and minerals without leaving any support for the said settled hereditaments, and to let down or otherwise injure the surface of the said settled hereditaments, and that it might be determined what rent ought to be reserved in respect of such right if granted.

WARRINGTON, J., held, with regard to the first point, that the plaintiff had no power to let down the surface under the reservation of minerals with power to work them. The law was laid down in *Davis v. Treharne*, 29 W. R. 869, [1881] 6 App. Cas. 460, 467, and the fact that this was a marriage settlement contained two different compensation clauses made no difference.

The second question was then argued.

Rowden, K.C., and *Bryan Farrer*, for Sir G. Sitwell, asked for a declaration that the plaintiff as tenant for life of the settled estates was entitled, under the Settled Land Act, 1882, to grant to the company a lease of a power to let down the surface. Without this right they could not get anyone to take a lease of the minerals. By section 6 a tenant for life is authorized to lease any easement, right, or privilege over the settled land for any purpose whatever for any term not exceeding in the case of a mining lease sixty years. By section 2, sub-section 10 (iv.), a "mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes." The proposed lease of a right to let down the surface will be a grant for purposes connected with mining, and will, therefore, be a mining lease within section 6. The right to let down the surface is an easement which is grantable by law, and any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose: *Rowbotham v. Wilson*, (1860) 8 H. L. C. 348, 362, 8 W. R. H. L. Dig. 4. Therefore, this right can be given by way of lease by a tenant for life under section 6, and that lease may be for sixty years. A mining lease may include surface land necessary for the effective working of the minerals: *In re Reveley's Settled Estates*, (1863) 11 W. R. 744.

H. Terrell, K.C., and *Hemmerde*, for the trustees.—The proposed grant is not a lease at all. It is a surrender for a term of years of the right to support. That right is in the case of land a right of property, and in the case of buildings an easement: *Dalton v. Angus*, (1881) 6 App. Cas. 740, 791, 29 W. R. Dig. 75. In this case the settled land is the dominant tenement, and the right is not an easement. A grant of a right to destroy the surface is not a lease within section 6. By section 7, sub-section 3, every lease is to contain a condition of re-entry. It is not possible to re-enter on such a right as this, so no lease can be granted. Even if it is an easement of which a lease can be granted within section 6, the arrangement now suggested ought not to be carried out. The proposed rent is quite inadequate, and it is impossible to

(*) Blank in the original.

ascertain the best rent of such a right; whereas by section 7, sub-section 2, it is provided that every lease shall reserve the best rent that can reasonably be obtained.

WARRINGTON, J.—The question which I have now to decide arises upon the Settled Land Act, 1882. The question is whether the plaintiff as tenant for life is, under the provisions of the Settled Land Act, entitled to grant to lessees of his minerals the right to let down the surface of the land. The material provisions of the Act are these: By section 6, "a tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding . . . (ii.) in the case of a mining lease sixty years." By the definition clause, section 2, sub-section 10 (iv.), "Mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting, or otherwise converting or working for the purpose of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes."

What is proposed is to grant to the lessees of the mines a right during the continuance of their lease so to work the mines as to let down or damage the surface of the settled land. It seems to me that, assum- the right so to do is within section 6, then the purposes for which it is proposed to grant that right are mining purposes within sub-section 10 (iv.) of the definition clause, and it only remains to consider whether such a right as it is proposed to grant is "an easement, right, or privilege" over the settled land within section 6. What is the right which it is proposed to grant? It is a a right to damage the surface. It is true that it is a right to damage the surface by underground workings, but for the purpose of construing section 6 the source of the damage is immaterial.

If the section allows, as I think it is plain that it does allow, a lease of a right to damage the surface either, for instance, by opening a pit and removing that part of the surface altogether, or by constructing a railway or tramway over the surface, which cannot be done without damaging part of the surface, it must, I think, also authorize the granting of a lease of a right to damage the surface in any other way. That this is so is shown by *Rowbotham* v. *Wilson*, and particularly by a passage at p. 362. Lord Wensleydale says: "I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analagous to the grant of a right to damage the surface by a way over it; and it was admitted, at your lordships' bar, that there is no authority to the contrary. It is undoubted law, that no particular words are necessary to a grant; and any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose." That is sufficient authority for saying that a right to damage the surface, however the damage is caused, is a right which is grantable at law. If that be so, I see no reason why under the Settled Land Act a tenant for life should not be authorized to lease that right, and to lease it in a proper case for mining purposes.

It is said that it is impossible to ascertain the best rent. I do not follow that.

The Act only says that the lease shall reserve the best rent which can reasonably be obtained. It may be a difficult question to decide, it may be a question for experts, but that such a rent could be ascertained one ought to have no doubt.

It was said that such a lease cannot comply with section 7, sub-section 3, as to a condition of re-entry. I do not think that can be maintained. Strictly, a condition of re-entry is only applicable to corporeal hereditaments. It is clear from the express words of section 6 that a tenant for life has the right to lease incorporeal hereditaments. The two sections, therefore, must be read together, and section 7, sub-section 3, must be understood to apply only to a lease to which a condition of re-entry is applicable.

I therefore hold that the tenant for life has power to grant the right in question for mining purposes.

Solicitors, *Arnold & Henry White.*

K. B. Div. (Farwell, J.) — Feb. 15, 21.

YOUNG v. NAVAL AND MILITARY AND CIVIL SERVICE CO-OPERATIVE SOCIETY OF SOUTH AFRICA (LIMITED). (a)

Company—Directors—Remuneration—Travelling and hotel expenses—Attending board meetings—Resolutions of directors—Reimbursement inter se—*Articles of association of company—Special circumstances.*

Directors of public companies who receive payment for attending to the business of the company are not entitled to be paid their travelling expenses to and from board meetings out of the company's assets in addition, unless there are special circumstances existing, or there is an authority in the instrument which regulates the company or the shareholders at a properly convened meeting to sanction it. Therefore a resolution of the directors, general in terms, purporting to give their travelling expenses to all the directors is clearly bad in the absence of such special circumstances or authority.

Action.

This was an action before Farwell, J., sitting as an additional judge of the King's Bench Division, and was brought by the plaintiff as a director of the defendant company, the question being raised whether a director who, in his capacity as director, had always received a fixed remuneration for his services, was entitled to the expenses which he had incurred in travelling to and fro to attend the board meetings of the company.

The company was incorporated in the year 1902, and on the 25th of April, 1902, the plaintiff was appointed one of its directors.

On the 13th of May, 1902, a board meeting was held at which the plaintiff and four other directors were present, and amongst various resolutions passed was the following: "(16) That all reasonable travelling expenses be reimbursed to the directors from time to time."

The articles of association of the company provided —viz., by article 91, for the payment of £200 per annum to each director "by way of remuneration for his services."

Article 92 provided for special remuneration for directors rendering special services or making special exertions in going abroad or otherwise for the purposes of the company.

Article 93 was the usual one for authorizing the directors to exercise the general powers of the company.

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

By article 105 directors were forbidden to vote on matters in which they were interested, and article 161 provided that every director, manager, secretary, and other officer or servant of the company should be indemnified against, and it should be the duty of the directors, out of the funds of the company, to pay all costs, losses, and expenses which any such officer or servant might incur or become liable to by reason of any contract entered into or act or deed done by him as such officer or servant, or in any way in the discharge of his duties. The plaintiff, while he was director of the company, was living at Totnes, and he was present at several board meetings, and was paid out of the company's funds, on each occasion, his travelling expenses to and from London and his hotel bills whilst in London. Nineteen receipts were produced by him, all signed, some of them containing details on the back—*e.g.*, one for the 25th of October was endorsed: "Return fare to and from Totnes, £2 18s. 4d.; cab hire to and from station, 3s. 6d.; hotel charges, 19s. 8d." The plaintiff claimed a balance of director's fees, and a small sum for unpaid travelling expenses. The defendant company counterclaimed repayment of a larger sum paid to the plaintiff while he was a director for travelling and hotel expenses, and also claimed from him payment of travelling expenses paid out of the company's funds while he was director to two other directors.

A. C. Clauson, for the plaintiff.—Trustees are entitled to just expenses under section 24 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), and directors are rather like trustees, and in certain cases are entitled to their travelling expenses.

He cited *Ex parte Joyner, In the Matter of Sharpe*, 2 Mont. & Ayr Bkcy. Reps. 1; *Attorney-General* v. *The Mayor, &c., of Norwich*, 2 My. & Cr. 406, on p. 424; *Cullerne* v. *London and Suburban General Permanent Building Society*, 39 W. R. 88, 25 Q. B. D. 485; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 48 W. R. 74, [1899] 2 Ch. 392, on p. 418; *Hirsche* v. *Sims*, [1894], A. C. 654, on p. 660, 43 W. R. Dig. 36; *Dovey* v. *Corr*, 50 W. R. 65, [1901] A. C. 477, on pp. 485, 486.

Upjohn, K.C., Cozens-Hardy, and *Park Goff*, for the defendants, referred to *In re George Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674. Directors can only be considered trustees when considering their liability in dealing with the funds of the company, and the difference between them and trustees is this: A trustee is always a trustee, but a director is not always so; he acts at the board meetings, also he may be considered in the light of a trustee when exercising the powers conferred on him by those board meetings, but not when he is at home. Articles 91 and 92 refer to all payments, article 161 only indemnifies them for expenses incurred in the discharge of their duty. Article 105 renders the resolution of the 13th of May, 1902, inoperative, for all the directors passed a resolution that their own travelling expenses should be paid. Directors, as a rule, are remunerated. If they desire more than their remuneration, as a general rule, they must go to the company. Here there were no special circumstances. If a man accepts an appointment at a stipulated salary it is his duty to go to the place where his duty lies, and he cannot claim out-of-pocket expenses, and here the director goes to the board meetings at his own expense.

Clauson, in reply.—General principles cannot be argued. This case must be decided on its facts and there are special circumstances.

Cur. adv. vult.

Feb. 21.—FARWELL, J., read the following judgment: [After stating the facts set out above, he continued:] No imputation of any sort is made against the plaintiff. It is not suggested that he had any design of travelling for his own pleasure or living at hotels at the company's expense. He was living in the West of England when he was elected, as was apparent from his address, and had to travel and stay at least one night in town in order to attend the directors' meetings, nor is it contended that such payments as were made are *ultra vires* the company; but it is said by the company that they are payments which cannot properly be allowed to be made by directors to themselves.

I am told that it is not unusual for directors to receive their travelling expenses to and from board meetings out of the company's assets, and I was unwilling to charge the plaintiff in this case, who was obviously honest, and whose sole salary as a director will not cover his travelling expenses, if I could avoid it. But, in my opinion, the law on the subject is plain. "Directors have no right to be paid for their services, and cannot pay themselves or each other or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting": *In re George Newman & Co.*, 43 W. R. 483, [1895] 1 Ch., at p. 686. But directors being both agents of and trustees for the company are entitled to be indemnified by the company against all losses and expenses properly sustained and incurred by them in the due performance of their office. They are both trustees and agents—trustees of the company's property, with the liabilities of trustees in respect thereof—*In re Lands Allotment*, 42 W. R. 404, [1894] 1 Ch. 616, 631—and agents in the transactions which they enter into on behalf of the company: *Great Eastern Railway* v. *Turner*, 20 W. R. 73, 68 Ch. App., p. 152. Their right to indemnity arises by the implication of a contract from the relation between themselves and the company, and therefore depends on the particular relation existing, for different contracts are implied from different relations. Thus an unpaid trustee is entitled to complete indemnity for all proper expenses incurred by him in the execution of his trust. The reasonable inference from his consent to act as a trustee gratuitously is that he is not to be out of pocket by reason of any proper expenditure in the matter, and I have no doubt of the correctness of the statement in Lewin on Trusts (11th ed.), p. 771, that a trustee will be entitled to be reimbursed his travelling expenses provided they are properly incurred, although the cases cited in the note are not cases of trustees in the usual signification of that term. But different considerations apply to the case of a paid agent or a paid trustee. The question, then, is: What outlay does his remuneration cover? For, if he is paid on the basis of providing anything at his own expense, he cannot get paid twice over by claiming the costs thereof under his right to indemnity. A paid agent is bound to discharge all the duties incident to his agency for the payment agreed on, and cannot make extra charges for work properly within the scope of his employment as agent. Thus in *Marshall* v. *Parsons*, 9 C. & P. 656, a commission agent for the sale of goods sought to charge, in addition to his commission, for attendances at Somerset House, where the patterns of the goods were inspected by Government officers. Lord Cranworth, then Baron Rolfe, directed the jury that the question was whether what the plaintiff did was or was not done in the ordinary course of his business as an agent—if the former, he was paid by his commission; if the later, he was entitled to be paid for them separately. I ask myself, then, if remuneration to a director for his services does or does not include his travelling expenses to and from the

board room, and I am of opinion that it does. It is the chief part of the ordinary business of a director to attend board meetings. Directors as a rule do not reside at the registered office of the company, where board meetings are usually held. The director lives where he pleases and suits his own convenience. He is paid a fixed sum for attending and advising with his co-directors. His expense in getting there is included in his salary, because it is necessarily incident to the duty undertaken by him that he should be in that particular place. He has undertaken for a fixed sum to do work at particular meetings of himself and others. He cannot perform his obligations without attending, and such attendance, being necessary for, is paid by the remuneration for such work. The banker, merchant, or solicitor who employs managers or clerks to work for salaries at his bank or offices does not thereby fall under any implied liability to reimburse them their travelling expenses to and from the bank or offices. Counsel for the plaintiff relied on article 161; but that merely states the general law applicable to agents and trustees, and must be read with the qualification that I have just pointed out. If it were not so every servant of the company could insist on his travelling expenses to and from the company's work in addition to his wages.

The reasons that I have given for holding travelling expenses included in the remuneration apply with even greater force to the hotel expenses. I can see no ground whatever on which they can be successfully claimed. The foregoing observations apply, of course, only to the case before me of travelling and hotel expenses to attend board meetings, and have nothing to do with similar expenses incurred on special occasions for special purposes. Then it is said that the plaintiff is entitled by reason of the special resolution of the 13th of May, 1902, but this resolution is clearly bad. It is general in terms, and purports to give their travelling expenses to all the directors. As I have already held that these expenses are included in their salaries, this resolution is equivalent to voting a present or additional remuneration to themselves and is bad. It might also be put on the ground that the resolution is a nullity under article 105, as all the directors present were incapacitated, from voting on it, and it is a single resolution and cannot be split up, as was suggested by counsel for the plaintiff, into a series of resolutions in which four directors might be taken as voting his expenses to the fifth. Further, the resolution does not mention hotel expenses, and these would be wrongly paid in any event. The company further claims from the plaintiff repayment of the sums paid to two other directors, but there is no evidence that the plaintiff did more than vote in favour of the resolution of the 13th of May, 1902, and had a general knowledge that travelling expenses were being paid, except in the case of £10 to Colonel Peile, the cheque for which he signed. I must hold him liable for this £10; but with regard to the rest I am of opinion that the case is covered by the decision of the Court of Appeal in *Cullerne* v. *London and Suburban, &c., Building Society*, 39 W. R. 88, 25 Q. B. D. 485, and that the plaintiff is not liable. The result is that the plaintiff recovers in the action £37 14s. 4d., and the defendants recover on the counter-claim £124 2s. Judgment will be entered for the defendants for £86 7s. 8d., and the plaintiff will have the costs of the action on the High Court scale, and the defendants the costs of the counter-claim with set-off.

Judgment.

Solicitor for plaintiff, *S. J. R. Stammers.*

Solicitors for defendants, *Cox & Lafone.*

Court of Appeal.

From Court of Passage, Liverpool. (Vaughan Williams, Romer, and Stirling, L.JJ.) } Feb. 13, 14, 15, 16.

MAGUIRE v. MAYOR OF LIVERPOOL. (a.)

Local authority—Highway—Statutory duty to repair—Neglect to repair—Liability—Indictment—Damages—Liverpool Improvement Act, 1846 (9 & 10 *Vict. c. cxxvii.*), *ss.* 36, 37, 38, 58.

Where by statute a liability to repair highways, which by common law would be thrown upon the inhabitants at large, is transferred to a new corporation or body created for the purpose of taking over the liability, it is not to be inferred that a new liability is created unless distinct intention on the part of the Legislature can be found in the terms of the Act. Primâ facie, *therefore, such new corporation or body is not liable to be sued by an individual for damages resulting from nonfeasance any more than the inhabitants of the parish would have been. And an intention on the part of the Legislature to impose the larger liability will not be inferred from a provision that the new corporation or body is to be liable to be indicted at common law for the want of the sufficient repair of any public highway in the same manner as any person or persons liable to the repair of highways was or were before the passing of the Act in question. If and so far as the case of* Hartnell *v.* Ryde Commissioners, 11 *W. R.* 963, *lays down any general proposition of law with regard to the liability in respect of the repair of highways, it must be taken to be overruled by the decision in* Cowley *v.* Newmarket Local Board, [1892] *A. C.* 345, 41 W. R. Dig. 85.

This was an appeal by the defendant corporation against a decision of the judge of the Court of Passage at Liverpool.

On the 5th of November, 1903, the plaintiff's horse and trap were being driven down Brownlow-hill, a public highway in the city of Liverpool. At a point in Brownlow-hill where it is entered by Blake-street there is a crossing made by slabs of stone placed in the roadway. On the lower side of the crossing, near one of the slabs of stone, a hole had been formed, described as being five inches in depth, shelving up to three inches, and nine inches across. Into this hole the plaintiff's horse put its foot, fell on its knee, and received such injuries that it had to be destroyed, with consequent agreed loss to the plaintiff of £24.

The action was brought to recover that amount from the defendants.

It was not contended by the defendants that the driver had been careless, and the want of repair was admitted. But it was contended that the evidence proved only nonfeasance on the part of the defendants, not misfeasance, and the judge held that there was no evidence of misfeasance. It was contended for the defendants that, this being so, they were not liable.

Down to 1830 some of the roads in Liverpool were repairable by the corporation and the others were repairable by the inhabitants of the parish.

It was admitted for the purposes of the case that Brownlow-hill was of the latter class.

By an Act passed in 1830 the duty of repairing all the roads was transferred to commissioners appointed by the Act. That Act was repealed by the Liverpool Improvement Act, 1846, under which the duty was transferred to the Corporation of Liverpool.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The learned judge, on the authority of *Hartnell* v. *Ryde Commissioners*, 11 W. R. 963, 4 B. & S. 361, held that the defendants were liable, and gave judgment for the agreed amount with costs.

The defendants appealed.

The following are the material provisions of the two Acts:

The Liverpool Act, 1830, s. 1, recited that certain ancient streets within the town of Liverpool had been accustomed to be paved and repaired at the expense of the mayor, bailiffs, and burgesses of Liverpool, and that certain other streets had of late years been also paved and repaired at the expense of the said mayor, bailiffs, and burgesses, and that other streets had been used and accustomed to be paved and repaired at the expense of the inhabitants of the said town, and that it was expedient to appoint one body of commissioners, and appointed nine of the common council of the town of Liverpool, together with fifteen owners or occupiers, commissioners for putting the Act into execution.

Section 75 appointed the commissioners surveyors of highways within the town of Liverpool.

Section 76 required the mayor, bailiffs, and burgesses to pay to the commissioners out of the borough fund a yearly sum of £5,000 to be applied for the purposes of carrying the Act into execution or as the commissioners should direct.

The Liverpool Improvement Act, 1846, s. 1, recited that the borough of Liverpool had been extended; and that it was expedient that the powers to be granted should be combined under one management and be uniform throughout the whole of the said borough; and enacted that the council of the said borough should carry this Act into execution.

Section 6 repealed the Act of 1830, and enacted that all powers and authorities thereby granted to the commissioners appointed by that Act should cease and determine.

Section 36: "And be it enacted, that the said mayor, aldermen, and burgesses shall be and they are hereby declared to be the surveyors of highways within and throughout the said borough, and shall have and they are hereby invested with, and by the said council may exercise, all such powers and authorities as any surveyors of highways in that part of the United Kingdom called England are or shall be invested with by virtue of the laws now or hereafter to be in force, and shall also be subject to all the liabilities to which surveyors of highways are now by law subject or may hereafter become subject."

Section 37: "And be it enacted, that the management and control over all and every of the streets within the said borough existing and being at the time when the provisions of this Act shall come into operation, or which shall thereafter be made (not being turnpike roads), and the pavements and other materials as well in the footways as carriage-ways of the said streets, and all erections and buildings, materials, implements, and other things provided for the purpose of the said highways by the surveyors of the highways, or by the said commissioners, under the hereinbefore recited Acts respectively, or by the said mayor, aldermen, and burgesses, or the said council, shall be the property of and are hereby vested in the said mayor, aldermen, and burgesses."

Section 38: "And be it enacted, that it shall be lawful for the said council from time to time to cause all or any of the streets within the said borough so vested in the mayor, aldermen, and burgesses as aforesaid, or any part thereof, to be formed, paved, or flagged, and the ground or soil thereof to be raised, lowered, or altered, in such manner and with such materials as they shall think proper, and also to pave or make, with such materials as they shall think fit, any causeways, pavements, or footways for the use of passengers in or on the sides of any such street, or elsewhere within the said borough, and to cause such streets, causeways, and footways to be repaired from time to time as may be required: Provided always, that if in consequence of carrying the said power and authority into execution, any alterations of any steps, doors, or entrances into any houses or buildings, or of any pavement, sewer, or drain adjoining or belonging to any property, shall be rendered necessary, such alteration shall be made by the said council by and out of the rates to be raised by virtue of this Act."

Section 58: "And be it enacted, that the said mayor, aldermen, and burgesses shall be liable to be indicted at common law for the want of the sufficient repair of any public highway within the said borough, in the same manner as any person or persons liable to the repair of such highways was or were before the passing of this Act."

Section 160 enacted that the various parishes and townships which then composed the borough should be separate and distinct districts for the purpose of laying and levying the rates imposed.

Section 161 enacted that the £5,000 required to be contributed under the Act of 1830 should be paid from the borough fund towards the sewerage and paving rates in the district of the parish of Liverpool.

Pickford, K.C., and *Oulton*, for the appellants.

Danckwerts, K.C., and *Stewart-Brown*, for the plaintiff.

Pickford, K.C., replied.

The following authorities were cited in the course of the arguments: *Hartnell* v. *Ryde Commissioners*, 11 W. R. 963, 4 B. & S. 361; *Russell* v. *Men of Devon*, 2 D. & E. 667; *Ohrby* v. *Ryde Commissioners*, 12 W. R. 1079, 5 B. & S. 743; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 25 W. R. 794, 2 Ex. D. 441; *Couch* v. *Steel*, 2 W. R. 170, 3 E. & B. 402; *Gibson* v. *Mayor of Preston*, 18 W. R. 689, 5 Q. B. 218; *Parsons* v. *St. Matthew, Bethnal Green*, 15 W. R. 85, 3 C. P. 56; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 41 W. R. Dig. 85; *Pictou Municipality* v. *Geldert*, 42 W. R. 114, [1893] A. C. 524; *Sydney Municipal Council* v. *Bourke*, [1895] A. C. 433, 43 W. R. Dig. 74; *Saunders* v. *Holborn Board of Works*, 43 W. R. 26, [1895] 1 Q. B. 64; *Young* v. *Davis*, 11 W. R. 735, 2 H. & C. 197; *Henley* v. *Mayor of Lyme*, 5 Bing. 91; *Lyme Regis Corporation* v. *Henley*, 8 Bligh N. S. 690; *Mayor of Lynn* v. *Turner*, 1 Cowp. 86; *Mackinnon* v. *Penson*, 2 W. R. 262, 8 Ex. 319, 9 Ex. 609; *Sutton* v. *Johnstone*, 1 B. & E. 493; *Guardians of Holborn Union* v. *Vestry of Shoreditch*, 25 W. R. 40, 2 Q. B. D. 145; *Nitrophosphate Manure Co.* v. *London and St. Katharine Docks Co.*, 9 Ch. D. 503, 26 W. R. Dig. 152; *Gorris* v. *Scott*, 22 W. R. 575, 9 Ex. 125; *Mersey Docks and Harbour Board* v. *Gibbs*, 14 W. R. 872, L. R. 1 E. & I. App. 93; *Wilson* v. *Mayor of Halifax*, 16 W. R. 707, 3 Ex. 114; *Forbes* v. *Lea Conservancy Board*, 27 W. R. 688, 4 Ex. D. 116; *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch. D. 102, 27 W. R. Dig. 121; *Borough of Bathurst* v. *Macpherson*, 4 A. C. 256, 27 W. R. Dig. 139; *Reg.* v. *Mayor of Poole*, 36 W. R. 239, 19 Q. B. D. 602; *Rex* v. *Mayor of Liverpool*, 3 East 86; *Bull* v. *Mayor of Shoreditch*, 20 Times L. R. 254; Clerk and Lindsell on Torts (3rd ed.), pp. 31, 32; Maxwell on the Interpretation of Statutes (3rd ed.), p. 575, *et seq.*; Pratt on Highways (13th ed.), p. 319.

VAUGHAN WILLIAMS, L.J.—This is an appeal from the decision of the judge of the Liverpool Passage Court, who considered himself bound by the decision

in *Hartnall* v. *Ryde Commissioners*, and therefore gave judgment for the plaintiff, but it is obvious from his judgment that the learned judge would have arrived at a different conclusion if he had not felt himself bound by that decision. Now it is said that *Hartnall* v. *Ryde Commissioners*, if it has not been overruled, has at all events been commented on in the House of Lords, particularly by Lord Herschell, in such a way as to cast grave doubt upon its authority. I do not myself think we need go the length of saying that *Hartnall* v. *Ryde Commissioners* has been overruled. It is a decision that is based upon a particular Act of Parliament, and it may be doubted whether the Court of Queen's Bench in that case intended to lay down the general principle that has been attributed to it, or intended to say that that general principle so laid down applied universally in every case where a liability to repair highways is imposed by an Act of Parliament. If the Court of Queen's Bench did mean to lay down such a general principle, then it would seem to be inconsistent with the subsequent decision of the House of Lords in the case of *Cowley* v. *Newmarket Local Board*. That case turned upon the liability of the local board established by the Public Health Act, 1875, in respect of non-repair of a highway, and the House of Lords, affirming the decision of the Court of Appeal, held that no action would lie in such a case against a local board created under that Act. It is difficult to see how the House of Lords could have come to that conclusion consistently with the case of *Hartnall* v. *Ryde Commissioners* if the latter case really did lay down the principle which it has been suggested that it did lay down in respect to highways generally. Looking therefore to the decision of the House of Lords in *Cowley* v. *Newmarket Local Board*, we may at all events act upon the assumption that *Hartnall* v. *Ryde Commissioners* is not good law, if it is right to assume that it did lay down the general proposition suggested in cases of nonfeasance. Our duty in this case is to look at the Act of 1846 and consider what is the liability of the Corporation of Liverpool when sued in a civil action for damages through injuries sustained by reason of the highway being out of repair. I think it is right to say here that, notwithstanding the observations addressed to us by counsel for the plaintiff, I am clearly of opinion that there is no evidence whatsoever that the court ought to consider, or which, if the case had been before a jury, ought to have been left to the jury, of any fact of misfeasance on the part of the corporation. Our attention was called to a recent decision of the House of Lords in *Shoreditch Corporation* v. *Bull*, and it was suggested that there was something in that case to lead us to say that there is evidence in this case of an act of misfeasance by the defendants having caused the accident, the subject of the action, I do not find anything in that decision compelling us to come, or which ought to induce us to come, to any such conclusion. It is quite true that there may be cases in which an act of misfeasance by the body liable to repair has thrown the road into a condition which amounts to a nuisance, and would make it dangerous for the public to use it. If by an act of misfeasance a road has been reduced to such a condition, it is impossible for the defendants to say that the complaint relates to mere misfeasance in not putting the road right, when it really relates to an act of misfeasance in first putting the road wrong. The evidence in *Shoreditch Corporation* v. *Bull* did show that acts of misfeasance on the part of those who were under the obligation to repair had reduced the road to a condition which made it unfit to use; and, as I understand it, they could not then say that the fact that they had omitted to remedy the wrong done entitled them to treat the action as an action for nonfeasance as distinguished from an action for misfeasance. Having said that, I will now deal with the only question that is left for us. We have to consider what was the intention of the Act of 1846. I do not propose to say much about the previous history of the obligations to repair in the borough of Liverpool. Shortly stated, there was a time prior to 1830 during which the streets in the town of Liverpool were partly repairable by the inhabitants of the parish in that town, although there were other streets which were repairable by the corporation of the borough, such liability being a prescriptive liability. The fact that boroughs frequently do incur a liability by prescription to repair streets, or certain streets, within the limits of the borough is undoubted —I see that the fact is mentioned in 2 Coke's Institutes, p. 700—and that was the state of things prior to 1830. Then came the legislation under the Act of 1830, and then came the legislation under the Act of 1846. Some suggestion was made that under the Act of 1830 the liabilities were definitely imposed upon the commissioners. Another suggestion was that according to the true construction of the Act of 1830 that was not so, but I do not think we need take that question into consideration. We have to construe the Act of 1846, and construing that Act, the first thing it deals with is liability to repair, which by the common law, independently of other special legislation or the existence of some liability *ratione tenuræ* or some prescriptive liability, would be thrown upon the inhabitants at large. That is the liability which is dealt with in this Act of Parliament and which is imposed upon the corporation, and we have to say whether the liability so imposed on the corporation ought, according to the true construction of this Act of Parliament, to be held to be a liability of the same nature as the liability of the inhabitants to repair by the common law, or whether it ought to be treated as a different liability and a larger liability, or, to state the particular question that we have to decide, whether the liability so imposed upon the corporation is one which, so far as nonfeasance is concerned, can only be enforced by the Crown by indictment and not by action on the part of a subject at all, or is a liability coming within the rule that where a duty is laid upon a public body by statute an action for damages will lie by any individual member of the public who sustains particular injury by reason of the neglect of such public body to perform that duty. We have to decide within which of those two rules, according to the true construction of this Act of Parliament, the corporation must be held to come. In my opinion the corporation under this Act of Parliament come within the former proposition and not the latter. I think that according to the true construction of this Act of Parliament there has been transferred to the corporation the same duty of repair and the same liability which, ordinarily speaking, is incurred by the inhabitants of a parish in respect of the maintenance of the highway in repair, and not such a statutory duty as to render the corporation liable to an action at the suit of a subject who has sustained particular injury by the neglect of the corporation to perform the duty of repair which is cast upon them by this Act of Parliament. But it is necessary to refer a little at length to the provisions of this Act. The Act by section 1 sets forth that it is expedient that powers be granted for the construction and maintenance of drains and sewers and for the paving and flagging of the streets should be combined under one management and should be uniform throughout the whole of the borough; and then, by section 36, throws on the corporation the duties of surveyors of the highways—a section which it is worth while to

notice is almost identical with section 144 of the Public Health Act, 1875, upon which *Cowley* v. *Newmarket Local Board* was decided. No one has argued that section 36 taken alone would impose upon the defendants the liability to be sued in such an action as the present. Then comes section 37, which vests the control of the streets and the pavements and materials in the corporation; and it is said that the effect of that section and section 38, which deals with the paving of streets and other matters, is to impose upon the corporation a primary duty to repair, and that they are not entitled to the benefit of the undoubted doctrine of law which has been established in respect to inhabitants of parishes when the liability to repair was thrown upon them. There again, however, an answer is found in *Cowley* v. *Newmarket Local Board*, because if we look at the later sections in the Public Health Act, 1875, and in particular at section 149, we find that they also contain similar provisions as to the vesting of the streets in the urban authority, and also as to the control of such streets. There is in substance no difference between the effect of section 149 of the Public Health Act, 1875, and the provisions in sections 37 and 38 of the Act of 1846. Undoubtedly in *Cowley* v. *Newmarket Local Board* the House of Lords, and also the Court of Appeal, held, notwithstanding provisions with regard to the vesting of streets to which I have called attention, that the case fell exactly within the same limits of liability as had always existed at common law in cases where the obligation to repair was the obligation of the inhabitants at large. Therefore, so far as that is concerned, the construction thus far of the provisions of the Act of 1846 seems to necessitate the same conclusion as to the meaning of that statute as the House of Lords arrived at in construing the Public Health Act of 1875. Now, I should like, before dealing with section 58, to say a word or two upon what was the ground of the decision in *Cowley* v. *Newmarket Local Board*. I observe that both Halsbury, L.C., and Lord Herschell assume that under the Public Health Act, 1875, the primary obligation to repair was imposed by that Act upon the urban authority and they assume that, notwithstanding the fact that in section 144 that which is said to be imposed upon the local board is the offices and duties of a surveyor of highways, just as it is under the Act of 1846 which we have to consider; and I also assume with reference to this Act that the primary duty to repair is similarly thrown upon the corporation. That statutory obligation having been created, how is it that by the decision in *Cowley* v. *Newmarket Local Board* escape is made from the general proposition that where a statutory duty is created of such a nature that indictment would lie, or a remedy by criminal law be good, for neglect to perform the statutory duty, an action will lie at the suit of a subject sustaining a particular injury? How is it that the undoubted general principle is avoided? According to my understanding of the judgments both of Lord Halsbury and of Lord Herschell, it is by going back to the nature of the liability which is thrown upon the inhabitants of the parish in respect of the repair of roads and the limitation of procedure for neglect to perform that duty to procedure by the Crown; and I arrive at the conclusion that in this Act of Parliament—an Act, in my judgment, mainly passed for purposes of remedy and convenience in performing the duties relating to a large accretion of houses and streets—the object was that, and that alone, and by no means to alter the liability of those upon whom, for convenience, the carrying out of this work is thrown, but to leave it exactly as it was when the obligation to repair was thrown upon the inhabitants of the parish. What Lord Herschell said was this: [His lordship read from p. 353 in 1892 A. C., "And in *Young* v. *Davis* it was held . . . I think the judgment appealed from ought to be affirmed," and continued:] This speech of Lord Herschell is followed by the speech of Lord Hannen, who was a party to the judgment in *Gibson* v. *Preston Corporation*. Lord Hannen said: "This principle"—that is, the principle that exempted both the surveyor of highways and inhabitants from a civil action—"is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870 in the case of *Gibson* v. *Preston Corporation*." In the present case for the present purpose the provisions in the Act which we have to consider are substantially the same as those contained in the Public Health Act, 1875, and the Public Health Act, 1848, and in those circumstances we ought to say, as was said in *Cowley* v. *Newmarket Local Board* and in *Gibson* v. *Preston Corporation*, that we do not find any distinct intention on the part of the Legislature by the Act of 1846 to create any new liability. If we apply that principle the result is that we ought to say that the corporation is not liable to be sued by the individual for damages resulting from nonfeasance any more than the inhabitants of the parish would have been. I do not forget that in seeking to sue the inhabitants of a parish in a civil action there were technical difficulties; but, without lengthening my judgment by referring to the cases upon the subject, it is perfectly plain that the technical answer to such an action was not the only one upon which the court proceeded in holding that no such action would lie. The only other question is this: Does section 58 of the Act of 1846 make any difference? That section enacts that the corporation "shall be liable to be indicted at common law for the want of the sufficient repair of any public highway within the said borough, in the same manner as any person or persons liable to the repair of such highways was or were before the passing of this Act." It is said that those words "person or persons" would cover the liability of persons who were liable to repair not by the common law, but, say, by *ratione tenuræ;* and they suggest that by reason of the provisions in that section a distinct intention is found on the part of the Legislature to impose upon the Corporation of Liverpool a liability to be sued in civil actions where an individual has sustained damage by reason of the non-performance of the obligation to keep the roads in proper repair. I cannot agree that there is anything in that section to make it right that we should find such a distinct intention on the part of the Legislature. I think that, having regard to the legislation that has taken place and to the various decisions which have been given, we ought, in construing this Act of Parliament, to start with a *primâ facie* presumption that in the transfer of the common law obligation to repair lying on the inhabitants of the parish at large and on other bodies for the purposes of the public convenience, the Legislature did not by such transfer intend to impose any greater duty or any greater obligation upon the person or bodies to whom the obligation was transferred than that which would have existed before the transfer. If one starts with that *primâ facie* presumption, then we must find in the Act of Parliament something that shows a distinct intention on the part of the Legislature to throw upon the transferee of the obligation a larger liability. In my opinion we cannot do so from anything that appears in this Act of Parliament. On the contrary, I think that this Act of Parliament is an

Act which was manifestly passed merely for convenience in carrying out the duties imposed by the public and for the public, and in these circumstances the presumption I have spoken of is rather stronger than otherwise. I think for these reasons that the judgment must be set aside and judgment entered for the defendants.

ROMER, L.J.—I have arrived at the same conclusion. No case was proved or made by the plaintiff at the trial of the action that the highway in question was one of the ancient or special streets which the Corporation of Liverpool were liable to repair by prescription, as stated in the preamble to the Act of 1830. Therefore I need not consider whether, if that fact had been proved by the plaintiff, the corporation, before the Act of 1830, would have been liable to an action for damages for non-repair, or whether, if that corporation had been so liable, that liability passed first by the Act of 1830 to the commissioners thereby appointed; or, secondly, under the Act of 1846, to the present defendants. It was admitted in the court below, and the appeal before us was argued on the same footing, that the case is to be determined on the hypothesis that the highway in question was one originally repairable by the inhabitants of the parish of Liverpool. Now clearly those inhabitants would not have been liable to an action for damages for non-repair. That was finally determined by the case of *Russell* v. *Men of Devon*. That being so, the next question arises: Were the commissioners appointed by the Act of 1830 then made liable to such an action? Of course, in considering that question the fact of there being such ancient streets as stated in the preamble to the Act is to be borne in mind, so far as relevant in construing the Act; but before coming to the special provisions of the Act of 1830 I desire to make some observations on some questions of principle governing the construction of such Acts as those of 1830 and 1846. In the first place, it has been said that the reason why the inhabitants of a parish were held not liable for non-repair was really because, as a matter of form, they could not be sued by a member of the public injured by the want of repair. It was said that if you find the liability to repair formerly placed on the inhabitants of a parish transferred by an Act of Parliament to a new corporation or body created for the purpose of taking over the liability to repair, then, inasmuch as the new body or corporation could be sued, there was no longer any reason why an action should not lie against that new body for non-repair of the highway. That view, however, has long since been shown to be wrong, although from time to time the contention is raised again, and is freshly urged. In *Cowley* v. *Newmarket Local Board* Lord Halsbury dealt with the point. After referring to the case of *Russell* v. *Men of Devon*, he continued: "That that has been considered to be the law for now more than a hundred years is certain, and, as has been pointed out, the objection in point of form to an action against the surveyor of the highways was not only an objection of form, but underlying it there was the objection of substance. The question of whether it was form or substance came before the Court of Exchequer in *Mackinnon* v. *Penson*. The effort there had been to argue that inasmuch as the county could not in point of form be sued, and that previous judgments had referred to that fact, the 43 Geo. 3, c. 59, s. 4, which enacted that the county might be sued in the name of its surveyor, disposed of the objection of form, as indeed it did. But the court went on to say that that statute did not give, and was not intended to give, an action for such an injury against the county, but that in cases where right could be maintained against the county an action might be brought against them in the name of their surveyor. That was, therefore, a distinct authority that no new right of action was intended to be created, and so far as I am aware that has continued to be the state of the authorities down to the present hour." Furthermore, I think that certain other principles are now established with reference to the Acts of Parliament which create new bodies with duties and obligations cast upon them to do the repairs of highways in lieu of the inhabitants of the parish. Modern authorities show that the question whether in such cases the liability to an action for damages for non-repair is thrown upon the new body created by an Act of Parliament such as I have mentioned, and such as those of 1830 and 1846, in the present case is one to be gathered from the words of the special Act. And it was pointed out in the case of *Picton Municipality* v. *Geldert* by Lord Hobhouse, who delivered the judgment of the Privy Council in that case, that "it must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed." I need not go through these modern authorities in detail. I think the result of them, and in particular of the case of *Cowley* v. *Newmarket Local Board*, is accurately summed up by Mathew, J. (as he then was), in the case of *Saunders* v. *Holborn District Board of Works*, where, after referring to the cases, he said: "The result of these decisions is plain. It is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute, it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the Legislature is clearly disclosed no action will lie." As I have said, those observations appear to me accurately to sum up the new authorities, treating the observations of Mathew, J., as being confined, as I think they were intended to be, to the question of the construction of such Acts of Parliament as those to which I have referred. But I ought, before parting with the question of principle, to say a word about the case of *Hartnall* v. *Ryde Commissioners*, for, as I understand the judgment of the learned judge of the court below, he seems to feel himself constrained to decide this case in the way he did, contrary to his own judgment, because he thought he was bound to do so by the authority of that case. Now with regard to the case of *Hartnall* v. *Ryde Commissioners*. I must say that that case cannot now be regarded as law, if and so far as it seems to indicate an opposite view on the question of principle to that which I have previously expressed or to lay down as a general proposition that the mere fact of a new body being created with the duty and liability to repair in itself makes that new body liable to an action for non-repair. That case, if it is to be supported at all at the present day, must be treated merely as a decision on the special wording of the Act there in question. I must, however, say that, governed by the light of more recent authorities to which I have referred, I think I should not myself now, if obliged to construe the Act there in question, arrive at the same conclusion as that arrived at by the judges who decided that case. Now, applying those principles to the Acts in the present case, it seems to me to follow that in the present case the defendants are not liable in the way suggested by the plaintiff. When I turn to the Act of 1830, though I bear in mind the preamble to which I have previously referred, I find that in sections 75 and 76 the general scope of the duties of

the commissioners is referred to as being that of surveyor of highways. I find a special provision at the end of section 76 with regard to the liability to repair, and it is noticeable that it runs in this form—namely, that it provides that such of the streets and highways as were theretofore repaired or repairable by the mayor, alderman, and burgesses—that is to say, the ancient and particular streets to which I have previously referred—shall from and after the passing of the Act be repaired and repairable, and have sewers made therein and kept in repair by the commissioners. In other words, their express liability to repair is not extended to the streets repairable by the inhabitants of the parish on the construction of that Act, and therefore I have no doubt that the commissioners would not by virtue of that Act have been placed in the position of being liable to an action for non-repair, and the highways repairable by the inhabitants of the parish of Liverpool.

That brings me to the last question on the point of law—namely, the question of the construction of the Act of 1846. With regard to that Act, I may say shortly that when I look at the preamble and the provisions of it, and especially when I look at sections 36 and 37, I should come to the conclusion that speaking generally the Act of Parliament intended to impose upon the new body created by that Act to repair the highways only limited liabilities. Sections 36 and 37 generally say that the new body shall be subject to all the liabilities to which surveyors of highways are now by law subject or may hereafter be subject. Now surveyors of highways certainly would not be liable as such merely as surveyors to an action for damages for non-repair. And one certainly cannot gather from sections 36 and 37 any intention to cast upon the new body any such general obligation as that now insisted upon by the plaintiff. The only other section which avails the plaintiff at all is section 58. That has already been read by my lord, and all I will say is this, that in my opinion not only does it clearly not carry the liability of the new body beyond indictment so as to extend the liability to an action for non-repair, but I cannot help thinking that on the true construction it shews that it was intended that the liability of the new body beyond the general liability to which the surveyors of highways would be liable was to be limited to the remedy by indictment. That ends the case, and the conclusion therefore I arrive at is that the defendants are under no liability to the plaintiff in this action for non-repair. On the mere question of fact which has been raised at the last moment, or as a second string to his bow by counsel who argued the case on behalf of the plaintiff, I need only say that in my opinion on the facts there was no evidence against the defendant of misfeasance by them as distinguished from nonfeasance. I think it is clear that the *action* occurred to the plaintiff merely by reason of non-repair and for no other real reason. It follows, therefore, that the appeal should be allowed.

STIRLING, L.J.—I am of the same opinion. I agree with what has been said by my brethren, and I will add but very few words. The action is brought against the Corporation of Liverpool to recover damages caused by the non-repair of a street within the borough. Now, if this street is to be taken upon the admissions made in the court below and in the course of the arguments before us to have been a street which originally was repairable by the parish simply no action could be maintained against that parish by reason of nonfeasance on their part. It must, I think, be taken in this case, as I understand the learned judge to have found, that no misfeasance was proved, and therefore it is simply a case of nonfeasance. The duties which originally fell upon the parish of Liverpool have been transferred to the Corporation of Liverpool by a statute, and the action is based upon the provisions of that statute. I think the law to be—as it is stated by the Lord Hannen in the passage which has already been read by my lord—that in dealing with a statute of this kind it is not to be inferred that a new liability is created unless distinct intention on the part of the Legislature can be found in the terms of the Act. That brings us to consider the terms of the Act. Now we start with this—that in the year 1830 an Act was passed which appointed certain commissioners to control the highways within the parish of Liverpool, part of which were at that time repairable by that parish and part by the corporation by prescription. The corporation were by that Act released from their obligation to repair upon the terms of paying a sum of £5,000 per annum to the parish for the purpose of the Act. The Act of 1846, with which we have to deal, repealed that Act of 1830, and the main ground on which it was passed was the great growth which had taken place in the intervening time in the development of Liverpool. After reciting the various Acts, the preamble goes on to recite the extensions of the borough of Liverpool and that it was expedient that provision should be made for dealing with streets and sewage, and also that these powers should be combined under one management and should be uniform throughout the whole of the borough. Then, as regards the streets, the material provisions are those in sections 36, 37, and 38, which, as was correctly pointed out in argument, resemble sections 144 and 149 of the Public Health Act, 1875. These sections standing by themselves certainly do not when read in the light of the decision of the House of Lords in *Cowley* v. *Newmarket Local Board* impose any new liability. Then we come to section 58, which has already been referred to, and I will also refer to section 160, which shows that though the various parishes and townships which then constituted the borough were brought under the control of the corporation for the purposes mentioned, yet it was provided that they should be separate and distinct districts; and to section 161, which provided that the mayor, aldermen, and burgesses should continue out of the borough fund to pay the sum of £5,000, as to which liability was imposed by the Act of 1830. Are we to infer, looking at the Act as a whole, that these provisions—more particularly those which I have enumerated—and reading all the sections together—intended to impose a new liability on the corparation and to make the corporation liable for nonfeasance where the parish would not have been liable? I am unable to arrive at that conclusion. It seems to me that section 58 was merely intended to provide convenient machinery by which the remedy by indictment might be put in force, and that the person who complained of non-repair should not be driven to consider what person or persons of the corporation or parish or township was or were the proper party or parties to be indicted, and that the indictment should be in such a case against the corporation, but I cannot see under section 58 any intention on the part of the Legislature to impose a liability which previously did not exist. For these reasons I agree that the appeal ought to be allowed.

Appeal allowed.

Solicitors, *F. Venn & Co.*, for *E. R. Pickmere*, Town Clerk of Liverpool; *Charles Russell & Co.*, for *T. P. Maguire*, Liverpool.

High Court of Justice.

Chan. Div. }
Buckley, J. } March 28.

In re WEST COAST GOLD FIELDS (LIMITED). (a.)

Company—Winding up—Bankruptcy of contributory—Liability on shares—Proof in bankruptcy—Surplus assets—Right of participation.

The holder of shares in a limited company which has gone into liquidation, upon which shares there is a liability for calls, cannot share in the distribution of the surplus assets of the company until he has paid all sums due to the company in respect of his liability on the shares, and this is so with regard to his trustee in bankruptcy where the shareholder has become bankrupt, even when the company have proved against his estate for the amount of the liability, and have received a dividend thereon before they went into liquidation.

The principle of In re Overend, Gurney, & Co., Ex parte Grissell, 14 *W. R.* 1015, *L. R.* 1 *Ch.* 528, *applied.*

Summons.

The above company was incorporated in 1901 with a capital of £1 shares. It had issued 18,000 shares fully paid up, and 12,107 shares upon which 10s. per share had been paid, and a call of 1s. per share had been made in December, 1902.

By their articles of association the company had a lien upon all their shares for moneys due to them (including calls) and for liabilities on the part of the registered holders.

A. S. Rowe was the registered holder of 1,800 of the 12,107 partly paid-up shares.

On the 22nd of January, 1903, Rowe became bankrupt, and the applicant, Salaman, was appointed the trustee of his estate.

On the 26th of January, 1903, the company lodged a proof against the estate for £900, made up of £90 in respect of the call of 1s. per share, and £810 for the uncalled liability of 9s. per share. This proof was admitted at £819, being the £90 and the £810 less 10 per cent. discount. The company did not value their lien upon the shares of the bankrupt in their proof.

In January, 1904, the company received from the trustee in bankruptcy £61 18s. 6d. as a dividend of 1s. 6d. in the £ upon their proof.

In May, 1904, the company went into voluntary liquidation, and the respondent was appointed liquidator.

In June, 1904, an application was made to the court by the company for leave to amend their proof by valuing their lien, or to withdraw it and lodge another. This was refused: see *In re Rowe, Ex parte West Coast Gold Fields (Limited)*, 52 W. R. 608, [1904] 2 K. B. 489.

In the winding up it turned out that the unpaid capital on the shares would be sufficient to satisfy all the liabilities of the company and provide a surplus for the contributories of some 2s. per share.

The trustee in bankruptcy claimed that in the distribution of the assets of the company amongst the contributories the 1,800 shares of Rowe ought to be treated as fully paid up, and that the trustee ought to be placed upon the list of contributories as the registered holder of these shares as fully paid up; and upon the liquidator refusing to do this he took out this summons asking for a declaration to the above effect.

F. Cassel, for the applicant.—By proving for the liability of Rowe the company gave up their lien upon his shares and also their rights against him, and had only a claim upon his estate. They must be treated as having been paid their claim for liability on the shares, and consequently the trustee of Rowe is entitled to share in the distribution of assets. The principle is that proof is equivalent to payment of the debt. This was conceded in the case of *In re MacMahon*, [1900] 1 Ch., p. 177. The same principle has been recognized as between an executor of an estate and a debtor to the estate who is entitled to a share in it and who has become bankrupt (*Stammers* v. *Elliott*, 16 W. R. 489, 3 Ch. App. 195), and in the case of a secured creditor in bankruptcy: *Ex parte Hornby*, Buck. 351; *Ex parte Solomon*, 1 G. & J. 25.

He also referred to *Ex parte West Riding Union Banking Co.*, 30 W. R. 239, 19 Ch. D. 105, 112.

Astbury, K.C., and *P. M. Walters*, for the respondent.—The debt of Rowe may have been discharged by the proof of the company, but it was not paid. If it were paid then a surety for the bankrupt would become discharged by the proof. *Stammers* v. *Elliott* turned upon the fact that the proof was by an executor who had absolute power over debts due to his testator. The distribution of assets is really a return to the shareholders of the capital paid by them on the shares, and those who have not paid up all the capital due cannot have part returned. [BUCKLEY, J., referred to *In re Overend, Gurney, & Co., Ex parte Grissell.*]

Cassel, in reply.—In *Grissell's case* the shareholder had not become bankrupt, and consequently there was no proof as here.

BUCKLEY, J.—In *Grissell's case* it was decided, many years ago, that where a person is both a creditor of and a shareholder in a company, his shares being partly paid up, he must satisfy all his obligations as shareholder and contributory, by paying into the common fund all sums due from him in respect of calls, before he can say: "As a creditor I am entitled to take something out of the common fund." There can be no set-off; the man must pay in before he can be heard to say he can take out. Now, the case with which I have to deal is not that of a creditor who also holds shares, but is simply that of a person who is a shareholder, and a shareholder only, and all that he is entitled to receive from the company is receivable not in respect of a debt, but in respect of a distributive share of the assets of the company in liquidation. I am asked to say that he is entitled to receive on distribution before he has discharged himself of his obligation to pay in. In other words, the case is a much stronger case, as it seems to me, against the applicant than was *Grissell's case*. It is said that these are his rights because he is a bankrupt. In fact these shares have had paid on them £900—viz., 10s. a share—and £61 8s. 6d., making together £961 8s. 6d. The trustee says that he ought to receive in distribution the same amount as if there had been paid £1,800 on the shares. Is that right or is it wrong? In my judgment it is wrong. The argument is that proof is equivalent to payment. To my mind that is an axiomatic or epigrammatic way of stating something which, in the circumstances, is quite untrue for the material purposes of this case. Of course proof is equivalent to payment in this sense, that the debtor can be pressed no further than for that amount; he is discharged, but his estate is not discharged. The proof is the record of the fact that his estate is liable, and that from his estate you are entitled to receive, rateably with the other creditors, dividends until the whole amount has been paid. That is not payment at all for any purpose which is material

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

here. The cardinal fact is that the amount proved for is not paid. What will be the rights of the company in the future? In respect of this proof, if there are further assets of the bankrupt—and only if there are further assets—there will be a right to receive back part of these moneys. Now what is the right decision under these circumstances? Why does *Grissell's case* not apply? I do not want to use any terms that are misleading, but I shall not be misunderstood if I say that the trustee is the owner of the shares, and the trustee is the person who is liable to pay for these shares. In both cases there are the rights against the estate. It is said that the principle of *Grissell's case* does not apply to such a state of things as this. It seems to me that it does apply, and *à fortiori* when, as here, the trustee is seeking to get distribution as a contributory when he has not complied with his liability to pay as a contributory. Another ground on which Mr. Astbury puts it, and which I think is also worthy of consideration, is this, that what you do in distribution of surplus assets is in substance to repay that which has been paid; that you are returning to the shareholders that which they have paid; and that where one man has paid more than another, the first thing you do is to repay the man who has paid most until you bring him down to the level of the man who has paid less. Here the shareholder has only paid £961, instead of £1,800; then you pay the other contributories until you have brought them down to the same level. That would seem to me a proper mode of administration under these circumstances. The other view of the case resolves itself into this, that the trustee would be entitled to take, by way of distribution, moneys now which, of course, would become part of the estate of the debtor, and then in respect of this proof the company would be entitled to rank against that sum with other creditors, and would thus get back some part of that which it had just paid into the estate. That is exactly what in *Grissell's case* was held not to be the right mode of administration. The right view is that the person liable as contributory must discharge himself in that character before he can set up that, as a creditor, he is entitled to distribution, and *à fortiori*, as it seems to me, before he can set up that, as a contributory, he is entitled to receive anything. I therefore think that this summons fails.

Summons dismissed.

Solicitors, *Morley, Shirreff, & Co.; Dollman & Pritchard.*

Chan. Div.
Swinfen Eady, J. } April 7, 13.

PRICE v. JOHN. (a.)

Rent-charge—Apportionment—Release of part of the hereditaments—Law of Property Amendment Act, 1859 (22 & 23 *Vict.* c. 35), *s.* 10.

Upon a release of a portion of hereditaments charged with a rent-charge, where the persons entitled to the remaining hereditaments concur in and confirm the release, the release operates only to bar the right to recover any part of the rent-charge out of the hereditaments released, and the remaining hereditaments remain liable to the whole of the rent-charge without apportionment.

Action.

By his will dated the 5th of December, 1856, P. Taylor devised a moiety of mines and minerals in the county of Glamorgan to his niece Ann Williams, subject to an annuity of £70 per annum which the testator charged upon his share and interest in the said mines and minerals in favour of H. E. Evans and her heirs for ever.

By an indenture dated the 14th of February, 1863, the said annuity of £70 per annum was granted and conveyed unto and to the use of David E. Williams, his heirs and assigns.

By an indenture of settlement dated the 29th of December, 1868, David E. Williams and the said Ann Williams granted and released two equal undivided eight parts of the said mines and minerals and all the estate, right, title, interest, property, claim and demand of the said David E. Williams and Ann, his wife, upon the trusts thereby declared.

Ann Williams died on the 18th of April, 1883.

David E. Williams died on the 1st of April, 1902.

By his will, dated the 19th of July, 1899, David E. Williams gave the said annuity of £70 per annum to the plaintiffs.

The plaintiffs asked for a declaration that they were entitled to an annuity or rent-charge of £70 per annum, or, alternatively, an annuity or rent-charge of £35 per annum charged upon or issuing out of the unsettled share of Ann Williams in the said mines and minerals.

R. J. Parker, for the plaintiffs.

J. G. Wood, for the defendants.

SWINFEN EADY, J., in giving judgment, said: The question is—What was the legal effect of the voluntary settlement of the 29th of December, 1868, upon the rent-charge of £70, charged upon and issuing out of the hereditaments thereby conveyed and other hereditaments.

It is not disputed that the hereditaments thereby conveyed were released from all liability in respect of the charge. It was contended on behalf of the first two defendants, either that the whole rent-charge of £70 passed to the grantees of the voluntary settlement, or that a moiety of it passed to them, leaving only a moiety charged on the remaining hereditaments.

By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 10, it is provided as follows: "The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

Before this Act a person having a rent-charge, by releasing his right in part of the land charged, extinguished the whole rent: 18 Vin. Abridg. 504. The effect of the settlement, which was executed since the Act, was to release from the rent-charge the part of the hereditaments comprised in the deed, but not to extinguish the whole rent-charge.

Upon a release of a portion of hereditaments charged with a rent-charge, if the persons entitled to the remaining hereditaments have not concurred in or confirmed the release, their rights are not affected under the statute, and accordingly it was held in *Booth v. Smith*, 33 W. R. 142, 14 Q. B. D. 318, that the remaining hereditaments in such a case will be subject only to a proportionate part of the whole rent-charge. But in the present case the persons entitled to the remaining hereditaments did concur in and confirm the release, and as regards Mrs. Williams by deed duly acknowledged, so that they are not entitled to the benefit of that portion of the section beginning "without prejudice nevertheless." Their rights are governed, therefore, by the earlier words of

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

the section—that the release shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released. The remaining hereditaments remain liable, therefore, to the whole of the rent-charge without apportionment. This, in my opinion, is the legal effect of the transaction, and probably was also the intention of the parties, so far as can be gathered from the settlement. The deed contains no reference to the rent-charge, or to the release of it or any part of it, and it may well be that the husband was willing to concur in the deed, and release the hereditaments comprised in it, being satisfied that the remaining hereditaments were a sufficient security for the whole rent-charge, as indeed I understand they were and are.

After concurring in the settlement, and conveying all his estate and interest in the hereditaments conveyed, the husband could not have afterwards contended successfully that he retained any charge upon or interest in the land conveyed, and the two cases of *Drew* v. *Lord Norbury*, 9 Ir. Eq. 171, 177, and *Johnson* v. *Webster*, 3 W. R. 84, 4 De G. M. & G. 474, 488, cited by Mr. Wood, support this view, but they are not any authority for the proposition contended for by him: that all or some part of the rent-charge of £70 actually passed by way of grant to the grantees under the voluntary settlement. The effect of that deed is to release the hereditaments conveyed from all and every part of the rent-charge, but not to grant all or any part of the rent-charge to the grantees. It remained vested in the grantor, and his right to enforce it against the remaining hereditaments charged by it was not affected by that deed.

There must be a declaration accordingly and the defendants must pay the costs of the action.

Solicitors, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *Jeffreys & Powell*, Brecon; *J. Clement Brown*, for *C. Valentine Pegge*, Neath.

Chan. Div. Warrington, J. } Jan. 13.

HILL *v.* FEARIS. (*a.*)

Partnership—Stockbroking business—Goodwill—Asset of partnership—Division of assets—Dissolution—Sale.

T. B. Hill and the defendant carried on business as stockbrokers in London under articles of partnership which contained no mention of goodwill. After the term for which the partnership was constituted expired the business was carried on by them as partners at will, the conditions of the articles being maintained as far as practicable. T. B. Hill died, and the defendant continued to carry on the business under the style of the old firm by permission of the committee of the Stock Exchange. Defendant accounted for Hill's capital, but declined to pay anything in respect of goodwill.

Held, that the nature of a stockbroker's business was not such that there could not be a saleable goodwill thereof; and that, in the absence of any provisions to the contrary in the articles, the goodwill must be sold and the proceeds accounted for.

Wilson *v.* Williams, [1892] 29 *L. R. Ir.* 176, 40 *W. R. Dig.* 166, *distinguished.*

Thomas Bourne Hill had for some time previously to 1895 carried on business at 29, Threadneedle-street, as a stockbroker under the name of Hill, Fawcett, & Hill.

In that year he took into partnership the defendant Walter Bourne Fearis and his own son, Charles Henry Bourne Hill.

On the 18th of May, 1895, articles of partnership were executed, whereby the partnership was to continue under the name of Hill, Fawcett, & Hill for seven years at the present offices of the firm. The capital was to consist of £3,500 brought in by T. B. Hill, and £750 brought in by each of the other partners.

Clause 26 gave T. B. Hill power to determine the partnership as regards C. H. B. Hill.

Clause 27 was as follows: "In the event of the death of the said T. B. Hill during the partnership the same shall be continued by the surviving partners, who shall pay to his executors or administrators any capital then standing to his credit beyond the said sum of £3,500 in addition to his share of profits to the date of his death, and during the remainder of the term of seven years the executors or administrators of the said T. B. Hill shall also be entitled to receive in addition to interest upon his said capital of £3,500 at the rate hereinafter provided, one-fourth part of the profits of the said business, one other fourth part being paid to the said C. H. B. Hill, and the remainder of the said profits to the said W. B. Fearis."

Clause 29 continued: "Within three calendar months after the determination of the partnership by effluxion of time a full and general account in writing shall be taken by the partners of all moneys, securities, debts, and effects then belonging to the partnership, and of all moneys and debts due by and of the liabilities of the partnership, and a just valuation shall be made of all the particulars included in such account which require and are capable of valuation, and immediately after such last-mentioned account shall have been so taken and settled the partners shall forthwith make due provision for the payment of all moneys and debts then due by the partnership and for meeting all the liabilities thereof, and subject thereto the capital of the partnership shall be repaid to the partners entitled thereto and the residue of the moneys, debts, and effects then belonging to the partnership shall be divided between the partners in the shares to which they are then entitled to the net profits of the partnership. And such instruments in writing shall be executed by the partners for facilitating the getting in of the outstanding debts and effects of the partnership and for indemnifying each other touching the premises and for vesting the sole right and property in the said respective shares of the said debts and effects in the party to whom the same shall upon such division belong and for releasing to each other all claims on account of the partnership as are usual in cases of the like nature." The partnership articles contained no mention of goodwill.

By a memorandum of the 4th of January, 1899, indorsed upon the deed, it was agreed by the three partners that the partnership should, as regards C. H. B. Hill, be dissolved in all respects as if it had been dissolved under clause 26. From this date the business was carried on by T. B. Hill and W. B. Fearis, the former taking two-thirds and the latter one-third of the profits. C. H. B. Hill was appointed an authorized clerk of the firm, with power to draw and sign cheques on their account. The partnership would have expired by effluxion of time on the 20th of May, 1902, but the partners agreed that it should continue in force for another year. From the 20th of May, 1903, until the death of T. B. Hill on the 17th of May, 1904, they carried on business under the same style as partners at will upon the terms of the deed so far as applicable.

The committee of the Stock Exchange having given their permission, Fearis carried on the business after

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

the death of T. B. Hill, in the firm's name and at the same premises. He had repaid T. B. Hill's capital, but declined to account for the profits since his death or to sell the goodwill. He alleged that there was no such thing as a goodwill of a stockbroker's business; and that the partners as members of the London Stock Exchange were bound by the rules of that body; that he had since the death of T. B. Hill carried on the business as his own; that the name of the firm could only be used by permission of the committee, which he had obtained; and that if any goodwill existed it was not saleable.

C. H. B. Hill, who was also a member of the Stock Exchange, offered £1,000 in August, 1904, which Mrs. Hill, the widow and executrix of T. B. Hill, intended to provide, for the goodwill of the business, but the defendant refused the offer.

Mrs. Hill, the plaintiff, brought this action against Fearis to have the affairs of the partnership wound up by the court, and the assets, including the goodwill thereof, realized; accounts and inquiries, a declaration that the defendant must give credit for profits of the business since T. B. Hill's death, and the difference between £1,000 and the price ultimately obtained for the goodwill.

H. Terrell, K.C., and *R. J. Parker*, for the plaintiff.—The defendant is bound to sell the goodwill of the business and account to us for the proceeds. If he carries on the business, he does so as trustee and not for himself only. An outgoing partner's estate is entitled to a share of the profits and of the assets: Lindley on Partnership (6th ed.), p. 592; section 42 of the Partnership Act, 1890. The value of the goodwill is an asset of the partnership: *In re David and Matthews*, 47 W. R. 313, [1899] 1 Ch. 378. Goodwill involves a right to represent that you are carrying on the business of the firm, to solicit the customers of the old firm, to have the books of the firm, and to prevent anybody else from saying that he is carrying on the business. In this case a *bonâ fide* offer has been made to buy the goodwill for £1,000, so it cannot be of no value.

Gore-Browne, K.C., and *Willoughby Williams*, for the defendant.—There is no saleable goodwill of the business of a stockbroker practising on the London Stock Exchange: *Wilson* v. *Williams*, [1892] 29 L. R. Ir. 176, 40 W. R. Dig. 166. There can be no goodwill, for by the rules of the Stock Exchange no one but the defendant can use the name of the firm. Goodwill is not mentioned in the partnership articles and has not been treated by the partners as an asset, therefore it ought not to be considered an asset on a dissolution: *Stewart* v. *Gladstone*, 27 W. R. 512, (1879) 10 Ch. D. 626. The relationship between a stockbroker and his client is purely personal. It is not the fact that every business has a goodwill. For instance, there is no goodwill of a solicitor's business: *Austen* v. *Boys*, (1858) 2 De G. & J. 626, 6 W. R. Ch. Dig. 50, and *Arundell* v. *Bell*, 31 W. R. 477, (1883) 52 L. J. Ch. 537. There is no mention of goodwill in the deed. In *In re David and Matthews* the word "effects" was held to include goodwill, but the facts in that case were quite different. The effects consisted of securities, and there was no special custom or rule. Clause 29 of this deed provides for division of the assets, not for realization: *Banks* v. *Gibson*, 13 W. R. 1012, (1865) 34 Beav. 566.

H. Terrell, K.C., in reply.—All these old cases have been overruled. At one time it was held that the goodwill belonged to the surviving partner: *Hammond* v. *Douglas*, (1800) 5 Ves. 539, 40 R. R. 168n. Then that it was attached to the premises: *Cruttwell* v. *Lye*, (1810) 17 Ves. 335, 346, 11 R. R. 98. Now the whole question is covered by *Trego* v. *Hunt*, 44 W. R. 225, [1896] A. C. 7, where goodwill is defined. *Wilson* v. *Williams* followed *Pearson* v. *Pearson*, 32 W. R. 1006, (1884) 27 Ch. D. 145, which was overruled by *Trego* v. *Hunt*.

WARRINGTON, J., who had stopped the learned counsel, said that the dispute in this case was between the executrix of a deceased partner and a surviving partner, and for the purposes of his judgment it resolved itself into a question whether amongst the assets of the partnership for the purpose of winding up is to be included the goodwill. In *Trego* v. *Hunt* Lord Macnaghten, speaking of "goodwill," says: "Generally it means much more than what Lord Eldon took it to mean in the particular case actually before him in *Cruttwell* v. *Lye*, where he says: 'The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place.' Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money." Lord Herschell expresses the same thing in rather different words—he says: "It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business." I summarize that by saying the goodwill of a business is the advantage, whatever it may be, which a person gets by continuing to carry on, and being entitled to represent to the outside world that he is carrying on, a business which has been carried on for some time previously. That seems to me to be the meaning of "goodwill." Here it is said first of all that in a stockbroker's business there is no such thing as goodwill. First, because of the nature of the connection between the stockbroker and those with whom he does business. But there are many cases which one can conceive in which the client, not knowing who to go to, if he knew that his old broker had a successor, might well give that man a trial, and see whether he would continue to employ him or not. It seems to me, therefore, that that branch of the argument fails. Then it is said that in the case of members of the London Stock Exchange the goodwill of a business can have no saleable value, because if the purchaser of a business wishes to carry it on under the original name he can only do so by the permission of the committee of the Stock Exchange. But the successor may be able to represent to clients that he is the successor in the business, and get such advantage as there may be arising out of the connection without saying that he is entitled to carry on the business in the old name. But I am pressed with authority, and I am referred to a case in Ireland, *Wilson* v. *Williams*, in which it was decided that in the case of stockbrokers there was no such thing as goodwill. In the first place, I do not think the Vice-Chancellor who decided that case intended to lay down a rule of law. On the contrary, at the conclusion of his judgment he said: "The question is one of mixed law and fact. Without going so far as to lay down any hard-and-fast rule as to stockbrokers' business being in every case incapable of goodwill, I hold that in this case there is no saleable goodwill." He therefore carefully abstained from laying down any rule which would bind a judge in another case on a different consideration of facts.

The result is, therefore, that in dealing with the matter without reference to the partnership articles, I cannot come to the conclusion that there is no advantage arising from the connection and the busi-

ness of the old firm, and, therefore, that there is nothing that can be treated as a saleable goodwill. I do not for this purpose attribute much importance to the offer made of £1,000. I cannot regard that as an offer made by an outsider. It was really made by the plaintiff, the executrix. But quite independently of that offer, I cannot hold that there is nothing to which a saleable value can be attributed.

It is said, secondly, that by the contract in this particular case the sale of the goodwill, which I must now assume does exist, in the events which have happened, is precluded by the articles of partnership. That is a question of construction. The articles contain only one provision which really bears, even if that can be said in strictness to bear, upon the present question. That is clause 29. In my judgment the real effect of this clause is not only not to exclude the goodwill, but not to exclude any of the assets from the sale. The goodwill is an asset of such a nature that the only division that can be made of it is by means of a sale. Supposing that the particulars enumerated in clause 29 in the description of the assets do not comprise goodwill, then what happens? There is a provision in the partnership articles for a division of part of the assets of the firm. That leaves the distribution of the remainder of the assets of the firm not included in that particular clause to be dealt with by the ordinary law—that is, to be sold and the proceeds to be divided. I cannot, in short, read clause 29 as indicating that the parties intended to exclude from the assets of the firm on the final dissolution any consideration of goodwill.

I hold that in winding up the affairs of this partnership the goodwill must be treated as one of the assets of the firm, and must be realized with the other assets of the firm.

Solicitors, *James Robinson; Morley, Shirreff, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — Jan. 31.

SCOTT v. SOLOMON. (a.)

Revenue—Licence to deal in plate—Sale of packets of tea with coupons—Coupons entitling purchaser to plate as prize—Revenue Act, 1867 (30 & 31 *Vict. c.* 90), *s.* 3.

Section 3 *of the Revenue Act,* 1867, *provides that all persons who deal in plate without having in force a proper licence authorizing them to do so shall be liable to a penalty. The appellants, a firm of tea merchants, sold packets of tea, each packet containing a coupon, and they advertised that they would give away* (inter alia) *articles of plate as prizes in exchange for the largest number of coupons sent in to them during a certain period.*

Held, that this was a dealing in plate within the meaning of section 3 *of the Act of* 1867.

Case stated.

The appellants were charged with dealing in plate without a proper licence contrary to section 3 of the Revenue Act, 1867 (30 & 31 Vict. c. 90).

The appellants carried on business as tea merchants, and gave away coupons with the packets of tea sold by them, and these coupons entitled the customers who had purchased the largest quantity of tea, as evidenced by the coupons sent in by them, to various articles, among them being gold watches and articles of plates. Witnesses who had obtained gold watches by means of this competition were called before the justices. They admitted in cross-examination that the tea was as good and the price of it the same during the competition as it was before and after the competition, but said they understood that in purchasing tea during the competition they were purchasing the possibility of obtaining a gold watch or one of the other prizes. It was admitted the appellants had not a licence to deal in plate, and the justices found as a fact they did deal in plate without a licence within the meaning of the section. They accordingly convicted them, but stated this case.

By 30 & 31 Vict. c. 90, s. 3: "Every person who shall do any act or carry on any business for which a licence to deal in plate is required by this Act, without having in force a proper licence authorizing them to do so, shall for every offence forfeit the sum of £50."

Danckwerts, K.C. (*J. R. Atkin* with him), for the appellants.—There was no dealing in plate here. To bring the appellants within the section it must be proved that they traded in and sold the articles: see the language of Lord Davey in *Grainger* v. *Gough*, 44 W. R. 561, [1896] A. C. 325, at pp. 345, 346, and Wills, J., in *Harris* v. *Amery*, 14 W. R. 199, 35 L. J. C. P. 89. It may be this was a lottery, but the Crown cannot require the appellants to take out a licence for conducting a lottery.

Rowlatt (*Sir R. Finlay, A.G.*, with him), for the respondents. — The evidence shows here that the customers when they purchased the tea also purchased a coupon, a sufficient number of which would entitle them to a gold watch. There was therefore a dealing or dealing within the meaning of the section. [He referred to *Hall* v. *McWilliam*, (1901) 85 L. T. 239.]

Lord ALVERSTONE, L.C.J.—This case seems to me to be near the line, but the evidence, I think, shows that there was only one transaction —viz., a sale of the tea and also the coupon. It is suggested that a full value in tea was given in return for the price paid, but that is absurd, as the business of the appellants could not be carried on if there were no payment for the coupons. I think that this is a system of trading in watches by means of receiving payment for them in instalments. Reliance has been placed on the language of Lord Davey in *Grainger* v. *Gough*, but I do not think that Lord Davey can have meant to say that there can be no trading unless the money for the article passes at the time of purchase. Then it is suggested that this transaction is a lottery. Whether that is so or not it seems to me it would be wrong to find that there was no trading here, because possibly the proceeding is a lottery.

I think, therefore, the conviction must be affirmed.

KENNEDY and RIDLEY, JJ., concurred.

Appeal dismissed.

Solicitors for appellants, *Chester & Co.*, for *Holt, Risque, & Robson*, Manchester.

Solicitor for respondent, *Solicitor for Inland Revenue.*

C. C. R.
(Lord Alverstone, L.C.J., and Wills, Kennedy, Channell, and Phillimore, JJ.) — Jan. 21, 31.

R. v. LAWSON. (a.)

Criminal law—Manager of company—Publication of false statements—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 84.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

A person who in fact acts as the manager of a public company, though he has never been appointed to that position, is a "manager" within the meaning of section 84 of the Larceny Act, 1861, and is therefore liable to be convicted for having published false statements with intent to deceive or defraud.

Case stated for the opinion of the Court for the Consideration of Crown Cases Reserved by A. T. Lawrence, J.

"1. Henry John Lawson was tried before me on the 22nd of November, 1904, and following days at the Central Criminal Court on an indictment charging him under section 84 of the Larceny Act, 1861, with unlawfully making, circulating, and publishing written statements false to his knowledge, with intent to induce persons to become shareholders in the Electric Tramway Construction and Maintenance Co. (Limited).

"2. The said company was a limited company registered under the Companies Acts, 1862-1900.

"3. The articles of association (which were put in evidence) contained provisions empowering the board to appoint a manager.

"4. No minute of the board appointing a manager was in existence, and there was no evidence of any actual appointment of the prisoner as manager by the directors of the company.

"5. The nominal capital of the company was £250,000, divided into 250,000 shares of £1 each.

"The issued capital consisted of £55,000 shares issued as fully paid.

"6. The whole of these shares, with the exception of about 5,000, were held by the prisoner or his nominees.

"7. The prisoner had given the then existing directors their share qualifications, and the said directors had executed blank transfers of such shares and lodged the same with the prisoner.

"8. The prisoner, with the assent and concurrence of the directors, dictated the policy of the company and managed its affairs. He also paid the expenses of publishing the incriminated matter.

"9. The indictment counts 8-16 inclusive charged the prisoner with publishing in the *Financial News*, the *Statist*, and a report or circular certain false statements.

"10. The prisoner submitted that he was not a 'manager' within the meaning of section 84 of 24 & 25 Vict. c. 96.

"11. I directed the jury that if the prisoner was the person who in fact managed the affairs of the company he was a manager within the meaning of the section.

"12. The jury found the prisoner guilty.

"13. I sentenced him to twelve months' imprisonment with hard labour, but respited the execution of the sentence until after the decision of this case.

"The prisoner was admitted to bail.

"The question for the opinion of the court is whether my direction to the jury was right.

"If right the conviction is to stand; if wrong the conviction is to be quashed.

Rufus Isaacs, K.C. (*Horace Avory, K.C.*, and *Kenneth Chalmers* with him), for the defendant.—This case ought to go back to the judge, as paragraphs 7 and 8 do not properly represent the evidence. [Lord ALVERSTONE, L.C.J.—At present we are not satisfied there is any ground for sending the case back.] A person cannot be made liable for having acted as a manager when he was never appointed to that position. *Gibson* v. *Benton*, 23 W. R. 858, L. R. 10, Q. B. 329, is distinguishable, but the defendant adopts the dissenting judgment of Quain, J., in that case as part of his argument. This section is a criminal one and must be strictly construed.

He also cited *Coventry and Dixon's case*, 28 W. R. 775, 14 Ch. D. 660; *In re Western Counties Steam Bakeries and Milling Co.*, 45 W. R. 263, [1897] 1 Ch. 617.

Sir E. Carson, S.G., H. Sutton, and *R. D. Muir*, were not called upon to argue.

Lord ALVERSTONE, L.C J.—In this case the first application made to us was to send the case back for some correction of paragraph 7 with regard to the qualifications given to certain directors, and of paragraph 8 which regard to the actual position of the defendant. Of course this court has ample power to send a case back if it find upon the argument that the case has not been properly stated, and does not raise the point; and if the allegations which Mr. Isaacs sought to correct could be said to be the allegations upon which this direction of the learned judge depended, we should have had to consider whether or not we ought to ask the judge to restate it. But it seems to me that the allegations contained in paragraphs 7 and 8 are only matters of history which lead up to the point which the learned judge has submitted to the jury. It cannot be disputed that there was evidence in support of the direction which he gave to the jury which would justify the jury in coming to a conclusion of fact on that direction if the direction is right.

Now, the direction was in these terms: "I directed the jury that if the prisoner was the person who in fact managed the affairs of the company he was a manager within the meaning of the section." Now, if we must read that direction, which was given after a trial lasting a great many days, and which was no doubt the summary of a much fuller explanation of the facts to the jury—if we are to construe that direction as merely meaning that the defendant was pulling the strings behind the company and dictating the policy of the company, I should entirely agree that that was not being a manager within the meaning of the section.

It is abundantly clear to my mind on reading the whole case that the learned judge when he used the words "managed the affairs of the company" did did not mean merely directed its policy. It is plain from the earlier part of the case that he was quite alive to the effect of the expression "dictating the policy of the company," and he has in his final direction described the conduct of the defendant as of the person who in fact managed the affairs of the company. I understand that to be a direction to the jury that if the defendant was in fact the manager of the company he came within the section. Now, is that right or wrong? The very able argument for the defendant alleges that the manager meant by the section must be a constituted officer of the company, and must be at any rate under the control of directors so as to be the servant of the company, and that therefore the direction is not sufficient because those conditions have not been explained to the jury. Now, construing the direction as I think it ought to be construed, is that within the section? This section was originally enacted in the year 1857. It was enacted in an Act the title of which is: "An Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property." Section 8 is for all practical purposes identical with section 84 of the Larceny Act, 1861: "If any director, manager, or public officer of any body corporate or public company shall make, circulate," &c., "with intent to deceive or defraud," "he shall be guilty of a misdemeanour." Now, I think the mere perusal of the language of

that section shows that the word "manager" cannot be used in a technical sense. "Director" is possibly a term of art; but ought the word "manager" to have the limited meaning for which Mr. Isaacs contends? He says the manager must be an appointed officer of the company at any rate, whether all the formalities of appointment have been complied with or not, and that the word in the section does not apply to a person who in fact manages the affairs of company. I think it is not immaterial to note that prior to 1861 the only technical use of the word "manager" was in connection with the official manager, who was an officer of the court who could act when companies got into difficulties in connection with winding up the affairs of the company. That cannot have been the manager referred to in this section. Therefore we have not before us anything that would lead us to think that the word "manager" is used in any technical or limited sense, and, looking to the mischief intended to be aimed at by the section, it seems to me that a *de facto* manager is as much a person whose conduct might be the subject of the section as a person who had been formally appointed manager. Therefore, if the case stood upon the section alone, and there was no authority upon it, I have a strong view that the direction of the learned judge was perfectly right, that a person who has in fact managed the affairs of the company is a manager within the meaning of that section.

But I feel it right to say that the argument to which we have listened has not displaced the weight of authority which has dealt with this matter. Mr. Isaacs has criticized the case of *Gibson* v. *Barton*. He has adopted the reasoning of the dissentient judge, Quain, J. He has said that that case is not an authority on the present case, because the particular thing done by the person whose conduct was there implicated was something which must be done by an officer of the company. I confess I think that the language of Blackburn and Lush, JJ., does not seem to support that distinction. The section there in question (section 26 of the Companies Act, 1862) says: "And every director and manager of the company who shall knowingly and wilfully authorize or permit such default" shall incur a penalty. In what sense are the words "director" and "manager" used in that section? Says Blackburn, J.: "When the section says 'director,' it is plain enough a director is a director, but the words are 'and manager.' We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transact the whole of the affairs of the company." The language of Lush, J., can only be reconciled with the same view. He says: "Then is he a manager within section 27? I think he is, and that 'manager' in that section must mean manager *de facto*. I do not think that it is competent for him to say, 'True, I acted as manager of the company, but yet, not being manager *de jure*, I can evade the liability imposed as between the public and the company by section 26.'" No doubt the section we have now to consider is not the same section, and if it could be shown from the language of the section itself or from the character of the offence that there are reasons why the word "manager" in the present section should be construed in a more narrow sense that decision would not be an authority. It seems to me, however, that the argument for the defendant has failed to show any ground for applying a different principle to the construction of the present section. *Gibson* v. *Barton* came before the Court of Queen's Bench in the case of *Edmonds* v. *Foster*. I think it is right to say that the learned judges in that case do not express an opinion either one way or the other as to the correctness of the decision in *Gibson* v. *Barton*, but they certainly say nothing which shows that they had any doubt as to the opinion of the majority being correct. Lord Coleridge says: "It is unnecessary to discuss the opinions of the judges in *Gibson* v. *Barton*, but, so far as it goes, the decision of the majority is very strongly in point for the respondents." Archibald, J., does not refer to the case. Amphlett, B., says: "Upon the principle laid down by the majority of the judges in *Gibson* v. *Barton*, the appellant being a director is liable to be convicted." I mentioned that case, not as adding much weight to the authority of *Gibson* v. *Barton*, but as showing that it came in 1875 before three judges, and that they did not throw any doubt upon it. But, in my opinion, *Coventry and Dixon's case* is much more important. There Sir George Jessel certainly went very far in supporting the principle of *Gibson* v. *Barton*. He cites the language of Blackburn and Lush, JJ., in that case, and then he says: "I agree with the judgment of Blackburn, J., and Lush, J. agreed with it, but my lamented friend Quain, J., did not agree with it." That case then went to the Court of Appeal. They overruled Sir George Jessel upon the point as to whether or not the act complained of was a misfeasance under the particular section which was then under consideration; but James, L.J., says: "It was admitted by the appellants that these persons, as *de facto* directors, would be liable for any act of commission or any omission on their part in the same manner and to the same extent as if they had been *de jure* as well as *de facto* directors." Baggallay, L.J., does not make any definite reference to the matter, but Bramwell, L.J., says: "If he has done anything wrong as a *de facto* director, no doubt he can be got at under the clause."

It is contended, and I think the observation is perfectly well founded, that having regard to the decision in that case, to a certain extent those opinions of the Lords Justices are *obiter*. I only desire to say that I think certainly Lord Bramwell would not have hesitated to express his opinion if he thought Sir George Jessel had been wrong in the view he took of the decision of the majority in *Gibson* v. *Barton*. The decision again came before the Court of Appeal in *In re Western Counties Steam Bakeries and Milling Co.*, where it was considered by Lindley, A. L. Smith, and Rigby, L.JJ. I cannot at all agree with the view suggested, that Rigby, L.J., did not agree with *Gibson* v. *Barton*. I think the language of his judgment shows that he did. It is not too much, therefore, to say that some ten judges have had this case before them, and as far as I can see there is nothing to indicate that they thought the language of Blackburn and Lush, L.JJ., wrong. Therefore, since the words of the section in question apply to a person who is called manager, and we find no technical meaning for that word at the time the Act was passed, I decline to accede to the argument that the word as used in the section can only have been intended to apply to persons who might be appointed managers under subsequent legislation or under a subsequent rule. Then finding the offence aimed at and contemplated by the section is an offence the consequences of which might be just as serious if a *de facto* manager was guilty of the offence as if a *de jure* manager was—in fact in some senses more so—and that the principle has been applied in *Gibson* v. *Barton*, and approved of, or at least not dissented from, by this large number of judges, I have myself no doubt in coming

to the conclusion that the direction of A. T. Lawrence, J., was right, and that the conviction must stand.

RIDLEY, J.—I am of the same opinion.

DARLING, J.—I only desire to say that my judgment does not all go upon the ground that was pressed upon us in the argument as being the basis of the decision in *Gibson* v. *Barton* — that this defendant was a manager *de son tort*, and, therefore, for that reason properly convicted upon the indictment. To me that argument might in certain instances be a very technical one, and possibly at variance with the real facts in the case. But here the jury found upon plenty of evidence that the defendant was the person who in fact really managed the affairs of the company. That is a great deal more than being a manager *de son tort* in the narrow sense. The defendant was a person who was doing the things which if there had been a manager the manager would have done. He was, as far as I can see, the only person who did them, and to hold that he was not the manager of the company would be to take an extraordinary technical view in his favour, whereas I think that the real facts should be looked at, and that, the jury having properly found that he was in fact the man who did the things which a manager and only a manager could have done, he was properly indicted as manager, and properly convicted under the statute.

CHANNELL, J.—I also agree that this conviction should be affirmed. I want just to say that I personally agree with a considerable portion of Mr. Isaacs' argument. I think that this is one of a group of sections dealing with offences which can only be committed by persons who occupy certain positions, but I think they can be convicted if they occupy those positions quite apart from whether they happen to have been either duly appointed or appointed at all to those positions. It is necessary under this section both to charge in the indictment that the man was manager, and to prove it to the satisfaction of the jury. Of course it is also necessary that there should be a proper direction to the jury as to what a manager within the meaning of the section is, and the only question that seems to me to be of any doubt in this case is whether this direction was quite correct. On the whole I interpret it in the way in which I think the direction ought to have been given. The learned judge says that the jury must find that the defendant was a person who in fact managed the affairs of the company; the direction does not say "managed the company." If that meant or was understood to mean that a person behind the scenes who controlled the whole of the policy of the company, because the directors and all the officers of company were his puppets—if it only meant that—I should not think it was being a manager within the meaning of the section. But if the direction to the jury meant, as I think it did, if you find that the defendant was the person who did the acts in the management of the company as managing its business —"its affairs" is what is said in the direction—if he did that, then it does not signify that there was no appointment of him as manager. It seems to me that upon a fair interpretation of it that is what the direction must have meant, and I think that therefore it is correct.

PHILLIMORE, J.—I agree, and I have nothing to add.

Conviction affirmed.

Solicitors for defendant, *Cox & Lafone.*

Solicitor for the Crown, *Solicitor to the Treasury.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Dec. 8, 9, 13, 14, 15.

KINE v. JOLLY. (a.)

Easement — Light — Dwelling-house — Prescription — Actionable nuisance—Mandatory injunction—Damages.

The result of the decision in Colls v. Home and Colonial Stores, ante, p. 30, *is that the right to light gained by prescription is a negative easement, and is properly enforced by an action of nuisance. To give rise to such an action the interference with the access of light through the ancient windows must be of such a character as sensibly to interfere with the comfort and convenience or usefulness of the building according to the ordinary notions of mankind.*

In the case of a dwelling-house in which such obstruction to light had been caused as to make one room less convenient and less comfortable, so as to materially diminish the letting value of the house, though the room was still well lighted and there was sufficient light to enable it to be used for the purposes for which it was designed,

Held (*by* Vaughan Williams *and* Cozens-Hardy, L.JJ., Romer, L.J., dissentiente), *that an actionable nuisance had been committed. If there is no case of sharp practice or unfair conduct on the part of the defendant, and the case is not one in which damages cannot be regarded as reasonable and adequate compensation, the relief to be given should be by granting damages and not by mandatory injunction.*

This was an appeal from a decision of Kekewich, J.

The action was brought to obtain an injunction to restrain the defendant from erecting, or permitting to remain erected, any wall or building so as to obstruct the access of light to certain windows of the plaintiff's house, or so as to cause any nuisance, injury, or annoyance to the plaintiff in the use and enjoyment of her premises, and damages.

The plaintiff resided with her family in a detached house, of which she was the owner, at Acton. She alleged that the defendant had recently built a house which materially obstructed the access of light to the windows of the drawing-room, morning-room, and hall. The morning-room, which was the most affected, was lighted by two windows, one on the north and one on the west, the latter only being affected by the defendant's building.

It appeared that plaintiff's house had been built on certain property which had been laid out as a building estate, and a plan of the estate was in evidence. The house was built by the owner of the freehold, and the plaintiff bought it from his representatives. It was admitted that the lights were ancient.

The defence denied that the defendant had materially obstructed the light from entering the plaintiff's dwelling-house by the said windows or either of them, or that he had in any way interfered with the plaintiff in the use and enjoyment of her dwelling-house, and alleged that she had abundant light for the house for all ordinary purposes of inhabitancy, and for the comfortable use and enjoyment of the same as a dwelling-house. But, in case he should be under any liability in respect of the matters complained of, he paid £12 10s. into court as sufficient to satisfy the same.

The defendant alleged that he had completed the building complained of prior to the date of the writ to the knowledge of the plaintiff.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The action was tried in December, 1903, by Kekewich, J., who granted a mandatory injunction in respect of all the windows, but pending an appeal the judgment of the House of Lords was delivered in *Colls* v. *Home and Colonial Stores* (*Limited*), *ante*, p. 30, [1904] A. C. 179, and the Court of Appeal therefore remitted the case to the judge for retrial.

The second trial took place in August, 1904.

Kekewich, J., held that the obstruction in the case of the drawing-room was not such as to create a nuisance, nor in the case of the hall taken alone, but taking that with the morning-room the obstruction did create an actionable nuisance. His lordship found that the room had been an exceptionally well-lighted room, and was still well lighted so as to enable it to be used for the purposes for which it was designed, but that there had been a large obstruction of light by the erection of the defendant's house and a large interference with the cheerfulness of the room, and that the character of the room was altered, and although still well-lighted it had lost in the obstruction of light one of its chief charms and advantages. His lordship also found that the obstruction had caused a substantial depreciation in the letting and selling value of the plaintiff's house, and he granted a mandatory injunction ordering the defendant to pull down so much of his house as caused a nuisance to the plaintiff by the obstruction of light to the windows of the morning-room and to the hall as the same existed previously to the erection of the defendant's house.

The plaintiff appealed.

Hughes, K.C., and *Vernon*, for the appellant.—Even on the findings of Kekewich, J., there is no cause of action. The plaintiff's only right is to have sufficient light for the comfortable use and enjoyment of the house as a dwelling-house. On the findings of fact that right is not interfered with.

They cited *Colls* v. *Home and Colonial Stores*, *ante* p. 30, [1904] A. C. 179; *Clarke* v. *Clarke*, 14 W. R. 115, L. R. 1 Ch. App. 16; and *Kelk* v. *Pearson*, 19 W. R. 665, L. R. 6 Ch. App. 809.

P. O. Lawrance, K.C., and *Cann*, for the respondent.—In *Colls* v. *Home and Colonial Stores* the House of Lords in effect adopted the test applied in *Back* v. *Stacey*, 2 Car. & P. 465; *Parker* v. *Smith*, 5 Car. & P. 438; and *Wells* v. *Ody*, 7 Car. & P. 410—namely, that there must be such a diminution of light as to make the plaintiff's premises less fit for business or occupation. All that the court has to do in the case of a dwelling-house is to see whether there has been such a privation of light as sensibly to affect its other amenities: *Clarke* v. *Clarke*, *Kelk* v. *Pearson*. This rule has not been affected by *Colls* v. *Home and Colonial Stores*.

They also referred to *Pringle* v. *Wernham*, 7 Car. & P. 377; *Warren* v. *Brown*, 50 W. R. 97, [1902] 1 K. B. 15; and *Shelfer* v. *City of London Electric Lighting Co.*, 43 W. R. 238, [1895] 1 Ch. 287.

Hughes, K.C., replied.

VAUGHAN WILLIAMS, L.J.—The question of what tests are to be applied in an action brought for obstruction of ancient lights in order to ascertain whether the plaintiff has a good cause of action has recently been very much discussed in *Colls* v. *Home and Colonial Stores*, and I think that the House of Lords there intended to lay down rules which should be applied in future cases of this nature. I do not think that I am saying anything disrespectful of judges in days gone by, whether common law judges or Chancery judges, in saying that the cases which have been decided are not quite consistent as to the tests that should be applied; and, under these circumstances, it was obviously very desirable that the differences, such as they were, in the principles laid down by these cases should be settled once for all. This being the first occasion on which the Court of Appeal has had to apply the principle which has now been laid down by the House of Lords, I hope that we may be able to apply that principle—I say deliberately "that principle," because I think that in substance there was only one principle laid down in the various speeches of the law lords in *Colls* v. *Home and Colonial Stores*—so as to show that the law has now been reduced to sufficient clearness to make it capable of practical application. The main distinction which runs through the two lines of cases which one finds in days gone by is this: The right of a house owner to light gained by prescription, whether before or after the Prescription Act, 1832, was regarded by one school as being a mere right of property, and by the other school not as a right of property in light, or, as is sometimes inaccurately stated, in light and air, but as a negative easement—a right to prevent some landowner from using his land so as to constitute a nuisance to the owner or occupier of a house upon adjoining land. As the result of the decision of the House of Lords in *Colls* v. *Home and Colonial Stores*, we must now apply the view of that school who held that the only right that was gained by the prescription was a negative easement—a right to prevent your neighbour from so using his land as to injure you, who happen to be the adjoining owner or to occupy the adjoining land. This view is shortly expressed by saying that the rights which are to be enforced in respect of this prescriptive easement are rights which would properly be enforced by an action of nuisance. An action of nuisance is different from an action of trespass. An action of trespass is the action which was brought where the body or the land of a person had been invaded. An action of nuisance is the action which was brought where there was no invasion of the property of somebody else, but where the wrong of the defendant consisted in so using his own land as to injure his neighbours. This action of nuisance was not in any way limited to cases where the plaintiff had acquired a legal right, and still less was it limited to cases in which the plaintiff had acquired a legal right, in the nature of prescription. The action, in the most popular as well as the precise legal sense of the word, would lie if a man so used his own land as to cause the air which passed over his neighbour's land, in which he had and could have no special right of property whatsoever, to be noxious and harmful. There was some doubt about that down to the case of *Angus* v. *Dalton*, 30 W. R. 191, 6 App. Cas. 740. That was an action brought against a defendant who, by digging on the edge of his own land, had let down the surface of his neighbour's land. There there was no right dependent on prescription, because the right of lateral or subjacent support for land uncovered with buildings is a common law right, and one which exists independently of any property in anything vested in the plaintiff. The action in that case was not and could not be an action of trespass; it was in the nature of an action of nuisance. But, supposing the land to be burdened by buildings, buildings of such weight that the subsidence of the land would not have occurred but for the buildings, in that case the plaintiff would have a prescriptive right, and it would be his prescriptive right, and his prescriptive right only, which enabled him to bring the action. Nevertheless, his action was an action of nuisance. I mention this case of the subsidence of land in particular, because it seems to me to illustrate the proposition that the action is equally an action of nuisance whether the plaintiff is relying upon his common law rights or whether he is

relying upon a prescriptive right. In all these cases of nuisance one has to consider what it is that must be proved by the plaintiff in order to support his action. It seems to me that the House of Lords went upon the principle that, whether the plaintiff is relying upon his common law rights or whether he is relying upon his prescriptive rights, or his rights of property of any sort or kind, the conditions precedent to constitute a cause of action are really identical. The courts have always been unwilling in these cases of nuisance to hold that every nuisance, apart from the rule which prevents the law concerning itself *de minimis*, should be a cause of action. On the contrary, in all these cases of nuisance which involve a limitation of a man's right to use his own land, the courts will not enforce the alleged rights of the plaintiff, unless that which has occurred is a substantial interference with his comfortable or profitable occupation of his dwelling-house, or warehouse, or house of business, as the case may be. Whether or not this rule, which has, according to my view, been applied in *Colls* v. *Home and Colonial Stores*, is logically justifiable, I do not take upon myself to say, and I do not think that it is very important, because it seems to me that there can be no doubt that such a rule, whether logical or not, is a rule which owes its existence to the convenience and comfort of the people at large. It is convenient that people should not be allowed to enforce rights to such an extent as to interfere with the good and the progress of the community. That is what I understand the meaning of the judgment in the House of Lords to be; and I cannot bring myself to the conclusion that that rule is wrong, because for reasons of convenience or any other reason the judges have thought fit to refer the origin of easements to grant, in such a way that easements may be rightly spoken of as conventional rights. They are conventional rights, and it may be that in strict logic conventional rights ought to be enforced according to their verbal definition; but I take it that that is not the law. I think we must bear in mind that in these cases which are conveniently grouped together as cases in which the proper form of action is an action of nuisance, citizens are not to be allowed to enforce rights which limit the user by others of property, unless the facts relied upon as constituting a nuisance are such as interfere with the ordinary rights that according to the ordinary notion of people they have a right to exercise in relation to one another, and in relation to their property. Having said that, I will try to apply what was said by the law lords in *Colls* v. *Home and Colonial Stores* to the facts as found by Kekewich, J., in this case. Lord Halsbury there says: "The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise, as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." Lord Macnaghten in his speech refers to the summing up of the judges at *nisi prius* in *Back* v. *Stacey*, *Parker* v. *Smith*, and *Wells* v. *Ody*, and he adopts them as supplying a definite test. The definition by Tindal, L.C.J., in *Parker* v. *Smith*, which he cites, is as follows: "That diminution of light and air which the law recognizes as the ground of an action against a party who builds near another's premises is such as really makes them to a sensible degree less fit for the purposes of business or occupation." Then Lord Macnaghten having quoted *Wells* v. *Ody*, tried before Parke, B., says: "In his charge to the jury the learned judge said that he entirely adopted the law as laid down by Tindal, C.J., in *Parker* v. *Smith*. And then, after reading a passage from *Parker* v. *Smith*, he concluded his address to the jury by saying: 'The question, therefore, which I shall leave to you is whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation.'" Although Lord Macnaghten deals, and deals very clearly, with the various difficulties that may arise in various cases, he never at any point in his speech departs from the definition of the circumstances under which such an action will lie, as they appear in *Back* v. *Stacey*, *Parker* v. *Smith*, and *Wells* v. *Ody*. Later on he cites the judgments in *Kelk* v. *Pearson* and *City of London Brewery Co.* v. *Tennant*, 22 W. R. 172, L. R. 9 Ch. App. 212, but they seem to me only to follow out the definitions in the three *nisi prius* cases which I have cited. The passage in the judgment of James, L.J., in *Kelk* v. *Pearson*, to which Lord Macnaghten refers, is as follows: "Now, I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement"—James, L.J., it is to be observed, states it properly as a negative easement—"a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable." Lord Davey's judgment, in respect to the definition of what is essential to constitute this cause of action, does not, I think, in any way differ from the judgment of Lord Macnaghten. He relies upon the same cases, and he sums it up thus: "According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind." That is general to all cases, and contains the definition generally of what is essential to constitute this right to light. Lord Lindley, in his judgment, says: "*Kelk* v. *Pearson* shows that in ordinary cases a person does not necessarily acquire a right to enjoy in future all the light he has had for twenty years. He may have had more than was reasonably required either for domestic or business purposes; and in that case his right to protection is limited to the amount of light reasonably required." That is to the same effect as a passage in the judgment of Lord Halsbury: "The question may be very simply stated thus: After an enjoyment of light for twenty years, or, if the question arose before the Act for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at the end of such period? He answers that by saying that he would not be entitled to all the light. Lord Lindley quotes *Kelk* v. *Pearson* and *City of London*

Brewery Co. v. *Tennant* with approval. The doctrine as stated in *City of London Brewery Co.* v. *Tennant* is the same as that stated in *Kelk* v. *Pearson*. "That doctrine," Lord Lindley says, "as stated in *City of London Brewery Co.* v. *Tennant*, is that generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house, if it is a warehouse, a shop, or other place of business. The expressions 'the ordinary notions of mankind,' 'comfortable use and enjoyment,' and 'beneficial use and occupation' introduce elements of uncertainty; but similar uncertainty has always existed and exists still in all cases of nuisance, and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement." I think I have read sufficient to show that, in principle, the result of all these cases is that the interference with the access of light through the ancient windows of the house must be of such a character as sensibly to interfere with the comfort and convenience or usefulness of the building, according to its character as a residence, or a place of business, or warehouse, or whatever else it may be, according to the ordinary notions of mankind. Unless it amounts to that, there is no cause of action; the mere proof that a given percentage of light has been taken away is not sufficient; and in order to support the action of nuisance it must be shown not only that there has been this or that considerable percentage of light abstracted, but also that the abstraction of this quantity of light has interfered with the comfortable or convenient occupation of the premises according to the notions of the citizens of this country. Applying that test, I am going to ask myself that question in this particular case, and I am going to take into consideration the light coming from other sources than through the particular window, the obstruction of the access to which is complained of in this action. I need not discuss that at length, because the defendant can hardly complain if I, in his favour, have taken into consideration light coming from other sources, even if I ought not to have done so in this particular case; but I do not feel any doubt about the matter, and it seems to me that in *Colls* v. *Home and Colonial Stores* the law lords came to the conclusion not only that we might, but that we must, take into consideration the light coming from other sources. I will now read the facts which are found by Kekewich, J., in his judgment. [His lordship referred to the judgment, and continued:] I do not think that Kekewich, J., meant to find anything definite as to how far reading was interfered with by the obstruction, or how far sewing was interfered with by the obstruction, and I do not propose to do so myself. But he does point out that these people actually ceased to use the room; he treats them as honest witnesses, and he thinks that they ceased to use the room because they personally honestly found the room much less convenient to use, and not for any strategic reasons in view of an action, or in that sort of temper which might make a man find every possible wrong or bad result present in a case in which he was making a complaint. [His lordship then referred to the remarks of Kekewich, J., as to the alteration in the character of the room, and continued:] I think that the learned judge was perfectly right in supposing that he must not leave out of consideration the fact that the plaintiff had purchased with the knowledge that the house that she purchased was one of a projected row of houses that sooner or later was sure to be erected on the adjoining plot. I think that, whether one treats this as a mattter of prescription under the Act or on the theory of lost grant, the grant always in theory had to be qualified in accordance with the surrounding circumstances; but we have had no real evidence as to what the knowledge was that was to be imputed to the plaintiff. No contract or plan binding on the owner of the land has ever been produced to us. All we know is that there was certainly an idea of cutting up this estate into plots, and this house was built, and for some twenty or thirty years there was no other house built; but, assuming the knowledge that Kekewich, J., imputes to the plaintiff, the building of a house in this row, having regard to these plots, could have been perfectly well carried out without obstructing the light coming to the plaintiff's windows. On these facts I have to ask myself, applying the test laid down in *Colls* v. *Home and Colonial Stores*, whether there has been an obstruction which has rendered the house substantially less comfortable and convenient. I do not say that I should have come to the conclusion of fact that Kekewich, J., has, but I think there is evidence on which he could have come to that conclusion; and I have to bear in mind that he saw the witnesses and was able to judge of their demeanour, and I do not think that I ought to go behind the conclusions of fact of the learned judge. There are statements in his conclusions which cause some little trouble to my mind. He says that this room is, notwithstanding the obstruction, still a well-lighted room. One cannot help asking oneself whether a house can be substantially less comfortable and convenient when the learned judge says that the room is still a well-lighted room, but I am not prepared to say that a room may not be still a well-lighted room after the obstruction, and yet be a room which is substantially less comfortable and less convenient according to the ordinary notions of mankind in this country. I think that may be so. I do not know what the exact standard is that one applies when one uses the word "well-lighted." "Well-lighted" is obviously a comparative expression; it may mean well lighted taking the average of rooms, or it may mean well lighted taking the average of the opinions of people of the present day as to the quantity of light that is required. I do not know in which sense it is used here; but if it means merely that the room is well lighted taking the average of rooms of houses in the suburbs or the average of rooms in the metropolis, or in large towns, it seems to me that, notwithstanding that the room is well lighted in that sense, it still might be that the obstruction has rendered the house substantially less comfortable and convenient according to the ordinary motions of mankind. Under those circumstances there is nothing in this finding in fact by the judge which prevents my adopting it. Again, he says, "if the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed, there would be no further question." As I understand, he means to find that there is sufficient light left to enable this room to be used for the purpose for which it was designed. There, again, it seems to me that, notwithstanding that sufficient light is left, it may be that the obstruction has changed a room which had ample light for all the purposes likely to be carried out in it into a room in which there is a bare sufficiency of light for its occupation for the purpose designed. In that case, again, I think it may be true to find, as the learned judge has found, that, according to the ordinary notions of mankind, the house has been substantially made less comfortable and less convenient. In dealing with this question of fact I do not think that we can leave out of consideration the evidence of the experts

as to value. These experts are men who very often can tell with great accuracy and certainty what effect the taking away of a particular convenience in a house may have upon its letting or selling value. It is not suggested here that these witnesses were prejudiced, or that there was any ground for distrusting them. They say that the house has diminished in value to the extent of (I think) £20 or £25 a year; and even if it were taken at a less sum, I cannot doubt but that the house must have been made substantially less comfortable and convenient, according to the ordinary notions of mankind, by reason of the obstruction. In one sense I entirely agree with what was said by Kekewich, J., about the leaving of sufficient light not being a test. It seems to me that it is absolutely impossible to apply the test which has been defined by the House of Lords without taking into consideration, amongst other things, the amount of light which is left in a particular room at the time when the obstruction takes place. Under these circumstances, I do not see my way to differ from the judgment of Kekewich, J., that there is a cause of action here. Then one has to consider whether there ought to be damages or a mandatory injunction. With regard to that, I propose to apply the test laid down by Lord Macnaghten in *Colls* v. *Home and Colonial Stores*, or that laid down by Smith, L.J., in his judgment in *Shelfer* v. *City of London Electric Lighting Co.* It seems to me here impossible to say that there ought to be any injunction by reason of any act by the defendant which could be properly termed high-handed, or upon which anyone could impute to him the desire to steal a march upon the plaintiff, or to evade the jurisdiction of the court. I think—and I wish emphatically to state this—that both parties honestly acted in accordance with what they believed, and not unreasonably might believe, to be their legal rights. Some suggestion was made that the plaintiff might have lost her right to an injunction by reason of delay; but I think the delay has been accounted for. The only other matter which, according to Lord Macnaghten's judgment, remains to be considered, is whether the injury cannot be fairly compensated by money damages. I think it can be, and under those circumstances I think there ought to be no mandatory injunction. I will not refer in detail to the rules laid down for general application in the judgment of Smith, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*, but the observations I have made will make it plain that, according to my view, there is nothing in any one of those rules which makes it right that a mandatory injunction should be granted here. There remains the question of damages. With regard to that, I do not think that Kekewich, J., has definitely found any sum for damages, and I think the amount of damages ought to be the subject of an inquiry in chambers, unless, of course, the parties can agree them. Notwithstanding the evidence of the experts—evidence to which attention ought to be given by reason of their knowledge, and also by reason of, I think I may say, their impartiality in this matter—I have great difficulty in agreeing with them in putting the damage quite as high as £25 a year, or at the capital sum which is placed on this house by them. I think it is only right, therefore, that there should be an inquiry if the parties cannot agree upon the amount.

ROMER, L.J.—This case is a simple one in one respect. It is a case where the house which is alleged to be injured is occupied by ordinary persons for the common purposes of domestic life. It is not the case of a business being carried on, nor a case of extraordinary user of any kind. The case is further narrowed by this—that practically the only part of the plaintiff's premises that we need consider is that which is called the morning-room. As I understand it, it is in respect of that room alone that the learned judge has thought the plaintiff entitled to relief. That being so, I have to consider what is the law applicable to this case. That law has recently been expounded by the House of Lords in the case of *Colls* v. *Home and Colonial Stores*. I have carefully considered, as was my duty, the addresses of the noble lords who decided that case, and I think I am enabled to gather from those addresses on what principle I am to deal with the case now before us, and I think I may state that principle shortly. The case has to be approached undoubtedly now from the point of view that the plaintiff has to establish what might fairly be called a nuisance. That of course in itself is no sufficient guide; but I am enabled to gather from *Colls* v. *Home and Colonial Stores* how a jury should be directed, or how a judge should direct himself in trying to determine in each case what would constitute a nuisance. I think all the noble lords were agreed that, at any rate for the purposes of such a case as this, the law is laid down, though not quite in the same language, yet for all substantial purposes in the same way, and accurately, in the four cases of *Back* v. *Stacey*, *Parker* v. *Smith*, *Kelk* v. *Pearson*, and *City of London Brewery Co.* v. *Tennant*. I take the law to be now, as stated in *City of London Brewery Co.* v. *Tennant*, as follows, strictly limiting the statement to such a case as we have now before us: An owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house. That I take to be in the present case a sufficient and proper direction of law, coupled only with this further statement, which I think is essential. I think that, in considering what, according to the ordinary notions of mankind, is sufficient light for the comfortable use and enjoyment of the house, one ought to bear in mind the locality, and, further, I think that in considering what is sufficient light one must bear in mind the statement made by Lord Lindley in *Colls* v. *Home and Colonial Stores*, and approved of, as I gather, by the other lords. "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James, V.C., in *Dyers Company* v. *King*, 18 W. R. 404, L. R. 9 Eq. 438, the light from other quarters and the light the obstruction of which is complained of may be so much in excess of what is protected by law as to render the interference complained of non-actionable"; and he goes on: "I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account." It appears to me that those are sufficient directions to me as to the law on the subject, and all I have to do is to see how the facts of the present case are to be dealt with in accordance with that law. I think it is impossible to say that the present case, on the facts, is free from difficulty. It appears to me to be one which may fairly be said to be on the border line. That it is difficult, I think, may fairly be said, owing to the fact that I, unfortunately for myself, have come to a different conclusion of fact in this case from that taken by my brothers. After considering the evidence in this case, and doing my best to arrive at a conclusion as to whether, according to the law, the defendant's building has caused a nuisance to the plaintiff, trying to come to the conclusion which an intelligent jury ought to come to in such as a case, I can only say that the conclusion I have come to is that the plaintiff has failed to prove that the defendant

has committed a nuisance in respect of these lights. I will shortly state my reasons for coming to that conclusion, and I will first deal with the question irrespective of the judgment of Kekewich, J. I have no doubt whatever that the defendant's building, by its erection, caused less light than before to come to the west window of the morning-room in question, and that not to an immaterial extent; and I bear in mind in the conclusion I have come to what the locality is here, and how matters stood before the erection of the defendant's house. I will first deal with the evidence that arises from an inspection, as it were, of the premises themselves. We have not the advantage, of course, of being able to go and see the premises themselves, but we have very good models before us, and it is not suggested that those models do not accurately give a proper representation of the two houses, and enable the court to judge how the defendant's house interferes with the light of the plaintiff's premises; bearing in mind, as one ought to do, that the defendant's house is to the west of the plaintiff's. To my mind the evidence that a jury could get from an inspection, or that a judge could get if he saw the premises himself, or from seeing a fair and proper representation of the premises, is very important. And I say this, not only because it is my own opinion, but because in *Back* v. *Stacey* Best, C.J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone; and Best, C.J.'s, address to the jury has been approved by the House of Lords. When I look at these two premises, and consider the defendant's house with relation to the plaintiff's, and particularly with relation to the morning-room, I notice that the morning-room is a comparatively small room extremely well lighted by two windows—the north window and the west. The north window is wholly uninterfered with by the defendant's premises, and it is an ancient light; and therefore, bearing in mind what was said by Lord Lindley, I am entitled to consider for present purposes that that light remains. Then, with regard to the west light, I notice that to the north, even the west window of the plaintiff's morning-room has light coming from nearly the whole, if not the whole, of a quarter of a circle—that is to say, due north to nearly due west, wholly uninterfered with. Of course that would not be direct sunlight, but it is light coming from the north, and even the defendant's house does not interfere with the light from the west and south; there is a margin wholly uninterfered with from the south, and to a certain extent from the south-west. Therefore there is only a partial interference with the west window itself, between west and south-west. Moreover, the height of the defendant's house is not excessive, in my opinion. It is not a case where it takes away forty-five degrees of light. So far as even the highest point may be said to affect the west window of the morning room, it does not interfere to that extent. If, then, I had to answer the question before me by reason of a knowledge of these premises, when I saw how the north light was wholly uninterfered with, and the west light was only partially interfered with, I should myself have been disposed to come to the conclusion on the evidence that the room would still remain well lighted and would have sufficient light, according to the ordinary notions of mankind, for its comfortable use and enjoyment as a dwelling-house. At any rate, I could not come to the opposite conclusion, or say that I was satisfied from looking at these models that any nuisance had been committed. Then how does the evidence stand, apart from the most important evidence that arises with regard to the premises themselves? I must say that, so far as the experts are concerned, speaking for myself, they give evidence, no doubt, in accordance with their opinions, but they are of course influenced, naturally, by the side on which they are called. It is not possible that this should not be so, otherwise how could one explain what we have here, and what we have in every case—experts on one side giving one view, and experts on the other side giving another? I do not think that the expert evidence removes the impression on my mind caused by a knowledge of the two houses together. Now I come to the other evidence—the evidence of certain residents in this house. They gave certain evidence with regard to reading, which, if it could have been accepted, would have been most material. Personally, I must say that I should have had very great difficulty in accepting it, but I am fortunately excused, if I may say so, from arriving at that conclusion, because Kekewich, J., having heard the witnesses, has said, "The evidence about reading must be dismissed altogether." The rest of the evidence of the occupiers of the house is open, to my mind, to this observation: They are not considering, of course, a question of nuisance; they are comparing the morning-room as it now is with that room without any obstruction whatever to the west; and they would naturally think, if they got any interference with their light, that it interfered with their comfort. They would naturally not appreciate the point that there may be an interference with light which is not a nuisance at law; and, speaking for myself, having regard to their evidence, coupled with the evidence of the expert witnesses and with the evidence derived from looking at the models, I am not satisfied on the evidence as a whole that there has been what amounts to a nuisance in this case. If I had thought that the learned judge had come to an opposite conclusion of fact, I should have hesitated to give effect to my view; but, doing the best I can do with the judgment of the learned judge, I do not come to the conclusion that his findings of fact do show that a nuisance has been committed. In fact, I think, on a fair interpretation of his judgment, he has made certain findings which negative the idea of nuisance. The very first finding he has with regard to this morning-room is this: "It was an exceptionally well-lighted room, and even now is well lighted." It is not well lighted generally, or irrespective of what he means by well lighted, because he goes on. "So that if the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question"; in other words, he holds as a fact that this is a well-lighted room still, and well lighted for the purposes for which the room was built; and the purpose for which that room was built we know was that of occupation as a morning-room for ordinary family domestic purposes. Therefore this is, to my mind, a clear finding that, notwithstanding anything the defendant has done, the plaintiff still has, following the words used in *City of London Brewery Co.* v. *Tennant*, sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, and of this morning-room in particular. That is, I think, the conclusion at which he has arrived on that finding, and I think there is nothing in the rest of his judgment to negative that. He certainly finds that there has been a large obstruction of light. As regards that, I am as well able to judge as the learned judge himself to what extent there has been an obstruction. I do not think it can be said that there is a large obstruction. That there has been an obstruction I agree, and the amount of it

I am aware of; but, even taking it that there has been a large obstruction of light to the west window, that does not decide the question. Then he says that the cheerfulness of the morning-room is essential. I do not know what he means by that; but what I think he means is that, like every morning-room, the lighter it is the more cheerful it is. Then he says that there has been a large interference with the cheerfulness of the room—not with its comfortable use and enjoyment as part of the dwelling-house, but with its cheerfulness. He makes it clear later on what he means, because he says, "I am convinced that the character of the room is altered"—that means in respect of the cheerfulness—"and that though still a well-lighted room it has lost in the obstruction of light one of its chief charms and advantages." In other words, when the plaintiff had used the morning-room with a look-out to the west wholly unobstructed it had a charm and advantage in its special cheerfulness, and by reason of the deprivation of that the character of the room to that extent has suffered; but the judge does not find that which amounts to a nuisance. On the contrary, as I have pointed out, he finds as a fact that which in my own opinion shows that there was no nuisance. That being so, it appears to me that the judgment of the learned judge, far from enabling me to depart from the opinion that I should otherwise have formed on this case, confirms it; and I come to the conclusion on the whole of this case that the plaintiff's case fails, and that the action ought to have been dismissed.

COZENS-HARDY, L.J.—This is a very important and extremely difficult case, and, as there is a difference of opinion, it is necessary that I should shortly state why I agree with the judgment given by my lord. It is needless to say that I approach this case with an anxious desire to follow loyally the decision of the House of Lords in *Colls* v. *Home and Colonial Stores*, so far as I can gather the principles which ought to govern it. I am not sure that I entirely agree with my lord when he says that there was in substance only one principle laid down by the law lords in that case. I think I can trace several points of difference, though they are not, perhaps, material for the purposes of the present case. It may be that in the very lengthy and interesting and elaborate discussion which we have had over that case we have somewhat forgotten that all the law lords based their judgments upon the findings of fact by Joyce, J. There was there a clear finding that the proposed building would not affect the selling or letting value of the respondent's premises; and there was also a finding that the diminution of light would not materially affect the respondents' comfort or convenience. The decision in *Colls* v. *Home and Colonial Stores*, therefore, does not seem to me to amount to more than this—that an obstruction which neither lessens the letting or selling value of the house nor materially affects the comfort or convenience of the occupier does not in law justify an action, even though a large proportion of light previously enjoyed has been lost. In the present case I think it is clear that the learned judge has held that the letting or selling value of the house has been affected by the defendant's building, and he has also certainly found that the comfort or convenience of the occupier has been affected by it. That being so, there is nothing, I think, in the decision in *Colls* v. *Home and Colonial Stores* which in any way prevents me from arriving at the conclusion which I propose to adopt. It has been strenuously argued on behalf the appellant that all we have to consider is the amount of light which has been left. I cannot accept that view of the law. It seems to me that the law as approved by the House of Lords, particularly by Lord Macnaghten, cannot be better stated than it was by Parke, B., in *Wells* v. *Ody*: "The question, therefore, which I shall leave to you is, whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation." Is it any answer to say that the room is still a well-lighted room? I think not, if the building makes the room less fit for occupation; and I do not think that we can bring in the phrase "according to the ordinary notions of mankind" to cut down the effect which would otherwise result from a building of this nature. I for my part accept the findings of fact of Kekewich, J. He has found, as I read his judgment, that the letting and selling value has diminished, and that the plaintiff's morning-room is materially affected so far as the comfort and convenience of the occupiers are concerned. That being so, I agree with my lord that there is a good cause of action. I pass from the judgment with this sole remark, that it seems to me that the learned judge applied the law quite correctly, or, to use a common phrase, he directed himself properly as to the law. When I come to the relief which he gave I am bound to say that I think this is not a case for a mandatory injunction. There is no case of sharp practice or unfair conduct on the part of the defendant. It is not a case of irrecoverable damage, or of the house being rendered uninhabitable, nor is it a case in which damages cannot be regarded as reasonable and adequate compensation. I think it is impossible to doubt that the tendency of the judgments of the House of Lords in *Colls* v. *Home and Colonial Stores* is to go a little further than was done in *Shelfer* v. *City of London Electric Lighting Co.* and to indicate that as a general rule the court ought to be less free in granting mandatory injunctions than it was in years gone by. Then, assuming that there is no mandatory injunction, are we in a position to assess the amount of damages? I think not. Although Kekewich, J., held that the plaintiff had suffered damages, he did not specify them. That being so, it seems to me that we are driven even at this late stage to say that there must be a reference to the master in chambers in the usual way, or to the official referee to ascertain the amount of damages.

Solicitors, *Graham Gordon; Redfern & Hunt.*

From Railway Commission. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — March 29.

PICKFORD'S (LIMITED) v. LONDON AND NORTH-WESTERN RAILWAY CO. (*a.*)

Railway—Traffic—Rates—Dissection of rate—Particulars of services—Particulars of charges—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 14.

Under section 14 *of the Regulation of Railways Act,* 1873, *the Railway Commissioners have jurisdiction, on the application of an interested person, to order a railway company to state not only the items of the services in respect of which a rate is charged, but also the particular sums charged for each particular service.*

Colman *v.* Great Eastern Railway Co., 4 *Ry. & Ca. Tr. Cas.* 108, *and* Birchgrove Steel Co. *v.* Midland Railway Co., 5 *Ry. & Ca. Tr. Cas.* 229, *approved.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from a decision of the Railway and Canal Commission Court (Bigham, J., Sir Frederick Peel, and Viscount Cobham).

On the application of Pickford's (Limited), who carried on business as general carriers, the Railway and Canal Commission Court made an order on the London and North-Western Railway Co. for the dissection of certain rates charged by the company for goods traffic, under section 14 of the Regulation of Railways Act, 1873.

The railway company having supplied the applicants with certain particulars in pursuance of the order, the applicants applied to the commissioners for the infliction of a penalty for disobedience to the order, alleging that the particulars supplied by the company did not constitute a sufficient compliance. The following is an instance of the information given by the particulars. The rate for soap from Bradford to Dewsbury was 7s. 10d. Of this the company in their particulars attributed 2s. 10d. as applicable to conveyance (this being the maximum chargeable under their special Act), and 5s. as applicable to "other expenses." The "nature and detail" of the other expenses were stated to be "provision of station at each end, covering and uncovering, loading and unloading, collection and delivery." The applicants contended that in default of a specific sum being allotted to each one of these items the order made had not been complied with.

Section 14 of the Regulation of Railways Act, 1873, provides as follows: "The commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses."

The judgment of the commissioners was delivered by Bigham, J., and was to the effect that the order had not been sufficiently complied with. The learned judge expressed his own personal opinion that the railway company had done everything which the Act and the order contemplated. But he felt himself bound to follow a decision of the commissioners given in the year 1882 in the case of *Colman* v. *Great Eastern Railway Co.*, 4 Ry. & Ca. Tr. Cas. 108, before the court was presided over by a judge, in accordance with the principles laid down by Collins, J., in *Didcot, Newbury, and Southampton Railway Co.* v. *Great Western Railway Co.*, 9 Ry. & Ca. Tr. Cas. 210, at p. 229, that the decisions given by the Commission Court since its commencement are binding on the Commission Court.

The railway company appealed.

Cripps, K.C. and *W. J. Noble* (*Moon, K.C.*, with them), for the railway company.

Foote, K.C., and *Rowland Whitehead* (*Balfour Browne, K.C.*, with them), for the applicants.

The following cases were cited: *London and North Western Railway Co.* v. *Lee*, 7 Times L. R. 603; *Pidcock & Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 9 Ry. & Ca. Tr. Cas. 45; *New Union Mills Co.* v. *Great Western Railway Co.*, [1896] 2 Q. B. 290, 44 W. R. Dig. 140; *Colman* v. *Great Eastern Railway Co.*, 4 Ry. & Ca. Tr. Cas. 108; *Birchgrove Steel Co.* v. *Midland Railway Co.*, 5 Ry. & Ca. Tr. Cas. 229; *Tomlinson* v. *London and North-Western Railway Co.*, 7 Ry. & Ca. Tr. Cas. 22; *Coxon* v. *North-Eastern Railway Co.*, 4 Ry. & Ca. Tr. Cas. 284; and *Liverpool Corn Traders' Association* v. *London and North-Western Railway Co.*, 7 Ry. Ca. Tr. Cas. 125.

COLLINS, M.R.—This is an appeal from a decision of the Railway Commission. An application was made by a trader against a railway company under section 14 of the Regulation of Railways Act, 1873, asking for an order on the railway company to disintegrate certain rates, and to state not only the nature of the particular rates of which the rates appearing in the rate-book consisted, but also the particular sums charged in respect of the particular rates. Section 14 provides as follows: "Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged." That is a provision for a station to station rate. Up to that point in the section that is the extent of the obligation on the company with regard to the condition of their rate-book. No larger obligation is imposed on the company till later in the section. All that is provided for so far is a station to station rate. The section then proceeds: "Every such book shall during all reasonable hours be open to the inspection of any person, without the payment of any fee." Then follows the part of the section with which we have especially to deal in this case: "The commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic requiring a railway company or canal company to distinguish in such book how much of each rate"—that is to say, each rate appearing in the rate-book under the earlier part of the section—"is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses."

In this case the applicants are rival traders—viz., Pickford's (Limited)—and they are interested in the charges made for cartage. Unlike other customers who deal with the railway, they do their own cartage, and, when the time came for them to pay the charges due from them to the railway company, they desired to know how much was charged for cartage. They claimed to be interested persons within the meaning of the section, and they asked for an order under the section, the ground of their application being that otherwise they would be liable to the risk of being prejudiced by undue preferences. The commissioners made an order; and, on the matter coming before them again, the point was taken on behalf of the railway company that, on the true construction of the section, they were not under any obligation to disintegrate their rates any further than they had already done in particulars given by them in answer to the application, with which particulars, however, the applicants were not satisfied. To take an example of the particulars, the company stated, with regard to the rate for soap from Bradford to Dewsbury, that the inclusive rate was 7s. 10d., and they attributed 2s. 10d. to conveyance and 5s. to other expenses. They also stated the nature and detail of the other expenses by enumerating the well-known incidents which constitute station terminal services and the services of collection and delivery, but they did not state the charges in respect of each of those services. They contended before the commissioners, and they

Held, as to the first appeal, that the barge-owners had no right of appeal from the judgment against the tug-owners; and as to the second appeal, (1) *that the contract of towage did not relieve the tug-owners from liability for loss or damage to third persons, but only gave them an indemnity from the person employing them in respect of such liability; and* (2) *that the tug-owners, having reasonably defended the action, were entitled to recover from the barge-owners the costs as well as the damages.*

Appeal by the defendants, the owners of *The Millwall*, from the judgment of Sir Francis Jeune.

The action was brought by Page & Co., the owners of the cargo in the barge *Millwall*, against Darling Brothers, the owners of the barge *Millwall*, and Gaselee & Son, the owners of the tug *Bee*, to recover the damage sustained by their cargo through the negligence of the defendants.

The plaintiffs loaded 572 bags of sulphate of ammonia on board *The Millwall* for conveyance to a steamer loading in a dock in the Thames, and instructed Darling Brothers to employ a tug to tow the barge, as time pressed, and to debit their account. Darling Brothers accordingly ordered a tug from Gaselee & Son; and on the 21st of January *The Millwall*, while in tow of the tug *Bee*, came into collision with a barge at anchor and made so much water that the cargo was seriously damaged. The charge for the carriage of the cargo, apart from the charge for the tug, was 1s. 6d. a ton. The plaintiffs, besides claiming on the ground of negligence, also sought to recover their damage against Darling Brothers under a contract by which Darling Brothers undertook to carry the cargo safely.

The defendants, the owners of *The Millwall*, denied that they had been negligent, or that they had failed to carry the cargo safely. In the alternative they alleged that the cargo was carried on the terms established by the course of business and dealing between the parties—viz., that Darling Brothers should not be liable for any loss of or damage to the cargo, which could be, or in fact was, covered by insurance, whether such loss or damage did or did not arise from the negligence of Darling Brothers, or their servants, or agents, and on the terms that the plaintiffs should insure against loss of or damage to the goods, and that the underwriters should in no case have recourse against Darling Brothers, and that in pursuance of the arrangement the plaintiffs did insure the cargo, and had been paid by the underwriters. The owners of the tug put in a defence denying negligence. The owners of the tug delivered their defence on the 14th of June, 1904; and on the following day they served the defendants Darling Brothers with a third-party notice, claiming that they were entitled to be indemnified by Darling Brothers against any sum which the plaintiffs might recover from the tug-owners for damages and costs, and against the costs of defending the action and of the third-party proceedings, upon the ground that the towage of *The Millwall* was upon their usual terms (as stated on their billheads and notepaper)—viz.: "Gaselee & Son hereby give notice that they will not be answerable for any loss or damage which may happen to, or be occasioned by, any barge or vessel, or its cargo, while in tow, however such loss or damage may arise and from whosesoever fault or default such loss or damage may arise; and the services of their tugs must be understood and agreed to be engaged or accepted upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults or defaults of their servants or any claim therefor by whomsoever made. And the customers of the said Gaselee & Son undertake and agree to bear, satisfy, and indemnify them accordingly." Darling Brothers, in their defence to the claim by Gaselee & Son for indemnity, pleaded, so far as material, that if the tug was employed upon the terms alleged, she was employed at the verbal request and on account and at the expense of the plaintiffs, who were well aware of Gaselee & Son's terms of towage. It was admitted that Darling Brothers had notice of the above-mentioned terms of Gaselee & Son. No order was made under ord. 16, r. 53, as to the mode or extent in or to which Darling Brothers should be bound or made liable by the judgment in the action as against Gaselee & Son.

At the trial of the action Sir Francis Jeune held that the barge *Millwall* was not to blame for the collision, and that the cargo was damaged by the negligence of the tug. He accordingly held that the plaintiffs were entitled to recover the damage sustained by them from the tug-owners; and he dismissed the action against the owners of *The Millwall*, the plaintiffs to pay *The Millwall's* costs, and he held that the plaintiffs could recover from the tug-owners, with their damage and costs, the costs payable by them to the owners of *The Millwall*. The claim for indemnity by the tug-owners as against the owners of *The Millwall* was then argued; and Sir Francis Jeune held that the contract to employ the tug was not made by the owners of *The Millwall* as agents for the plaintiffs, but was made by them as an independent contract, and that, therefore, there was no privity of contract between the plaintiffs and the tug-owners so as to bind the plaintiffs by the tug-owners' conditions; and upon the construction of the clause set out above he held that a right of indemnity existed, and that the owners of *The Millwall* were liable to pay to the tug-owners, who had reasonably, though, as it turned out, wrongly, defended the action, all the damages and costs which the plaintiffs would recover from the tug-owners, and also the tug-owners' costs in the action.

The tug-owners appealed against the judgment holding them liable to the plaintiffs; and the owners of *The Millwall* appealed both against so much of the judgment as pronounced the tug-owners liable to the plaintiffs, and also against the judgment holding them liable to indemnify the tug-owners. The tug-owners subsequently withdrew their appeal. Neither the damages nor the costs in any of the proceedings were actually paid, execution having been stayed pending the appeals.

Upon the appeal by the owners of *The Millwall* against that part of the judgment holding the tug-owners liable to the plaintiffs coming on for hearing,

March 15.—*Scrutton, K.C.*, and *A. D. Bateson*, for the plaintiffs, took the preliminary objection that, as the owners of *The Millwall* had succeeded against the plaintiffs in the court below, they had no right of appeal. They could not appeal against a judgment in their favour. The tug-owners, who were unsuccessful in the court below, alone could appeal against the judgment, and they had withdrawn their appeal. The doctrine of subrogation does not assist the owners of *The Millwall*. They can only be subrogated to such rights as the tug-owners have, and as the latter have withdrawn their appeal, that right has gone, and the owners of *The Millwall* cannot be subrogated to it. Further, there cannot in any court be any subrogation until payment, which has not occurred here. The appeal, therefore, is not competent: *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226, 45 W. R. Dig. 74.

Carver, K.C., and *F. Laing, K.C.* (*R. H. Balloch* with them), for the owners of *The Millwall*.—The tug-owners have served a third-party notice under ord. 16, rr. 48, 55, claiming indemnity from the

owners of *The Millwall*, and the latter may perhaps be, though it is not admitted that they are, bound by the judgment against the tug-owners. They are entitled to appeal against that judgment, as their rights may be prejudicially affected by it. Section 19 of the Judicature Act, 1873, taken in conjunction with ord. 58, r. 1, gives a right of appeal. It is not contended that a right of appeal can be based upon the doctrine of subrogation.

COLLINS, M.R.—This is a preliminary objection taken by the plaintiffs to this appeal. The action arises in this way. The plaintiffs were the owners of cargo loaded in a barge called *The Millwall* for conveyance to a ship which was being loaded in a dock in the Thames. While *The Millwall* was being towed by a tug she came into collision with a barge at anchor, and the cargo on board *The Millwall* was damaged. The plaintiffs brought an action against both the owners of *The Millwall* and the owners of the tug to recover the damage to the cargo, and the learned President held that the tug was to blame and not *The Millwall*. He accordingly gave judgment for the plaintiffs as against the tug-owners, and for the owners of *The Millwall* as against the plaintiffs, and he ordered that the plaintiffs should pay costs to the owners of *The Millwall*, and that the plaintiffs should recover the costs so paid from the tug-owners. From that judgment the tug-owners gave notice of appeal; but that appeal was withdrawn. There is therefore no appeal by the tug-owners from the judgment in favour of the plaintiffs. After that matter had been disposed of, the claim by the tug-owners for indemnity from the owners of *The Millwall* came on for hearing, the plaintiffs not being present at, and not being concerned in, that inquiry; and the learned President held that the owners of *The Millwall* were bound to indemnify the tug-owners, and he accordingly ordered them to pay to the tug-owners all the damages and costs which the plaintiffs would recover from the tug-owners and also the tug-owners' own costs. The owners of *The Millwall* have given notice of appeal against so much of the judgment as pronounced in favour of the plaintiffs' claim against the tug-owners and also against the judgment holding them liable to indemnify the tug-owners. By that notice of appeal they therefore seek to question the judgment as between the plaintiffs and the tug-owners. It is objected on the part of the plaintiffs that that is not an appeal which the owners of *The Millwall* are entitled to bring, it being a judgment between other parties, and that the owners of *The Millwall* cannot appeal against that judgment unless they are subrogated to the rights of the tug-owners who are parties to the judgment. The owners of *The Millwall* are obviously not parties to the judgment in favour of the plaintiffs as against the tug-owners, and they are not subrogated to any rights of the tug-owners under which they can appeal from the judgment. They can only take the rights which the person to whom they are subrogated have; and inasmuch as the tug-owners have abandoned their right of appeal, it is impossible to subrogate the owners of *The Millwall* to a right of appeal which has been abandoned. Counsel for the appellants indeed admitted that; and they rested the right of appeal upon the rules as to third-party procedure. But when one comes to examine those rules it seems to me that no proceeding has been taken and no directions have been given by the court which have the effect of putting the owners of *The Millwall* in a position to question the judgment in favour of the plaintiffs as against the tug-owners. Ord. 16, r. 53, is the rule dealing with the matter, and that rule provides that "the court or a judge, upon the hearing of the application mentioned in rule 52"—that is a rule providing for directions as to the trial of the liability of the third party to make the contribution or indemnity claimed—"may, if it shall appear desirable to do so, give the third party liberty to defend the action upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action." Now no order has been asked for or made determining that the third parties—the owners of *The Millwall*—are to be bound by the judgment in the action as between the plaintiffs and the tug-owners. Therefore, so far as I know, it may be, though I desire to express no opinion upon the point, that there is nothing binding the owners of *The Millwall* by the judgment between the plaintiffs and the tug-owners, and it is clear that there is no provision made in that rule or in any other rule whereby the owners of *The Millwall* are substituted as defendants for the tug-owners so as to give them a right of appeal in their own name. Counsel could not point to any order giving them any special rights in the matter. The owners of *The Millwall*, therefore, have no right of appeal, either under the principle of subrogation or under the provisions of the rules, against the judgment between the plaintiffs and tug-owners. The appeal, so far as it affects the plaintiffs, must be dismissed with costs.

MATHEW, L.J.—I am of the same opinion, and have nothing to add.

COZENS-HARDY, L.J.—I am of the same opinion. It seems to me to be clear under the rules that the mere bringing in of a third party does not, apart from a subsequent order, make the judgment in the action binding upon him, because by ord. 16, r. 53, the court or a judge, upon the hearing of an application for directions, can make an order as to the mode and extent in or to which the third parties shall be bound or made liable by the judgment in the action. That conclusion is strengthened by ord. 16, r. 55, which is the particular rule under which the third-party notice was served in the present case, for under that rule one defendant may claim contribution or indemnity from any other defendant, and the same procedure is to be adopted as in other cases, "but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action." One of the rights of the plaintiffs as against the tug-owners is contained in a judgment against the latter which is not appealed from, and the present appeal by the third parties is directly in the teeth of the words at the end of rule 55, to which I have referred. No order has been made enabling the owners of *The Millwall* to defend the action as between the plaintiffs and the tug-owners. There is a *lis* between the plaintiffs and the owners of *The Millwall*, in which the owners of *The Millwall* were successful. There is another *lis* between the plaintiffs and the tug-owners, in which the plaintiffs were successful. We are asked to say that the owners of *The Millwall* have some right of appeal against the judgment in the second *lis*. There is nothing in the Judicature Act or the rules giving such a right. I think that the limits to which the right of appeal extend in the exceptional cases dealt with in order 16 are shown by the judgment of Cotton, L.J., in *In re Youngs*, 30 Ch. D. 421, at p. 426, where he says that "there is

no power to give to a person who could not be made a party to the action leave to appeal against the judgment." If the owners of *The Millwall* had obtained an order allowing them to defend the action as against the tug-owners, then very possibly they might have appealed against the judgment. They cannot do so now.

March 17.—*Carver, K.C.*, and *F. Laing, K.C.* (*R. H. Balloch* with them), for the owners of *The Millwall*.—The tug-owners are not liable to the plaintiffs. The plaintiffs directed the owners of *The Millwall* to employ a tug to tow the barge, and when the latter employed the tug they did so as agents for the plaintiffs. There was therefore privity of contract between the plaintiffs and the tug-owners, and the provisions of the contract made by the owners of *The Millwall* and the tugowners bound the plaintiffs. Even if there was no privity of contract, inasmuch as the plaintiffs directed the owners of *The Millwall* to employ a tug, they must be taken to have directed them to do so upon the usual terms. The usual terms, and, indeed, the only terms upon which a tug could have been employed, were the terms upon which Gaselee & Son agreed to tow. It is impossible to say that the tug-owners were liable to the plaintiffs for negligence when they only accepted the towage upon the terms that they were not to be liable for negligence. *Delaurier* v. *Wyllie*, 17 R. 167, is in point. Illustrations of the same principle are afforded by *Hall* v. *North-Eastern Railway Co.*, 23 W. R. 860, L. R. 10, Q. B. 439; *Singer Manufacturing Co.* v. *London and South-Western Railway Co.*, 42 W. R. 347, [1894] 1 Q. B. 833; and *Keene* v. *Thomas*, *ante*, p. 336, [1905] 1 K. B. 136. Secondly, if the tug-owners were liable to the plaintiffs, they have no right of indemnity over. Underwriters who agreed that if their assured became liable to pay and paid as damages for running down any other ship any sum not exceeding the value of the vessel insured, they would repay to the assured a certain proportion of that sum, were held in *Xenos* v. *Fox*, 16 W. R. 1053, L. R. 3 C. P. 630, 17 W. R. 893, L. R. 4 C. P. 665, not liable to pay any portion of the costs which the assured incurred in successfully defending an action of collision brought against him. The indemnity clause here only covers "such loss or damage"—that is, loss or damage to the cargo. There is no contract to indemnify the tug-owners against costs. The judgment is therefore wrong.

J. A. Hamilton, K.C., and *Bailhache*, for the tug-owners.—The clause in question does not affect the cargo-owners. It is only operative as between the tug-owners and the barge-owners. It is because the tug-owners have come under an obligation to third persons, whether cargo-owners or others, that the indemnity clause is required. The clause assumes such a liability and gave an indemnity in respect thereof. Therefore the tug-owners had no defence under the clause to the action by the plaintiffs. There being no privity of contract between the tug-owners and the cargo-owners, the latter had a good cause of action against the former. Secondly, the cause covers the costs of reasonably defending the action: *Hammond* v. *Bussey*, 20 Q. B. D. 79, 36 W. R. Dig. 65. The tug-owners, by giving the barge-owners a third-party notice, gave them an opportunity of protecting their interests, either by taking over the defence of the action, or by giving the tug-owners notice not to defend, and that if they did defend they would do so at their own risk. The barge-owners did not do this. The costs are therefore recoverable.

Carver, K.C., in reply.—The first part of the clause is quite general, and is independent of the second part, which gives the indemnity.

March 18.—COLLINS, M.R.—This is a dispute between the barge-owners and the tug-owners, and that dispute turns upon the contract of towage made between them. It is contended by the tug-owners that the effect of that contract is to shift all responsibility for the damage done to the cargo from them on to the barge-owners. The learned President, taking that view, held that the contract had the effect of shifting from the tug-owners to the barge-owners the entire liability for the damage to the cargo. That was a decision most unwelcome to the barge-owners, who had been acquitted of all blame in the matter, whereas the tug-owers had been held alone to blame, and they were naturally startled at the result. The question, however, arises upon the agreement which the barge-owners made with the tug-owners. It seems to me that that agreement presents no real difficulty. It seems to be clear that, upon the terms of that agreement, the liability for any loss or damage is taken from the tug-owners and placed on the barge-owners. Now comes this question. The barge-owners, being in that disagreeable predicament, sought to force the plaintiffs to discuss with them whether that part of the original judgment which held the tug-owners liable to pay to the plaintiffs the amount of the damage done to the cargo was right, and for that purpose they gave notice of appeal from that judgment. The tug-owners had given notice of appeal against that judgment, but they withdrew that notice. We held a few days ago that the barge-owners had not put themselves in the position of the tug-owners so as to entitle them to contest that decision. The barge-owners now contend that that judgment against the tug-owners is not binding upon them, and they seek to show that it is wrong upon the ground that the tug-owners, as between themselves and the plaintiffs, are exempt from liability for negligence. It may be that that judgment is not binding upon the barge-owners, and that they are entitled to show that it is wrong, and that the tug-owners ought not to have been held liable at all. I do not decide that it is open to the barge-owners to contest that judgment upon a collateral issue. I will assume that they are entitled to do so for the purposes of the present argument.

I now come to the terms of the contract upon which the tug-owners undertook to tow the barge. Mr. Carver first of all contends that, in the circumstances under which that document came into existence, it established privity of contract between the plaintiffs and the tug-owners, and that therefore the tug-owners were relieved of all liability to the plaintiffs. That is a question of fact, depending upon the circumstances in which the engagement of the tug was made. The learned President came to the conclusion that privity of contract had not been established between the plaintiffs and the tug-owners, and that the barge-owners made the contract directly with the tug-owners on their own behalf. It is not necessary to refer to the evidence upon that part of the case. I see no reason for differing from the conclusion arrived at by the learned President. I think that he arrived at the fair meaning of the arrangement between the parties. Therefore I start with this, that the document did not create privity of contract between the plaintiffs and the tug-owners. Upon the hypothesis that privity of contract is not established, Mr. Carver's next contention is that the true effect of the document is to relieve the tug-owners from all liability for loss or damage in respect of the carriage of the cargo—in other words, that the cargo was carried at owners' risk. In

my opinion, upon the construction of this document, it does not amount to a contract to carry the cargo at owners' risk. It presupposes a liability to some one on the part of the tug-owners, and it secures an indemnity to them. It is a contract of indemnity against a liability which the tug-owners require to be indemnified against. Mr. Carver contended that the first part of the document stands alone, and is perfectly general in its terms, and amounts to a declaration that the goods are to be carried at owners' risk. The answer to that contention is that the document does not stop there. The whole document is a contract of indemnity to the tug-owners against "such loss or damage"—that is, the loss or damage previously mentioned. The barge-owners, therefore, undertake to indemnify the tug-owners against claims by anyone for damage to vessel or cargo occasioned by, as in the present case, a collision. Therefore the point that there is no liability upon the part of the tug-owners to the plaintiffs fails.

Now comes the further contention that, admitting liability to indemnify the tug-owners, that indemnity must be limited to the damage occasioned to the cargo, and does not include the costs which the tug-owners have been held liable to pay. That raises the question whether, having regard to all the circumstances, the tug-owners in defending the action acted otherwise than reasonably. The case falls within the principle which was laid down long ago, and is now well-established. It was laid down in 1859 in *Broom* v. *Hall*, 7 C. B. N. S. 503, 9 W. R. C. L. Dig. 32, the head-note in which case is as follows: "A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff—held, that A. was entitled to recover the costs." No doubt after that decision one or two cases were decided which did not give full effect to it. One such case was *Baxendale* v. *London, Chatham, and Dover Railway Co.*, 23 W. R. 167, L. R. 10 Ex. 35. But in the subsequent case of *Hammond* v. *Bussey* all the cases were considered and full effect was given to the decision in *Broom* v. *Hall*. In the present case there was no jury to decide whether the tug-owners acted reasonably in defending the action, but the learned President found that they acted reasonably in defending, and that they had a right of indemnity over for the costs to which they had been put. The evidence that they had acted reasonably is strong. They gave the barge-owners, who were ultimately liable, full notice of the claim, they served a third-party notice upon the barge-owners which gave them full opportunity of intervening and disputing the claim, or of ascertaining the extent of the loss and paying it, and in these circumstances it is not competent for them to throw upon the tug-owners the whole burden of the litigation. The learned President came to the conclusion that the tug-owners did all that they reasonably could in ascertaining whether they were liable to the plaintiffs, and in diminishing the amount of the loss, and that, therefore, they had a right of indemnity over against the barge-owners for the costs to which they were rendered liable in those proceedings. In these circumstances, the barge-owners are liable to repay those costs to the tug-owners. Mr. Carver says that the document does not in terms include the costs, but only the "loss or damage." No doubt that is so, but it is not conclusive of the matter. By reason of the existence of the contract of indemnity which renders the third parties liable in a certain event, there arises, upon the happening of that event, the question whether the tug-owners, in whose favour the indemnity is given, have acted reasonably in contesting the claim made against them. The contract of indemnity gives the third parties an interest in that question, and the third-party procedure gives them full opportunity of meeting or contesting that claim. The liability to pay the costs does not arise directly out of the contract of indemnity, but comes into existence afterwards, and arises out of the conduct of the parties after the contract of indemnity is come into operation and a claim has been made which gives rise to a right of indemnity under the contract. Sometimes a provision for the payment of the costs is introduced into the contract of indemnity itself, but it does not follow that where it is not so introduced the right to indemnity against those costs is excluded. For these reasons the judgment of the learned President was right and the appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion.

COZENS-HARDY, L.J.—I am of the same opinion. I agree with the Master of the Rolls that upon the facts no privity of contract has been established between the plaintiffs and the tug-owners, and that the conditions were applicable only as between the tug-owners and the barge-owners. The only point upon which I desire to add anything is upon the question whether, inasmuch as costs are not mentioned in the indemnity contract, the tug-owners can recover from the barge-owners the costs of defending the action brought against them by the plaintiffs. It is well settled in one large class of case that the costs of litigation are recoverable by the person entitled to the indemnity. The class of case to which I refer is that of two trustees being held liable for breach of trust, one of whom is primarily liable, in which case it is well established that the trustee primarily liable is bound not only to make good to his co-trustee the loss incurred, but also the costs to which the co-trustee has been put. That has been decided in *Lockhart* v. *Reilly*, 4 W. R. 438, 25 L. J. Ch. 697, and in a very recent case before Warrington, J., of *In re Linsley*, *ante*, p. 172, [1904] 2 Ch. 785. In this latter case Warrington, J., held that "a solicitor-trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate." That is the principle upon which the learned President proceeded in the present case, and it is no new principle, but one long established.

Appeal dismissed.

Solicitor for the plaintiffs, *James Ballantyne.*

Solicitors for the barge-owners, *Keene, Marsland, Bryden, & Bennett.*

Solicitors for the tug-owners, *J. A. & H. E. Farnfield.*

as to value. These experts are men who very often can tell with great accuracy and certainty what effect the taking away of a particular convenience in a house may have upon its letting or selling value. It is not suggested here that these witnesses were prejudiced, or that there was any ground for distrusting them. They say that the house has diminished in value to the extent of (I think) £20 or £25 a year; and even if it were taken at a less sum, I cannot doubt but that the house must have been made substantially less comfortable and convenient, according to the ordinary notions of mankind, by reason of the obstruction. In one sense I entirely agree with what was said by Kekewich, J., about the leaving of sufficient light not being a test. It seems to me that it is absolutely impossible to apply the test which has been defined by the House of Lords without taking into consideration, amongst other things, the amount of light which is left in a particular room at the time when the obstruction takes place. Under these circumstances, I do not see my way to differ from the judgment of Kekewich, J., that there is a cause of action here. Then one has to consider whether there ought to be damages or a mandatory injunction. With regard to that, I propose to apply the test laid down by Lord Macnaghten in *Colls* v. *Home and Colonial Stores*, or that laid down by Smith, L.J., in his judgment in *Shelfer* v. *City of London Electric Lighting Co.* It seems to me here impossible to say that there ought to be any injunction by reason of any act by the defendant which could be properly termed high-handed, or upon which anyone could impute to him the desire to steal a march upon the plaintiff, or to evade the jurisdiction of the court. I think—and I wish emphatically to state this—that both parties honestly acted in accordance with what they believed, and not unreasonably might believe, to be their legal rights. Some suggestion was made that the plaintiff might have lost her right to an injunction by reason of delay; but I think the delay has been accounted for. The only other matter which, according to Lord Macnaghten's judgment, remains to be considered, is whether the injury cannot be fairly compensated by money damages. I think it can be, and under those circumstances I think there ought to be no mandatory injunction. I will not refer in detail to the rules laid down for general application in the judgment of Smith, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*, but the observations I have made will make it plain that, according to my view, there is nothing in any one of those rules which makes it right that a mandatory injunction should be granted here. There remains the question of damages. With regard to that, I do not think that Kekewich, J., has definitely found any sum for damages, and I think the amount of damages ought to be the subject of an inquiry in chambers, unless, of course, the parties can agree them. Notwithstanding the evidence of the experts—evidence to which attention ought to be given by reason of their knowledge, and also by reason of, I think I may say, their impartiality in this matter—I have great difficulty in agreeing with them in putting the damage quite as high as £25 a year, or at the capital sum which is placed on this house by them. I think it is only right, therefore, that there should be an inquiry if the parties cannot agree upon the amount.

ROMER, L.J.—This case is a simple one in one respect. It is a case where the house which is alleged to be injured is occupied by ordinary persons for the common purposes of domestic life. It is not the case of a business being carried on, nor a case of extraordinary user of any kind. The case is further narrowed by this—that practically the only part of the plaintiff's premises that we need consider is that which is called the morning-room. As I understand it, it is in respect of that room alone that the learned judge has thought the plaintiff entitled to relief. That being so, I have to consider what is the law applicable to this case. That law has recently been expounded by the House of Lords in the case of *Colls* v. *Home and Colonial Stores*. I have carefully considered, as was my duty, the addresses of the noble lords who decided that case, and I think I am enabled to gather from those addresses on what principle I am to deal with the case now before us, and I think I may state that principle shortly. The case has to be approached undoubtedly now from the point of view that the plaintiff has to establish what might fairly be called a nuisance. That of course in itself is no sufficient guide; but I am enabled to gather from *Colls* v. *Home and Colonial Stores* how a jury should be directed, or how a judge should direct himself in trying to determine in each case what would constitute a nuisance. I think all the noble lords were agreed that, at any rate for the purposes of such a case as this, the law is laid down, though not quite in the same language, yet for all substantial purposes in the same way, and accurately, in the four cases of *Back* v. *Stacey*, *Parker* v. *Smith*, *Kelk* v. *Pearson*, and *City of London Brewery Co.* v. *Tennant*. I take the law to be now, as stated in *City of London Brewery Co.* v. *Tennant*, as follows, strictly limiting the statement to such a case as we have now before us: An owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house. That I take to be in the present case a sufficient and proper direction of law, coupled only with this further statement, which I think is essential. I think that, in considering what, according to the ordinary notions of mankind, is sufficient light for the comfortable use and enjoyment of the house, one ought to bear in mind the locality, and, further, I think that in considering what is sufficient light one must bear in mind the statement made by Lord Lindley in *Colls* v. *Home and Colonial Stores*, and approved of, as I gather, by the other lords. "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James, V.C., in *Dyers Company* v. *King*, 18 W. R. 404, L. R. 9 Eq. 438, the light from other quarters and the light the obstruction of which is complained of may be so much in excess of what is protected by law as to render the interference complained of non-actionable"; and he goes on: "I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account." It appears to me that those are sufficient directions to me as to the law on the subject, and all I have to do is to see how the facts of the present case are to be dealt with in accordance with that law. I think it is impossible to say that the present case, on the facts, is free from difficulty. It appears to me to be one which may fairly be said to be on the border line. That it is difficult, I think, may fairly be said, owing to the fact that I, unfortunately for myself, have come to a different conclusion of fact in this case from that taken by my brothers. After considering the evidence in this case, and doing my best to arrive at a conclusion as to whether, according to the law, the defendant's building has caused a nuisance to the plaintiff, trying to come to the conclusion which an intelligent jury ought to come to in such as a case, I can only say that the conclusion I have come to is that the plaintiff has failed to prove that the defendant

has committed a nuisance in respect of these lights. I will shortly state my reasons for coming to that conclusion, and I will first deal with the question irrespective of the judgment of Kekewich, J. I have no doubt whatever that the defendant's building, by its erection, caused less light than before to come to the west window of the morning-room in question, and that not to an immaterial extent; and I bear in mind in the conclusion I have come to what the locality is here, and how matters stood before the erection of the defendant's house. I will first deal with the evidence that arises from an inspection, as it were, of the premises themselves. We have not the advantage, of course, of being able to go and see the premises themselves, but we have very good models before us, and it is not suggested that those models do not accurately give a proper representation of the two houses, and enable the court to judge how the defendant's house interferes with the light of the plaintiff's premises; bearing in mind, as one ought to do, that the defendant's house is to the west of the plaintiff's. To my mind the evidence that a jury could get from an inspection, or that a judge could get if he saw the premises himself, or from seeing a fair and proper representation of the premises, is very important. And I say this, not only because it is my own opinion, but because in *Back* v. *Stacey* Best, C.J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone; and Best, C.J.'s, address to the jury has been approved by the House of Lords. When I look at these two premises, and consider the defendant's house with relation to the plaintiff's, and particularly with relation to the morning-room, I notice that the morning-room is a comparatively small room extremely well lighted by two windows—the north window and the west. The north window is wholly uninterfered with by the defendant's premises, and it is an ancient light; and therefore, bearing in mind what was said by Lord Lindley, I am entitled to consider for present purposes that that light remains. Then, with regard to the west light, I notice that to the north, even the west window of the plaintiff's morning-room has light coming from nearly the whole, if not the whole, of a quarter of a circle—that is to say, due north to nearly due west, wholly uninterfered with. Of course that would not be direct sunlight, but it is light coming from the north, and even the defendant's house does not interfere with the light from the west and south; there is a margin wholly uninterfered with from the south, and to a certain extent from the south-west. Therefore there is only a partial interference with the west window itself, between west and south-west. Moreover, the height of the defendant's house is not excessive, in my opinion. It is not a case where it takes away forty-five degrees of light. So far as even the highest point may be said to affect the west window of the morning room, it does not interfere to that extent. If, then, I had to answer the question before me by reason of a knowledge of these premises, when I saw how the north light was wholly uninterfered with, and the west light was only partially interfered with, I should myself have been disposed to come to the conclusion on the evidence that the room would still remain well lighted and would have sufficient light, according to the ordinary notions of mankind, for its comfortable use and enjoyment as a dwelling-house. At any rate, I could not come to the opposite conclusion, or say that I was satisfied from looking at these models that any nuisance had been committed. Then how does the evidence stand, apart from the most important evidence that arises with regard to the premises themselves? I must say that, so far as the experts are concerned, speaking for myself, they give evidence, no doubt, in accordance with their opinions, but they are of course influenced, naturally, by the side on which they are called. It is not possible that this should not be so, otherwise how could one explain what we have here, and what we have in every case—experts on one side giving one view, and experts on the other side giving another? I do not think that the expert evidence removes the impression on my mind caused by a knowledge of the two houses together. Now I come to the other evidence—the evidence of certain residents in this house. They gave certain evidence with regard to reading, which, if it could have been accepted, would have been most material. Personally, I must say that I should have had very great difficulty in accepting it, but I am fortunately excused, if I may say so, from arriving at that conclusion, because Kekewich, J., having heard the witnesses, has said, "The evidence about reading must be dismissed altogether." The rest of the evidence of the occupiers of the house is open, to my mind, to this observation: They are not considering, of course, a question of nuisance; they are comparing the morning-room as it now is with that room without any obstruction whatever to the west; and they would naturally think, if they got any interference with their light, that it interfered with their comfort. They would naturally not appreciate the point that there may be an interference with light which is not a nuisance at law; and, speaking for myself, having regard to their evidence, coupled with the evidence of the expert witnesses and with the evidence derived from looking at the models, I am not satisfied on the evidence as a whole that there has been what amounts to a nuisance in this case. If I had thought that the learned judge had come to an opposite conclusion of fact, I should have hesitated to give effect to my view; but, doing the best I can do with the judgment of the learned judge, I do not come to the conclusion that his findings of fact do show that a nuisance has been committed. In fact, I think, on a fair interpretation of his judgment, he has made certain findings which negative the idea of nuisance. The very first finding he has with regard to this morning-room is this: "It was an exceptionally well-lighted room, and even now is well lighted." It is not well lighted generally, or irrespective of what he means by well lighted, because he goes on. "So that if the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question"; in other words, he holds as a fact that this is a well-lighted room still, and well lighted for the purposes for which the room was built; and the purpose for which that room was built we know was that of occupation as a morning-room for ordinary family domestic purposes. Therefore this is, to my mind, a clear finding that, notwithstanding anything the defendant has done, the plaintiff still has, following the words used in *City of London Brewery Co.* v. *Tennant*, sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, and of this morning-room in particular. That is, I think, the conclusion at which he has arrived on that finding, and I think there is nothing in the rest of his judgment to negative that. He certainly finds that there has been a large obstruction of light. As regards that, I am as well able to judge as the learned judge himself to what extent there has been an obstruction. I do not think it can be said that there is a large obstruction. That there has been an obstruction I agree, and the amount of it

I am aware of; but, even taking it that there has been a large obstruction of light to the west window, that does not decide the question. Then he says that the cheerfulness of the morning-room is essential. I do not know what he means by that; but what I think he means is that, like every morning-room, the lighter it is the more cheerful it is. Then he says that there has been a large interference with the cheerfulness of the room—not with its comfortable use and enjoyment as part of the dwelling-house, but with its cheerfulness. He makes it clear later on what he means, because he says, "I am convinced that the character of the room is altered"—that means in respect of the cheerfulness—"and that though still a well-lighted room it has lost in the obstruction of light one of its chief charms and advantages." In other words, when the plaintiff had used the morning-room with a look-out to the west wholly unobstructed it had a charm and advantage in its special cheerfulness, and by reason of the deprivation of that the character of the room to that extent has suffered; but the judge does not find that which amounts to a nuisance. On the contrary, as I have pointed out, he finds as a fact that which in my own opinion shows that there was no nuisance. That being so, it appears to me that the judgment of the learned judge, far from enabling me to depart from the opinion that I should otherwise have formed on this case, confirms it; and I come to the conclusion on the whole of this case that the plaintiff's case fails, and that the action ought to have been dismissed.

COZENS-HARDY, L.J.—This is a very important and extremely difficult case, and, as there is a difference of opinion, it is necessary that I should shortly state why I agree with the judgment given by my lord. It is needless to say that I approach this case with an anxious desire to follow loyally the decision of the House of Lords in *Colls* v. *Home and Colonial Stores*, so far as I can gather the principles which ought to govern it. I am not sure that I entirely agree with my lord when he says that there was in substance only one principle laid down by the law lords in that case. I think I can trace several points of difference, though they are not, perhaps, material for the purposes of the present case. It may be that in the very lengthy and interesting and elaborate discussion which we have had over that case we have somewhat forgotten that all the law lords based their judgments upon the findings of fact by Joyce, J. There was there a clear finding that the proposed building would not affect the selling or letting value of the respondent's premises; and there was also a finding that the diminution of light would not materially affect the respondents' comfort or convenience. The decision in *Colls* v. *Home and Colonial Stores*, therefore, does not seem to me to amount to more than this—that an obstruction which neither lessens the letting or selling value of the house nor materially affects the comfort or convenience of the occupier does not in law justify an action, even though a large proportion of light previously enjoyed has been lost. In the present case I think it is clear that the learned judge has held that the letting or selling value of the house has been affected by the defendant's building, and he has also certainly found that the comfort or convenience of the occupier has been affected by it. That being so, there is nothing, I think, in the decision in *Colls* v. *Home and Colonial Stores* which in any way prevents me from arriving at the conclusion which I propose to adopt. It has been strenuously argued on behalf the appellant that all we have to consider is the amount of light which has been left. I cannot accept that view of the law. It seems to me that the law as approved by the House of Lords, particularly by Lord Macnaghten, cannot be better stated than it was by Parke, B., in *Wells* v. *Ody*: "The question, therefore, which I shall leave to you is, whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation." Is it any answer to say that the room is still a well-lighted room? I think not, if the building makes the room less fit for occupation; and I do not think that we can bring in the phrase "according to the ordinary notions of mankind" to cut down the effect which would otherwise result from a building of this nature. I for my part accept the findings of fact of Kekewich, J. He has found, as I read his judgment, that the letting and selling value has diminished, and that the plaintiff's morning-room is materially affected so far as the comfort and convenience of the occupiers are concerned. That being so, I agree with my lord that there is a good cause of action. I pass from the judgment with this sole remark, that it seems to me that the learned judge applied the law quite correctly, or, to use a common phrase, he directed himself properly as to the law. When I come to the relief which he gave I am bound to say that I think this is not a case for a mandatory injunction. There is no case of sharp practice or unfair conduct on the part of the defendant. It is not a case of irrecoverable damage, or of the house being rendered uninhabitable, nor is it a case in which damages cannot be regarded as reasonable and adequate compensation. I think it is impossible to doubt that the tendency of the judgments of the House of Lords in *Colls* v. *Home and Colonial Stores* is to go a little further than was done in *Shelfer* v. *City of London Electric Lighting Co.* and to indicate that as a general rule the court ought to be less free in granting mandatory injunctions than it was in years gone by. Then, assuming that there is no mandatory injunction, are we in a position to assess the amount of damages? I think not. Although Kekewich, J., held that the plaintiff had suffered damages, he did not specify them. That being so, it seems to me that we are driven even at this late stage to say that there must be a reference to the master in chambers in the usual way, or to the official referee to ascertain the amount of damages.

Solicitors, *Graham Gordon; Redfern & Hunt.*

From Railway Commission. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — March 29.

PICKFORD'S (LIMITED) v. LONDON AND NORTH-WESTERN RAILWAY CO. (*a*.)

Railway—Traffic—Rates—Dissection of rate—Particulars of services—Particulars of charges—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 14.

Under section 14 *of the Regulation of Railways Act*, 1873, *the Railway Commissioners have jurisdiction, on the application of an interested person, to order a railway company to state not only the items of the services in respect of which a rate is charged, but also the particular sums charged for each particular service.*

Colman v. Great Eastern Railway Co., 4 *Ry. & Ca. Tr. Cas.* 108, *and* Birchgrove Steel Co. v. Midland Railway Co., 5 *Ry. & Ca. Tr. Cas.* 229, *approved.*

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from a decision of the Railway and Canal Commission Court (Bigham, J., Sir Frederick Peel, and Viscount Cobham).

On the application of Pickford's (Limited), who carried on business as general carriers, the Railway and Canal Commission Court made an order on the London and North-Western Railway Co. for the dissection of certain rates charged by the company for goods traffic, under section 14 of the Regulation of Railways Act, 1873.

The railway company having supplied the applicants with certain particulars in pursuance of the order, the applicants applied to the commissioners for the infliction of a penalty for disobedience to the order, alleging that the particulars supplied by the company did not constitute a sufficient compliance. The following is an instance of the information given by the particulars. The rate for soap from Bradford to Dewsbury was 7s. 10d. Of this the company in their particulars attributed 2s. 10d. as applicable to conveyance (this being the maximum chargeable under their special Act), and 5s. as applicable to "other expenses." The "nature and detail" of the other expenses were stated to be "provision of station at each end, covering and uncovering, loading and unloading, collection and delivery." The applicants contended that in default of a specific sum being allotted to each one of these items the order made had not been complied with.

Section 14 of the Regulation of Railways Act, 1873, provides as follows: "The commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses."

The judgment of the commissioners was delivered by Bigham, J., and was to the effect that the order had not been sufficiently complied with. The learned judge expressed his own personal opinion that the railway company had done everything which the Act and the order contemplated. But he felt himself bound to follow a decision of the commissioners given in the year 1882 in the case of *Colman* v. *Great Eastern Railway Co.*, 4 Ry. & Ca. Tr. Cas. 108, before the court was presided over by a judge, in accordance with the principles laid down by Collins, J., in *Didcot, Newbury, and Southampton Railway Co.* v. *Great Western Railway Co.*, 9 Ry. & Ca. Tr. Cas. 210, at p. 229, that the decisions given by the Commission Court since its commencement are binding on the Commission Court.

The railway company appealed.

Cripps, K.C. and *W. J. Noble* (*Moon, K.C.*, with them), for the railway company.

Foote, K.C., and *Rowland Whitehead* (*Balfour Browne, K.C.*, with them), for the applicants.

The following cases were cited: *London and North Western Railway Co.* v. *Lee*, 7 Times L. R. 603; *Pidcock & Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 9 Ry. & Ca. Tr. Cas. 45; *New Union Mills Co.* v. *Great Western Railway Co.*, [1896] 2 Q. B. 290, 44 W. R. Dig. 140; *Colman* v. *Great Eastern Railway Co.*, 4 Ry. & Ca. Tr. Cas. 108; *Birchgrove Steel Co.* v. *Midland Railway Co.*, 5 Ry. & Ca. Tr. Cas. 229; *Tomlinson* v. *London and North-Western Railway Co.*, 7 Ry. & Ca. Tr. Cas. 22; *Coxon* v. *North-Eastern Railway Co.*, 4 Ry. & Ca. Tr. Cas. 284; and *Liverpool Corn Traders' Association* v. *London and North-Western Railway Co.*, 7 Ry. Ca. Tr. Cas. 125.

COLLINS, M.R.—This is an appeal from a decision of the Railway Commission. An application was made by a trader against a railway company under section 14 of the Regulation of Railways Act, 1873, asking for an order on the railway company to disintegrate certain rates, and to state not only the nature of the particular rates of which the rates appearing in the rate-book consisted, but also the particular sums charged in respect of the particular rates. Section 14 provides as follows: "Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged." That is a provision for a station to station rate. Up to that point in the section that is the extent of the obligation on the company with regard to the condition of their rate-book. No larger obligation is imposed on the company till later in the section. All that is provided for so far is a station to station rate. The section then proceeds: "Every such book shall during all reasonable hours be open to the inspection of any person, without the payment of any fee." Then follows the part of the section with which we have especially to deal in this case: "The commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic requiring a railway company or canal company to distinguish in such book how much of each rate"—that is to say, each rate appearing in the rate-book under the earlier part of the section—"is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses."

In this case the applicants are rival traders—viz., Pickford's (Limited)—and they are interested in the charges made for cartage. Unlike other customers who deal with the railway, they do their own cartage, and, when the time came for them to pay the charges due from them to the railway company, they desired to know how much was charged for cartage. They claimed to be interested persons within the meaning of the section, and they asked for an order under the section, the ground of their application being that otherwise they would be liable to the risk of being prejudiced by undue preferences. The commissioners made an order; and, on the matter coming before them again, the point was taken on behalf of the railway company that, on the true construction of the section, they were not under any obligation to disintegrate their rates any further than they had already done in particulars given by them in answer to the application, with which particulars, however, the applicants were not satisfied. To take an example of the particulars, the company stated, with regard to the rate for soap from Bradford to Dewsbury, that the inclusive rate was 7s. 10d., and they attributed 2s. 10d. to conveyance and 5s. to other expenses. They also stated the nature and detail of the other expenses by enumerating the well-known incidents which constitute station terminal services and the services of collection and delivery, but they did not state the charges in respect of each of those services. They contended before the commissioners, and they

have contended before us, that they are not bound to do more than they have done.

It seems to me that in this case we are not exclusively concerned with section 14, and that we must also look at section 15. That section is as follows: "The commissioners shall have power to hear and determine any question or dispute which may arise with respect to the terminal charges of any railway company where such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery, and other services of a like nature; any decision of the commissioners under this section shall be binding on all courts and in all legal proceedings whatsoever." That seems to involve this—that Parliament thought it was possible to ascertain of what sums charges made for such services was made up.

I now come to that part of section 14 on which we have to put a construction. Having regard to the words of the section, I am of opinion that the particulars to which Parliament meant that the trader should be entitled are not only particulars of the services, but particulars of the charges. The section speaks of "the nature and detail of such other expenses." That seems *primâ facie* to involve the amount of the expenses.

Counsel for the company rely on the fact that the section uses the word "expenses" and not the word "charges," and they suggest that "expenses" is merely equivalent to services. But the expenses are the charges for the services, and, in my opinion, the meaning of the section is that the trader is entitled to know how much he is charged for each particular service.

The section was the subject-matter of a decision in the year 1882 in the case *Colman* v. *Great Eastern Railway Co.*, when Sir Frederick Peel presided over the Commission Court. The commissioners there held that the words "specifying the nature and detail of such other expenses" required a railway company, on whom an order under the section had been made, to state in their rate-book what terminal services they undertook to perform with regard to the particular traffic, and how much they charged for each of such terminal services, and that the company did not sufficiently comply with the section by giving a list of the various terminal services which they performed and stating what their total charge was for the whole of those services. That is a decision precisely in point on the question now before the court in favour of the applicants. It was followed in the case of *Birchgrove Steel Co.* v. *Midland Railway Co.* The judgment of Sir Frederick Peel in the latter case seems to me to be good sense and in consonance with the intention of the Legislature.

I have referred to sections 14 and 15 of the Regulation of Railways Act, 1873. I think it right also to refer to an earlier piece of legislation on the subject —viz., section 17 of the Regulation of Railways Act, 1868. That was a step in the direction of giving traders the kind of relief which is sought in this case. It enabled them to obtain from a company particulars of charges made for goods, but without particularizing the several items of which the charge for loading, unloading, covering, collection, and delivery might consist. Parliament was intending to confer a privilege on traders as against railway companies, and that privilege Parliament gradually enlarged. The first provision contained the limitation I have mentioned. If that provision is contrasted with the section now under discussion, it is clear that the object of section 14 of the Act of 1873 is to extend the privilege by removing that limitation. Still later Parliament has extended the privilege even further—viz., by the Railway and Canal Traffic Act, 1888, s. 33, sub-section 3, which gives traders fresh facilities for obtaining information as to charges.

The last-mentioned sub-section seemed to me at first to afford an agument in favour of the railway company, as implying that the same information could not have been obtained under the Act of 1873. But it now appears to me to be clear that the object of sub-section 3 of section 33 of the Act of 1888 is to give traders a more summary remedy—viz., that of applying by letter to the company, who are liable under sub-section 7 to a penalty if they fail to comply with the application, and to relieve them from the necessity of going to the Commission Court.

It is suggested that it is an unreasonable hardship on a company to be bound to give in their rate-book a detailed statement of every possible rate. I think the answer to that is that the first part of section 14 of the Act of 1873 is general, and that the obligation to give details is only introduced when an application has been made by some person interested. It is only for the benefit of a particular person that this detailed information has to be given. For him the company must distinguish the items of the various charges. If he is satisfied, it does not seem that the commissioners need call on the company to make the information public. At any rate there seems to be clear jurisdiction under the section to order the discovery which is asked for, and, therefore, in my opinion the appeal fails.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicants, *Neish, Howell, & Haldane.*

Solicitor for the railway company, *C. de J. Andrewes.*

From K. B. Div.
(Mathew and Cozens-Hardy, L JJ.) March 21.

LEADBITTER v. MAYOR, &c., OF ST. MARYLEBONE (No. 2). (a.)

Metropolis — Building — Party structure — Building owner's notice—Limitation of time for exercise of rights under notice—London Building Act, 1894 (57 & 58 *Vict. c. cxiii.*), s. 90, *sub-section* 4.

The limitation of six months mentioned in section 90, *sub-section* 4, *of the London Building Act,* 1894, *applies to cases in which, a building owner having served a party-wall or structure notice, the adjoining owner consents thereto. It does not apply where differences arise between the building owner and the adjoining owner with regard to the notice, and arbitrators are appointed to settle the differences.*

Appeal from the refusal of Bucknill, J., to make an order under ord. 42, r. 30, for the purpose of giving effect to an injunction obtained by the plaintiffs against the defendants.

The plaintiffs were the freeholders of a house known as No. 33, John-street, Marylebone; the defendants were the freeholders of the adjoining house, which was known as No. 34, John-street.

In 1902 a dispute arose between the plaintiffs' tenant and the defendants with regard to the party-wall between the two houses, the tenant having served on the defendants a building owner's party-wall notice under section 90 of the London Building Act, 1894, and the defendants having served on the

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

tenant a counter-notice under section 89, and the matter was referred for settlement to surveyors in pursuance of section 91. The award of the surveyors, after dealing with the differences between the parties to which the notices related, provided further that the defendants should be entitled to raise the party-wall at any time as they thought fit.

In 1904 the defendants proposed to raise the party-wall and commenced building thereon.

The plaintiffs, who had in the meantime accepted a surrender of their tenant's lease, brought an action of trespass against the defendants, claiming an injunction to restrain the defendants from raising or building on the party-wall without first serving a building-owner's notice on the plaintiffs.

On the 6th of August, 1904, the Court of Appeal gave judgment, granting the plaintiffs the injunction which they claimed: see *ante*, p. 118.

On the 11th of August the defendants served a building owner's party-wall notice on the plaintiffs as adjoining owners. A difference arose between the parties as to the execution of the works mentioned in the notice, and surveyors were appointed under section 91 for the settlement of the matters in dispute.

At the expiration of six months from the service of the notice—*i.e.*, on the 11th of February, the surveyors had not made their award, and no further building had been done by the defendants.

Thereupon the plaintiffs, contending that by reason of section 90, sub-section 4, of the London Building Act, 1894, the powers of the surveyors had lapsed, applied for and obtained an order for a reference to an official referee to assess the amount due to them for damages in the action. They also applied to Bucknill, J., at chambers, for an order, under ord. 42, r. 30, directing that the defendants should remove the building erected by them upon the party-wall, and that, if they failed to do so, the plaintiffs should be at liberty to remove the same at the expense of the defendants.

Bucknill, J., dismissed the application.

The plaintiffs appealed.

Sub-section 4 of section 90 is as follows: "A party-wall or structure notice shall not be available for the exercise of any right unless the work to which the notice relates is begun within six months after the service thereof, and is prosecuted with due diligence."

J. Eldon Bankes, K.C., and *Poyser*, for the plaintiffs.

Macmorran, K.C., and *G. A. Scott*, for the defendants.

MATHEW, L.J.—I am of opinion that this appeal must be dismissed. It is admitted that the plaintiffs are not in a position to insist upon the order which they asked for at chambers, and it is agreed that the application shall be treated as one for a sequestration against the defendants for having disobeyed the former order of this court. That order restrained the defendants from interfering with the party-wall without first putting themselves in order by giving a building-owner's notice. The defendants forthwith gave the requisite notice, and a difference having arisen, it became necessary to make arrangements for arbitration. But, in consequence of difficulties which occurred, the period of six months from the giving of the notice elapsed before any award was made. It is said that the result of this is that the defendants are bound to begin the necessary proceedings under the Act all over again. It would be very hard if all the expense incurred by the defendants in the previous proceedings had to be thrown away, and we must look at section 90, sub-section 4, of the London Building Act, 1894, to see whether the law requires that this should be so. The sub-section provides that "A party-wall or structure notice shall not be available for the exercise of any right unless the work to which the notice relates is begun within six months after the service thereof and is prosecuted with due diligence." In my opinion that applies to cases where no difference arises between the building owner and the adjoining owner with regard to the notice, and where the adjoining owner consents to the notice. There is another section, viz., section 91, which applies to cases where differences do arise, and it provides for the appointment of arbitrators to settle the differences. This is a case under section 91, and, in my opinion, the limitation of time mentioned in section 90 does not apply.

COZENS-HARDY, L.J., concurred.

Appeal dismissed.

Solicitor to the plaintiff, *W. Stubbs.*

Solicitors to the defendants, *Mackrell, Maton, Godlee, & Quincey.*

From P. D. & Ad. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — March 15, 18.

"THE MILLWALL." (*a.*)

Practice—Appeal—Co-defendant made third party—Right to appeal from judgment for plaintiff against co-defendant—Contract—Damages—Indemnity—Costs—Reasonably defending action.

The plaintiffs loaded goods on board a barge belonging to one of the defendants for conveyance to a steamer. The barge-owners employed a tug belonging to the other defendants on their own account, and not on behalf of the plaintiffs, upon the following terms: "Gaselee & Son" (the tug-owners) "hereby give notice that they will not be answerable for any loss or damage which may happen to, or be occasioned by, any barge or vessel, or its cargo, while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise; and the services of their tugs must be understood and agreed to be engaged or accepted upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults or defaults of their servants or any claim therefor by whomsoever made. And the customers of the said Gaselee & Son undertake and agree to bear, satisfy, and indemnify them accordingly." While being towed the barge collided with a vessel at anchor, and her cargo was damaged. The plaintiffs sued both the defendants to recover the damage, and the tug-owners served a third-party notice upon the barge-owners claiming indemnity in respect of any damages and costs which they might have to pay. No order was made under ord. 16, r. 53, as to the mode and extent in or to which the barge-owners should be bound or made liable by the judgment in the action as against the tug-owners. At the trial the tug was held alone to blame for the collision, and judgment was given for the plaintiffs against the tug-owners, and for the barge-owners against the plaintiffs, the plaintiffs to recover from the tug-owners with their damages and costs the costs payable by them to the barge-owners. It was further held that the barge-owners were liable to indemnify the tug-owners against the damages and costs, and also against the tug-owners' costs of the action. The barge-owners appealed (1) *against so much of the judgment as held the tug-owners liable to the plaintiffs; and* (2) *against the judgment holding them liable to indemnify the tug-owners.*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Held, as to the first appeal, that the barge-owners had no right of appeal from the judgment against the tug-owners; and as to the second appeal, (1) *that the contract of towage did not relieve the tug-owners from liability for loss or damage to third persons, but only gave them an indemnity from the person employing them in respect of such liability; and* (2) *that the tug-owners, having reasonably defended the action, were entitled to recover from the barge-owners the costs as well as the damages.*

Appeal by the defendants, the owners of *The Millwall*, from the judgment of Sir Francis Jeune.

The action was brought by Page & Co., the owners of the cargo in the barge *Millwall*, against Darling Brothers, the owners of the barge *Millwall*, and Gaselee & Son, the owners of the tug *Bee*, to recover the damage sustained by their cargo through the negligence of the defendants.

The plaintiffs loaded 572 bags of sulphate of ammonia on board *The Millwall* for conveyance to a steamer loading in a dock in the Thames, and instructed Darling Brothers to employ a tug to tow the barge, as time pressed, and to debit their account. Darling Brothers accordingly ordered a tug from Gaselee & Son; and on the 21st of January *The Millwall*, while in tow of the tug *Bee*, came into collision with a barge at anchor and made so much water that the cargo was seriously damaged. The charge for the carriage of the cargo, apart from the charge for the tug, was 1s. 6d. a ton. The plaintiffs, besides claiming on the ground of negligence, also sought to recover their damage against Darling Brothers under a contract by which Darling Brothers undertook to carry the cargo safely.

The defendants, the owners of *The Millwall*, denied that they had been negligent, or that they had failed to carry the cargo safely. In the alternative they alleged that the cargo was carried on the terms established by the course of business and dealing between the parties—viz., that Darling Brothers should not be liable for any loss of or damage to the cargo, which could be, or in fact was, covered by insurance, whether such loss or damage did or did not arise from the negligence of Darling Brothers, or their servants, or agents, and on the terms that the plaintiffs should insure against loss of or damage to the goods, and that the underwriters should in no case have recourse against Darling Brothers, and that in pursuance of the arrangement the plaintiffs did insure the cargo, and had been paid by the underwriters. The owners of the tug put in a defence denying negligence. The owners of the tug delivered their defence on the 14th of June, 1904; and on the following day they served the defendants Darling Brothers with a third-party notice, claiming that they were entitled to be indemnified by Darling Brothers against any sum which the plaintiffs might recover from the tug-owners for damages and costs, and against the costs of defending the action and of the third-party proceedings, upon the ground that the towage of *The Millwall* was upon their usual terms (as stated on their billheads and notepaper)—viz.: "Gaselee & Son hereby give notice that they will not be answerable for any loss or damage which may happen to, or be occasioned by, any barge or vessel, or its cargo, while in tow, however such loss or damage may arise and from whosesoever fault or default such loss or damage may arise; and the services of their tugs must be understood and agreed to be engaged or accepted upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults or defaults of their servants or any claim therefor by whomsoever made. And the customers of the said Gaselee & Son undertake and agree to bear, satisfy, and indemnify them accordingly." Darling Brothers, in their defence to the claim by Gaselee & Son for indemnity, pleaded, so far as material, that if the tug was employed upon the terms alleged, she was employed at the verbal request and on account and at the expense of the plaintiffs, who were well aware of Gaselee & Son's terms of towage. It was admitted that Darling Brothers had notice of the above-mentioned terms of Gaselee & Son. No order was made under ord. 16, r. 53, as to the mode or extent in or to which Darling Brothers should be bound or made liable by the judgment in the action as against Gaselee & Son.

At the trial of the action Sir Francis Jeune held that the barge *Millwall* was not to blame for the collision, and that the cargo was damaged by the negligence of the tug. He accordingly held that the plaintiffs were entitled to recover the damage sustained by them from the tug-owners; and he dismissed the action against the owners of *The Millwall*, the plaintiffs to pay *The Millwall's* costs, and he held that the plaintiffs could recover from the tug-owners, with their damage and costs, the costs payable by them to the owners of *The Millwall*. The claim for indemnity by the tug-owners as against the owners of *The Millwall* was then argued; and Sir Francis Jeune held that the contract to employ the tug was not made by the owners of *The Millwall* as agents for the plaintiffs, but was made by them as an independent contract, and that, therefore, there was no privity of contract between the plaintiffs and the tug-owners so as to bind the plaintiffs by the tug-owners' conditions; and upon the construction of the clause set out above he held that a right of indemnity existed, and that the owners of *The Millwall* were liable to pay to the tug-owners, who had reasonably, though, as it turned out, wrongly, defended the action, all the damages and costs which the plaintiffs would recover from the tug-owners, and also the tug-owners' costs in the action.

The tug-owners appealed against the judgment holding them liable to the plaintiffs; and the owners of *The Millwall* appealed both against so much of the judgment as pronounced the tug-owners liable to the plaintiffs, and also against the judgment holding them liable to indemnify the tug-owners. The tug-owners subsequently withdrew their appeal. Neither the damages nor the costs in any of the proceedings were actually paid, execution having been stayed pending the appeals.

Upon the appeal by the owners of *The Millwall* against that part of the judgment holding the tug-owners liable to the plaintiffs coming on for hearing,

March 15.—*Scrutton, K.C.*, and *A. D. Bateson*, for the plaintiffs, took the preliminary objection that, as the owners of *The Millwall* had succeeded against the plaintiffs in the court below, they had no right of appeal. They could not appeal against a judgment in their favour. The tug-owners, who were unsuccessful in the court below, alone could appeal against the judgment, and they had withdrawn their appeal. The doctrine of subrogation does not assist the owners of *The Millwall*. They can only be subrogated to such rights as the tug-owners have, and as the latter have withdrawn their appeal, that right has gone, and the owners of *The Millwall* cannot be subrogated to it. Further, there cannot in any court be any subrogation until payment, which has not occurred here. The appeal, therefore, is not competent: *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226, 45 W. R. Dig. 74.

Carver, K.C., and *F. Laing, K.C.* (*R. H. Ballock* with them), for the owners of *The Millwall*.—The tug-owners have served a third-party notice under ord. 16, rr. 48, 55, claiming indemnity from the

owners of *The Millwall*, and the latter may perhaps be, though it is not admitted that they are, bound by the judgment against the tug-owners. They are entitled to appeal against that judgment, as their rights may be prejudicially affected by it. Section 19 of the Judicature Act, 1873, taken in conjunction with ord. 58, r. 1, gives a right of appeal. It is not contended that a right of appeal can be based upon the doctrine of subrogation.

COLLINS, M.R.—This is a preliminary objection taken by the plaintiffs to this appeal. The action arises in this way. The plaintiffs were the owners of cargo loaded in a barge called *The Millwall* for conveyance to a ship which was being loaded in a dock in the Thames. While *The Millwall* was being towed by a tug she came into collision with a barge at anchor, and the cargo on board *The Millwall* was damaged. The plaintiffs brought an action against both the owners of *The Millwall* and the owners of the tug to recover the damage to the cargo, and the learned President held that the tug was to blame and not *The Millwall*. He accordingly gave judgment for the plaintiffs as against the tug-owners, and for the owners of *The Millwall* as against the plaintiffs, and he ordered that the plaintiffs should pay costs to the owners of *The Millwall*, and that the plaintiffs should recover the costs so paid from the tug-owners. From that judgment the tug-owners gave notice of appeal; but that appeal was withdrawn. There is therefore no appeal by the tug-owners from the judgment in favour of the plaintiffs. After that matter had been disposed of, the claim by the tug-owners for indemnity from the owners of *The Millwall* came on for hearing, the plaintiffs not being present at, and not being concerned in, that inquiry; and the learned President held that the owners of *The Millwall* were bound to indemnify the tug-owners, and he accordingly ordered them to pay to the tug-owners all the damages and costs which the plaintiffs would recover from the tug-owners and also the tug-owners' own costs. The owners of *The Millwall* have given notice of appeal against so much of the judgment as pronounced in favour of the plaintiffs' claim against the tug-owners and also against the judgment holding them liable to indemnify the tug-owners. By that notice of appeal they therefore seek to question the judgment as between the plaintiffs and the tug-owners. It is objected on the part of the plaintiffs that that is not an appeal which the owners of *The Millwall* are entitled to bring, it being a judgment between other parties, and that the owners of *The Millwall* cannot appeal against that judgment unless they are subrogated to the rights of the tug-owners who are parties to the judgment. The owners of *The Millwall* are obviously not parties to the judgment in favour of the plaintiffs as against the tug-owners, and they are not subrogated to any rights of the tug-owners under which they can appeal from the judgment. They can only take the rights which the person to whom they are subrogated have; and inasmuch as the tug-owners have abandoned their right of appeal, it is impossible to subrogate the owners of *The Millwall* to a right of appeal which has been abandoned. Counsel for the appellants indeed admitted that; and they rested the right of appeal upon the rules as to third-party procedure. But when one comes to examine those rules it seems to me that no proceeding has been taken and no directions have been given by the court which have the effect of putting the owners of *The Millwall* in a position to question the judgment in favour of the plaintiffs as against the tug-owners. Ord. 16, r. 53, is the rule dealing with the matter, and that rule provides that "the court or a judge, upon the hearing of the application mentioned in rule 52"—that is a rule providing for directions as to the trial of the liability of the third party to make the contribution or indemnity claimed—"may, if it shall appear desirable to do so, give the third party liberty to defend the action upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action." Now no order has been asked for or made determining that the third parties—the owners of *The Millwall*—are to be bound by the judgment in the action as between the plaintiffs and the tug-owners. Therefore, so far as I know, it may be, though I desire to express no opinion upon the point, that there is nothing binding the owners of *The Millwall* by the judgment between the plaintiffs and the tug-owners, and it is clear that there is no provision made in that rule or in any other rule whereby the owners of *The Millwall* are substituted as defendants for the tug-owners so as to give them a right of appeal in their own name. Counsel could not point to any order giving them any special rights in the matter. The owners of *The Millwall*, therefore, have no right of appeal, either under the principle of subrogation or under the provisions of the rules, against the judgment between the plaintiffs and tug-owners. The appeal, so far as it affects the plaintiffs, must be dismissed with costs.

MATHEW, L.J.—I am of the same opinion, and have nothing to add.

COZENS-HARDY, L.J.—I am of the same opinion. It seems to me to be clear under the rules that the mere bringing in of a third party does not, apart from a subsequent order, make the judgment in the action binding upon him, because by ord. 16, r. 53, the court or a judge, upon the hearing of an application for directions, can make an order as to the mode and extent in or to which the third parties shall be bound or made liable by the judgment in the action. That conclusion is strengthened by ord. 16, r. 55, which is the particular rule under which the third-party notice was served in the present case, for under that rule one defendant may claim contribution or indemnity from any other defendant, and the same procedure is to be adopted as in other cases, "but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action." One of the rights of the plaintiffs as against the tug-owners is contained in a judgment against the latter which is not appealed from, and the present appeal by the third parties is directly in the teeth of the words at the end of rule 55, to which I have referred. No order has been made enabling the owners of *The Millwall* to defend the action as between the plaintiffs and the tug-owners. There is a *lis* between the plaintiffs and the owners of *The Millwall*, in which the owners of *The Millwall* were successful. There is another *lis* between the plaintiffs and the tug-owners, in which the plaintiffs were successful. We are asked to say that the owners of *The Millwall* have some right of appeal against the judgment in the second *lis*. There is nothing in the Judicature Act or the rules giving such a right. I think that the limits to which the right of appeal extend in the exceptional cases dealt with in order 16 are shown by the judgment of Cotton, L.J., in *In re Youngs*, 30 Ch. D. 421, at p. 426, where he says that "there is

no power to give to a person who could not be made a party to the action leave to appeal against the judgment." If the owners of *The Millwall* had obtained an order allowing them to defend the action as against the tug-owners, then very possibly they might have appealed against the judgment. They cannot do so now.

March 17.—*Carver, K.C.*, and *F. Laing, K.C.* (*R. H. Balloch* with them), for the owners of *The Millwall*.—The tug-owners are not liable to the plaintiffs. The plaintiffs directed the owners of *The Millwall* to employ a tug to tow the barge, and when the latter employed the tug they did so as agents for the plaintiffs. There was therefore privity of contract between the plaintiffs and the tug-owners, and the provisions of the contract made by the owners of *The Millwall* and the tugowners bound the plaintiffs. Even if there was no privity of contract, inasmuch as the plaintiffs directed the owners of *The Millwall* to employ a tug, they must be taken to have directed them to do so upon the usual terms. The usual terms, and, indeed, the only terms upon which a tug could have been employed, were the terms upon which Gaselee & Son agreed to tow. It is impossible to say that the tug-owners were liable to the plaintiffs for negligence when they only accepted the towage upon the terms that they were not to be liable for negligence. *Delaurier* v. *Wyllie*, 17 R. 167, is in point. Illustrations of the same principle are afforded by *Hall* v. *North-Eastern Railway Co.*, 23 W. R. 860, L. R. 10, Q. B. 439; *Singer Manufacturing Co.* v. *London and South-Western Railway Co.*, 42 W. R. 347, [1894] 1 Q. B. 833; and *Keene* v. *Thomas*, *ante*, p. 336, [1905] 1 K. B. 136. Secondly, if the tug-owners were liable to the plaintiffs, they have no right of indemnity over. Underwriters who agreed that if their assured became liable to pay and paid as damages for running down any other ship any sum not exceeding the value of the vessel insured, they would repay to the assured a certain proportion of that sum, were held in *Xenos* v. *Fox*, 16 W. R. 1053, L. R. 3 C. P. 630, 17 W. R. 893, L. R. 4 C. P. 665, not liable to pay any portion of the costs which the assured incurred in successfully defending an action of collision brought against him. The indemnity clause here only covers "such loss or damage"—that is, loss or damage to the cargo. There is no contract to indemnify the tug-owners against costs. The judgment is therefore wrong.

J. A. Hamilton, K.C., and *Bailhache*, for the tug-owners.—The clause in question does not affect the cargo-owners. It is only operative as between the tug-owners and the barge-owners. It is because the tug-owners have come under an obligation to third persons, whether cargo-owners or others, that the indemnity clause is required. The clause assumes such a liability and gave an indemnity in respect thereof. Therefore the tug-owners had no defence under the clause to the action by the plaintiffs. There being no privity of contract between the tug-owners and the cargo-owners, the latter had a good cause of action against the former. Secondly, the cause covers the costs of reasonably defending the action: *Hammond* v. *Bussey*, 20 Q. B. D. 79, 36 W. R. Dig. 65. The tug-owners, by giving the barge-owners a third-party notice, gave them an opportunity of protecting their interests, either by taking over the defence of the action, or by giving the tug-owners notice not to defend, and that if they did defend they would do so at their own risk. The barge-owners did not do this. The costs are therefore recoverable.

Carver, K.C., in reply.—The first part of the clause is quite general, and is independent of the second part, which gives the indemnity.

March 18.—COLLINS, M.R.—This is a dispute between the barge-owners and the tug-owners, and that dispute turns upon the contract of towage made between them. It is contended by the tug-owners that the effect of that contract is to shift all responsibility for the damage done to the cargo from them on to the barge-owners. The learned President, taking that view, held that the contract had the effect of shifting from the tug-owners to the barge-owners the entire liability for the damage to the cargo. That was a decision most unwelcome to the barge-owners, who had been acquitted of all blame in the matter, whereas the tug-owers had been held alone to blame, and they were naturally startled at the result. The question, however, arises upon the agreement which the barge-owners made with the tug-owners. It seems to me that that agreement presents no real difficulty. It seems to be clear that, upon the terms of that agreement, the liability for any loss or damage is taken from the tug-owners and placed on the barge-owners. Now comes this question. The barge-owners, being in that disagreeable predicament, sought to force the plaintiffs to discuss with them whether that part of the original judgment which held the tug-owners liable to pay to the plaintiffs the amount of the damage done to the cargo was right, and for that purpose they gave notice of appeal from that judgment. The tug-owners had given notice of appeal against that judgment, but they withdrew that notice. We held a few days ago that the barge-owners had not put themselves in the position of the tug-owners so as to entitle them to contest that decision. The barge-owners now contend that that judgment against the tug-owners is not binding upon them, and they seek to show that it is wrong upon the ground that the tug-owners, as between themselves and the plaintiffs, are exempt from liability for negligence. It may be that that judgment is not binding upon the barge-owners, and that they are entitled to show that it is wrong, and that the tug-owners ought not to have been held liable at all. I do not decide that it is open to the barge-owners to contest that judgment upon a collateral issue. I will assume that they are entitled to do so for the purposes of the present argument.

I now come to the terms of the contract upon which the tug-owners undertook to tow the barge. Mr. Carver first of all contends that, in the circumstances under which that document came into existence, it established privity of contract between the plaintiffs and the tug-owners, and that therefore the tug-owners were relieved of all liability to the plaintiffs. That is a question of fact, depending upon the circumstances in which the engagement of the tug was made. The learned President came to the conclusion that privity of contract had not been established between the plaintiffs and the tug-owners, and that the barge-owners made the contract directly with the tug-owners on their own behalf. It is not necessary to refer to the evidence upon that part of the case. I see no reason for differing from the conclusion arrived at by the learned President. I think that he arrived at the fair meaning of the arrangement between the parties. Therefore I start with this, that the document did not create privity of contract between the plaintiffs and the tug-owners. Upon the hypothesis that privity of contract is not established, Mr. Carver's next contention is that the true effect of the document is to relieve the tug-owners from all liability for loss or damage in respect of the carriage of the cargo—in other words, that the cargo was carried at owners' risk. In

my opinion, upon the construction of this document, it does not amount to a contract to carry the cargo at owners' risk. It presupposes a liability to some one on the part of the tug-owners, and it secures an indemnity to them. It is a contract of indemnity against a liability which the tug-owners require to be indemnified against. Mr. Carver contended that the first part of the document stands alone, and is perfectly general in its terms, and amounts to a declaration that the goods are to be carried at owners' risk. The answer to that contention is that the document does not stop there. The whole document is a contract of indemnity to the tug-owners against "such loss or damage"—that is, the loss or damage previously mentioned. The barge-owners, therefore, undertake to indemnify the tug-owners against claims by anyone for damage to vessel or cargo occasioned by, as in the present case, a collision. Therefore the point that there is no liability upon the part of the tug-owners to the plaintiffs fails.

Now comes the further contention that, admitting liability to indemnify the tug-owners, that indemnity must be limited to the damage occasioned to the cargo, and does not include the costs which the tug-owners have been held liable to pay. That raises the question whether, having regard to all the circumstances, the tug-owners in defending the action acted otherwise than reasonably. The case falls within the principle which was laid down long ago, and is now well-established. It was laid down in 1859 in *Broom* v. *Hall*, 7 C. B. N. S. 503, 9 W. R. C. L. Dig. 32, the head-note in which case is as follows: "A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff—held, that A. was entitled to recover the costs." No doubt after that decision one or two cases were decided which did not give full effect to it. One such case was *Baxendale* v. *London, Chatham, and Dover Railway Co.*, 23 W. R. 167, L. R. 10 Ex. 35. But in the subsequent case of *Hammond* v. *Bussey* all the cases were considered and full effect was given to the decision in *Broom* v. *Hall*. In the present case there was no jury to decide whether the tug-owners acted reasonably in defending the action, but the learned President found that they acted reasonably in defending, and that they had a right of indemnity over for the costs to which they had been put. The evidence that they had acted reasonably is strong. They gave the barge-owners, who were ultimately liable, full notice of the claim, they served a third-party notice upon the barge-owners which gave them full opportunity of intervening and disputing the claim, or of ascertaining the extent of the loss and paying it, and in these circumstances it is not competent for them to throw upon the tug-owners the whole burden of the litigation. The learned President came to the conclusion that the tug-owners did all that they reasonably could in ascertaining whether they were liable to the plaintiffs, and in diminishing the amount of the loss, and that, therefore, they had a right of indemnity over against the barge-owners for the costs to which they were rendered liable in those proceedings. In these circumstances, the barge-owners are liable to repay those costs to the tug-owners. Mr. Carver says that the document does not in terms include the costs, but only the "loss or damage." No doubt that is so, but it is not conclusive of the matter. By reason of the existence of the contract of indemnity which renders the third parties liable in a certain event, there arises, upon the happening of that event, the question whether the tug-owners, in whose favour the indemnity is given, have acted reasonably in contesting the claim made against them. The contract of indemnity gives the third parties an interest in that question, and the third-party procedure gives them full opportunity of meeting or contesting that claim. The liability to pay the costs does not arise directly out of the contract of indemnity, but comes into existence afterwards, and arises out of the conduct of the parties after the contract of indemnity is come into operation and a claim has been made which gives rise to a right of indemnity under the contract. Sometimes a provision for the payment of the costs is introduced into the contract of indemnity itself, but it does not follow that where it is not so introduced the right to indemnity against those costs is excluded. For these reasons the judgment of the learned President was right and the appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion.

COZENS-HARDY, L.J.—I am of the same opinion. I agree with the Master of the Rolls that upon the facts no privity of contract has been established between the plaintiffs and the tug-owners, and that the conditions were applicable only as between the tug-owners and the barge-owners. The only point upon which I desire to add anything is upon the question whether, inasmuch as costs are not mentioned in the indemnity contract, the tug-owners can recover from the barge-owners the costs of defending the action brought against them by the plaintiffs. It is well settled in one large class of case that the costs of litigation are recoverable by the person entitled to the indemnity. The class of case to which I refer is that of two trustees being held liable for breach of trust, one of whom is primarily liable, in which case it is well established that the trustee primarily liable is bound not only to make good to his co-trustee the loss incurred, but also the costs to which the co-trustee has been put. That has been decided in *Lockhart* v. *Reilly*, 4 W. R. 438, 25 L. J. Ch. 697, and in a very recent case before Warrington, J., of *In re Linsley*, *ante*, p. 172, [1904] 2 Ch. 785. In this latter case Warrington, J., held that "a solicitor-trustee, to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate." That is the principle upon which the learned President proceeded in the present case, and it is no new principle, but one long established.

Appeal dismissed.

Solicitor for the plaintiffs, *James Ballantyne.*

Solicitors for the barge-owners, *Keene, Marsland, Bryden, & Bennett.*

Solicitors for the tug-owners, *J. A. & H. E. Farnfield.*

High Court of Justice.

Chan. Div. } April 14, 15.
Farwell, J. }

In re GOOD.
HARINGTON *v.* WATTS. (*a.*)

Will—Charity—Perpetuity—Gift to officers' mess for upkeep of library.

Gift of residuary estate for upkeep of a mess library held to be a charitable gift within the Statute of Elizabeth (43 *Eliz. c.* 4). *Gift of leasehold houses for old officers of a regiment at a small rent during their life held void for perpetuity.*

Income Tax Commissioners *v.* Pemsel, [1891] *A. C.* 583, 39 *W. R. Dig.* 217, *discussed and explained.*

In re Stratheden, 42 *W. R.* 647, [1894] 3 *Ch.* 265, *approved.*

Originating summons.

Thomas Good, formerly a sergeant in the 14th Regiment (now the 2nd Battalion Prince of Wales' Own West Yorkshires), who died on the 12th of September, 1904, disposed of his property by his will as follows: "I give to the officers' mess of the 2nd Battalion 14th Regiment, my old happy home, all my books and bookcases whatsoever and wheresoever for the use of the officers of the aforesaid mess only and, subject as aforesaid, the whole of my residuary estate and the investments and income thereof in trust for the aforesaid officers' mess absolutely, and I give them the same accordingly to be invested, and the dividend and annual income only, arising therefrom to be paid to the aforesaid officers' mess to maintain the said library and for the renewal of books for ever." It was also provided in the will that, when there was any balance over in any year after providing for the upkeep of the library, such balance should be spent in the purchase of plate for the mess. There was a further devise of "my two houses at Ryde for the use of old officers of the regiment at a small rent during their life." The gross value of the estate was sworn at £7,000 or thereabouts.

By this summons the following questions were asked among others: (1) Whether the bequest of the testator's residuary estate to the officers' mess of the 2nd Battalion West Yorkshire Regiment "the income only therefrom to be paid to maintain a library and renewal of books for ever" was a good charitable trust or otherwise a valid gift, or whether it was void for remoteness. (2) Whether the devise of the two houses at Ryde for the use of old officers of the regiment was a good and valid gift or was void for remoteness.

Crossman, for the defendant Colonel Watts, argued that the bequest of residuary estate was an absolute gift to the individual members of the regimental mess. Being a valid gift it was not affected by the attempt to engraft an invalid trust: *Hancock* v. *Watson*, 50 W. R. 321, [1902] A. C. 14.

Upjohn, K.C., and *Manning*, for the plaintiff, Colonel Harington, argued that a mess was neither a charity nor a perpetuity, but was an organization of the same nature as a club, and could by mutual agreement dispose absolutely of all its property.

R. J. Parker, for the Treasury Solicitor, referred to the Statute of Elizabeth (43 Eliz. c. 4), and argued that any fund for the equipment of the army was within the preamble of that statute, and so was charitable. Further, in the case of *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 583, 39 W. R. Dig. 217, Lord Macnaghten lays down four heads of charitable gift, one of which is gifts in relief of the national purse. Anything towards the efficiency of the army was *pro tanto* of national benefit. From the army regulations it was shown that a mess is an integral part of a regiment whose property is dealt with quite independently of its individual volition, and that the government contributes to its equipment. Evidence was given that libraries formed part of the equipment of depots, and that it had been considered whether they should be provided in regimental messes also. A saving of public expense was not necessary to make charitable any gift which was for the benefit of the public. In *In re Stratheden*, 42 W. R. 647, [1894] 3 Ch. 265, a gift to a volunteer corps was held to be charitable, while in *In re Stephens*, W. N. 1892, p. 140, a fund to provide a shooting prize in perpetuity was similarly upheld.

Jenkins, K.C. (*Method* with him), for the Official Solicitor on behalf of the next-of-kin, argued that the gift was void. If the nation as a whole did not benefit by this, then the case fell within *Carne* v. *Lang*, 2 De G. & J. 75, where a gift to a library not benefiting the whole public was held not charitable. A mess library was only a private benefit to the officers concerned, whose pockets it relieved, and though it might increase the efficiency of the officers, was no more a charity than a gift to maintain a polo stable: *Newland* v. *Attorney-General*, 3 Mer. 684; *Nightingale* v. *Goulbourn*, 5 Ha. 484; *In re Macduff*, 45 W. R. 154, [1896] 2 Ch. 466, where Lord Lindley said that everything that came within the four heads enumerated by Lord Macnaghten in *Pemsel's case* was not necessarily charitable.

FARWELL, J., gave judgment as follows: I think it is plain from the affidavit of the Assistant Adjutant-General that the mess is an integral portion of the regiment, and not a mere club as has been suggested, and in my opinion this gift is not a gift to officers individually, but is a gift to the mess for the time being.

The real question is whether a gift to the mess, of a fund, the income of which is a perpetuity to keep up a library for the officers' mess of the regiment, is a charitable gift within the Statute of Elizabeth. I think that probably everyone would agree with Lord Lindley's criticism of Lord Macnaghten's judgment, that he did not intend to say that every object of public utility is necessarily a good charity, but there is no doubt that many objects are charitable because they are of public utility. Some objects of public utility are charitable, though not all, and the question is whether, within the purview of the Statute of Elizabeth, a particular object is or is not a charity.

Now Mr. Parker has put his argument on two grounds: (1) that anything that assists the efficiency of the army is charitable within the meaning of the Act because it is for a public purpose—a purpose in which the public are interested; (2) he says that it would also come within the last clause of the preamble of the Statute of Elizabeth: "The aid and ease of any poor inhabitants concerning payment of fifteenths, the settinge out of souldiers, and other taxes," because it would relieve the taxation in so far as it is applied to the maintenance of the officers' mess. The difficulty of applying the second portion of that is that, at present, at any rate, looking at the regulations I have before me, there is no provision made for payment by the Government in aid of the library of the mess, although the Government does make allowances in aid of the supply of other things to the mess, such as hardware and furniture.

I have come to the conclusion, after some doubt, as one always must have in these cases which are very

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

near the line, that this is a charitable gift on the first ground, namely, that it is directly a public benefit by increasing the efficiency of the army in which the public is interested, not only financially, but also for the safety and protection of the country.

I am disposed to think that it might be supported on the second ground on the Assistant Adjutant-General's affidavit, which states that part of the mess equipment in divers regiments already consists of a library and that it has been already considered by the military authorities whether a library should not be made part of the necessary equipment of every officers' mess on the ground that it is conducive to military efficiency. But I prefer to put it on the first ground argued by Mr. Parker, because that appears to me to come within the principle on which the court has acted in applying this very difficult question of the Statute of Elizabeth. I am not, of course, suggesting that the officers are objects of charity. It is the public, not the officers, who get the benefit, by the better means placed at their disposal to make themselves efficient servants of the king for the defence of their country. On that ground I think it may be upheld.

I may say that Kekewich, J., has held that a prize for shooting is a good charitable gift, and Romer, J., also considered that a gift to a volunteer corps was a good charity. I think it would be difficult to say that money to be expended in terms in some specific way in order to increase the efficiency of the regiment in a particular mode would not be a good charity. This, to my mind, does increase the efficiency of the army by giving the officers greater opportunities of providing themselves with literature. I must assume that the books bought will be books of merit, and, after all, so long as they are books of merit, they need not necessarily be confined to military literature. I should be sorry to hold that any gift which tends to increase educational equipment is not a charitable gift. I declare that the gift of the residuary estate is a good charitable gift.

As to the two houses at Ryde, it seems to me that this gift fails altogether. After giving the whole of his residuary estate the testator goes on to say, "As to my two houses at Ryde, to the use of old officers of the regiment at a small rent during their life." Is it part of residue falling in that way? If so the trust fails. If it is not a part then the houses are not disposed of except by this trust. I think he meant this to be a separate trust, and as this fails for perpetuity there is an intestacy as to these houses.

Solicitors, *C. E. Beal*, for *T. Robinson; The Official Solicitor; The Treasury Solicitor.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 12.

SMITH *v.* SAVAGE. (*a.*)

Adulteration—Food and drugs—Sample purchased for analysis—Purchase of four packets of an article—Contents of packets mixed together and then divided—Compliance with requirement of Act—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 14.

The appellant, an inspector under the Sale of Food and Drugs Acts, purchased four penny packets from the respondent, a grocer, labelled "Finest cream of tartar; 98 per cent. bi-carbonate of potassium. B.P. 1898." *The packets, which were all similar in size, appearance, and label, were taken by the respondent from the same box. The appellant having emptied out the contents of the four packets and mixed them together, divided them into three parts, sealed them up, and sent one of the sealed packets to the county analyst, who certified that the sample contained lead. At the hearing of an information preferred by the appellant against the respondent, laid under section* 14 *of the Sale of Food and Drugs Act,* 1875, *the respondent raised the objection that the appellant had made four separate purchases, as each packet was an article, and that by mixing together the contents of the four packets and then dividing the substance so mixed into three parts the requirements of section* 14 *had not been complied with. The justices dismissed the information. The inspector appealed.*

Held, allowing the appeal, that the objection taken by the respondent was not a good objection.

Mason *v.* Cowdray, 49 *W. R.* 28, [1900] 2 *Q. B.* 419, *distinguished.*

Case stated by the justices of Wilts.

At a court of summary jurisdiction at Hungerford the respondent, a grocer, was charged by the appellant, an inspector under the Sale of Food and Drugs Acts, that he did unlawfully sell to the appellant to his prejudice as the purchaser, a certain drug, to wit, four penny packets of cream of tartar, not of the nature, substance, and quality demanded, such cream of tartar containing lead in the proportion of three-fourths of a grain per pound contrary to section 6 of the Food and Drugs Act, 1875

The case stated that on the 9th of August, 1904, the appellant visited the respondent's shop and saw the respondent, who, in reply to a question, said he sold cream of tartar and produced a box of packets labelled "Finest cream of tartar; 98 per cent. bi-carbonate of potassium. B.P. 1898." The appellant asked for four packets, and was supplied with four, which were all similar in size, appearance, and label, and were taken from the same box. He paid fourpence for them, and told the respondent that the purchase was for analysis. The appellant emptied the contents of the packets into one place, and then divided the whole of the contents into three parts for analysis and sealed them up and sent one of the three to the county analyst, who certified that the sample contained lead in the proportions mentioned.

At the hearing before the justices the respondent raised the following points: That the appellant made four separate purchases, each packet being an "article," and that the appellant did not, by mixing together the contents of the four packets and then dividing the substance so mixed into three parts, comply with section 14 of the Sale of Food and Drugs Act, 1875, and in support of this contention he cited *Mason* v. *Cowdray*, 49 W. R. 28, [1900] 2 Q. B. 419.

The appellant submitted that as one packet was too small to be dealt with by the analyst, and in order to get a sufficient quantity to analyze he had to buy four packets, and that in the circumstances the requirements of section 14 had been properly complied with, as the entire purchase had been duly divided into three parts as directed, and that *Mason* v. *Cowdary* was distinguishable, as in that case there was no mixing, and therefore not a proper division of the entire purchase.

The justices upheld the objection, and dismissed the information.

The inspector appealed.

Holman Gregory, for the appellant.

H. D. Bonsey, for the respondent.

Lord ALVERSTONE, L.C.J.—In my opinion this appeal must be allowed. It was contended by the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

respondent, and the justices upheld that contention, that the requirements of section 14 of the Sale of Food and Drugs Act, 1875, had not in this case been complied with, because each packet was an "article," and the section directs that the "article" purchased shall be divided into three parts. It seems to me that there was only one purchase here, as the appellant asked for four packets of cream of tartar, and the fact that the article asked for was kept by the seller done up in penny packets for the convenience of measurement does not alter the case. In *Mason* v. *Cowdary* six bottles of camphorated oil were bought for analysis. There was no mixing of the contents of the different bottles, but two bottles were sent to the analyst, two given back to the seller, and two retained by the inspector. Darling, J., who tried the case, held that as the oil might be of quite different quality in the different bottles there was not such a division of the article purchased as complied with the statute. Here the contents of the packets, however, were all mixed together and then divided. The case must go back to the justices to proceed in the matter, as the objection taken, in my opinion, is not a good objection.

KENNEDY and RIDLEY, JJ., concurred.

Case remitted accordingly.

Solicitor for the appellant, *H. Bevir*, Wootton Bassett.

Solicitors for the respondent, *Neve, Beck, & Kirby.*

K. B. Div. (Phillimore, J.) Jan. 18.

MYLAM *v.* MARKET HARBOROUGH ADVERTISER CO. (*a.*)

Inland revenue—Income tax—Exemption—Company—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 163 —*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 34.

A company incorporated under the Companies Act is not entitled to claim exemption from income tax under section 163 *of the Income Tax Act,* 1842, *and section* 34 *of the Finance Act,* 1894, *on the ground that its aggregate annual income does not exceed* £160.

Case stated by the Commissioners of Income Tax.

The question for the opinion of the court was whether a limited company was entitled to exemption from income tax under section 163 of the Income Tax Act, 1842, as amended by section 34 of the Finance Act, 1894, on the ground that its annual profits did not exceed £160. It appeared from the case that the Market Harborough company was a limited company with a capital of £2,000, in 2,000 shares of £1 each, which had been fully subscribed and paid up. The articles of association provided that Table A of the Companies Act, 1862, should apply to the company except as thereinafter provided by clause 4 of the articles, that at the discretion of the directors part of the profits might be set aside for reserve fund. Such reserve fund was to be applicable towards meeting bad debts, providing for extraordinary expenditure, equalization of dividends, and other purposes to which the company's funds were properly applicable.

The following regulations (*inter alia*) of Table A applied:

72. "The directors may, with the sanction of the shareholders in public meeting, declare that a dividend out of the profits of the company be paid to members in proportion to their share."

73. "No dividend shall be payable except out of the profits arising from the business of the company."

The company's gross profit for the year ending the 31st of March, 1903, was £280 17s. 2½d., which being added to the balance in hand of £8 14s. 2½d. made a total of £289 11s. 5d. From this amount £50 was deducted for depreciation; £25 was placed to reserve fund; £100 was expended in paying a dividend to the shareholders of 5 per cent.; £15 was paid to the directors for their services during the year; and a balance of £99 11s. 5d. was carried forward.

It was admitted on behalf of the company that it was proposed to deal with the profits for the year ending the 31st of March, 1904, as in former years, by writing off a sum for depreciation, placing a sum to reserve, paying a dividend to the shareholders, making a payment to the directors for their services, and carrying forward a balance to the next account.

On behalf of the company it was contended: (*a*) That on the proper construction of the interpretation clause, section 192, of the Income Tax Act, 1842, the company being a body politic, was by the operation of that clause deemed to be a person, and consequently was entitled to the exemption conferred by section 163 of the Act, it being immaterial to the point whether the company paid dividends or not, as those shareholders who were individually liable to the tax would have to include any dividends received by them free of tax, in their own returns; (*b*) that taxing Acts being in the nature of penal ones must be strictly construed, and persons coming within the exemption clauses were entitled to take advantage thereof whether the result was contemplated at the time the Act came into operation or not.

The commissioners decided in favour of the company, but stated this case. The question for the opinion of the court was whether the commissioners were right in deciding that the company were entitled to exemption.

By section 163 of the Income Tax Act, 1842: "Any person chargeable to the duties granted by this Act either by assessment or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled who shall prove before the commissioners for general purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act,"—does not exceed £160, see Finance Act, 1894 (57 & 58 Vict. c. 30), s. 34—"shall be exempted from the said duties, and shall be entitled to be repaid the amount of all deductions or payments on account thereof in the manner hereinafter directed except so much of such duties as the person claiming such exemption shall or may be entitled to charge against any other person or to deduct or retain from or out of any payment to which any such claimant may be or become liable."

Sir E. Carson, S.G. (*Rowlatt* with him), for the Inland Revenue.—The company is not entitled to exemption, first, because it is not a person within the meaning of the Act, and second, because the company is not taxed here at all, but the individual shareholders. The case of *Inland Revenue* v. *Old Monkland Conservative Association*, 42 Sc. L. R. 12, is not in point.

The company was not represented.

PHILLIMORE, J.—In this case I have to decide whether the commissioners were right in exempting this company from income tax in respect of its revenue on the ground that the annual amount of its aggregate income does not exceed £160. I think that the commissioners were wrong, and that this appeal must be allowed. I do not, however, decide this case on the ground that the word "person" in section 163

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

of the Income Tax Act excludes a corporation. That question may have to be decided some day; for the present purpose I shall assume that it does not exclude a corporation. But the exemption in section 163 is carefully conditioned, and there is excepted from its operation so much of the duties as the person claiming exemption from duties shall be entitled to deduct or retain from or out of any payment to which the claimant for exemption may be liable. Now, under section 54 a corporate body must estimate the profits and gains to be charged upon it; and that estimate is to be made upon the amount of its annual profits and gains before any dividends shall have been paid thereout to any other persons having any share in such profits and gains, and all such persons shall allow out of such dividends a proportionate deduction in respect of the duty so charged. Thus the corporation is bound to make a return showing an estimate of what will be the amount of its profits, and then in paying the dividends to its shareholders it may deduct from each recipient his quota of the amount estimated as payable in respect of the tax. It follows that there is no ground for exemption. The corporation itself is not taxed; it loses nothing because it deducts from its shareholders the amount it pays for the tax. Thus the exception to the exemption applies in terms to the corporation itself. If the individual shareholders are exempt, they can recover by the ordinary and well-known process. I have considered the case of *Inland Revenue* v. *Old Monkland Association*, but that case is not in point. The claimants there were an unincorporated body, and, moreover, the assessment was not made upon profits divisible among the members, but upon house property not let upon lease, and was made under Schedule A. I express no opinion as to what may be the result in case an unincorporated body claims exemption under section 163.

Appeal allowed.

Solicitor, *Solicitor to Inland Revenue.*

K. B. Div. (Phillimore, J.) Dec. 20.

KEMP *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland Revenue—Stamp duty—Conveyance of property—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 3—*Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 62.

An assent in writing made under the hand but not under the seal of an executor to a devise of real estate by his testator, pursuant to section 3, *sub-section* 1, *of the Land Transfer Act,* 1897, *is not liable to duty as a conveyance or transfer, as being within the meaning of section* 62 *of the Stamp Act,* 1891, "*an instrument whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person.*"

Case stated.

This was a case stated by the Commissioners of Inland Revenue as to the stamp duty chargeable upon an assent in writing by an executor to a devise of real estate. The instrument in question was in the following terms:

"Whereas, by an indenture dated the 15th of September, 1888, and made between Elizabeth Kemp, of . . . , spinster, of the one part, and Arthur Joslen, of . . . , of the other part, the hereditaments and premises hereinafter described were (*inter alia*) conveyed by the said Elizabeth Kemp to the said Arthur Joslen by way of mortgage to secure the sum of £100 and interest. And whereas the said Elizabeth Kemp, by her will, dated the 10th day of November, 1903, devised the said hereditaments unto her nephew Alfred Kemp, his heirs and assigns, and appointed William Henry Simons, of . . ., executor thereof. And whereas the said Elizabeth Kemp died on the 13th day of November, 1903, without having altered or revoked her said will, possessed of the said hereditaments hereinafter described, for an inheritance thereof in fee simple, subject to the hereinbefore recited indenture of mortgage, which will was duly proved by the said executor on the 30th of November, 1903, in the Principal Registry of the Probate Division of the High Court of Justice. And whereas the said William Henry Simons has paid the funeral and testamentary expenses of the said Elizabeth Kemp, and all her debts of which he has had notice, now he, the said William Henry Simons, as personal representative of the said Elizabeth Kemp, deceased, hereby signifies his assent to the devise by the said testatrix to the said Alfred Kemp of all that messuage, house, and premises known as . . . now in the occupation of . . . subject to the said indenture of mortgage of the 15th day of September, 1888, and to the principal money and interest thereby secured, so far as the same relates to the said hereditaments and premises above described, and also subject to a charge thereon for all moneys (if any) which the personal representative of the said Elizabeth Kemp is liable to pay. As witness the hand of the said William Henry Simons this 14th day of April, 1904."

The object of the signature to the instrument by Simons was to give a good title to the hereditaments and premises mentioned in favour of Alfred Kemp, subject to the mortgage thereof, and the instrument was for that purpose handed to the mortgagee, in whose custody the title-deeds were.

Simons, in signing and handing over the document, purported to be acting under the provisions of section 3 of the Land Transfer Act, 1897.

The commissioners being of opinion that the instrument was an instrument whereby property on an occasion other than a sale or a mortgage was transferred to or vested in Alfred Kemp within the meaning of section 62 of the Stamp Act, 1891, assessed it as liable to the fixed duty of 10s. as upon a "conveyance or transfer not thereinbefore described" within the meaning of that heading in the first schedule to the Act. The questions for the opinion of the court were (1) whether the instrument was liable to duty as assessed; (2) if not, to what duty (if any) it was liable.

By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 62: "Every instrument and every decree or order of any court or any commissioners whereby any property on any occasion except a sale or mortgage is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property. . . ." By the first schedule a duty of 10s. is imposed upon "every conveyance or transfer of any kind not hereinbefore described."

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3, sub-section 1: "At any time after the death of the owner of any land his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representative in respect of the land shall cease except as to any acts done or contracts entered into by them before such assent or conveyance.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Cozens-Hardy, for the appellant.—This is not a conveyance within the meaning of section 62 of the Stamp Act, 1891. The assent need not be in writing, though it naturally enough usually is. It merely completes the title of the devisee, and does not transfer the property.

He referred to Bythewood's Conveyancing (1829), ii., 641; Hughes' Concise Precedents (1855), vol. 1, 400; and cited the following cases: *Paramour* v. *Yardley*, Plowd. 539, (1718) 1 Str. 70; *Doe* v. *Mabberly*, 6 C. & P. 126.

Sir R. Finlay, A.G., for the Crown.—The rule of law is that the legal interest in a chattel real is vested in the executor under the will: Williams on Executors, p. 1103. His assent is therefore necessary to the vesting of the legal interest in the devisee, and the assent therefore requires to be stamped as a conveyance under section 62 of the Stamp Act, 1891.

PHILLIMORE, J.—This case has taken some time in argument because I required to be satisfied that the legal estate in a chattel real, which has become vested in an executor by reason of the will of his testator coupled with probate of the will, would pass to the specific legatee or devisee of the chattel real without a formal assignment by deed. The decisions which have been cited by counsel show that the estate can so pass, and that in fact the legatee of a specific term gets the legal estate in the term just as the legatee of a specific chattel gets the ownership of that chattel by the will of the testator. That being the law, it has been the custom of conveyancers sometimes to take an assignment by deed from the executor, sometimes to have a document in writing called an assent signed by the executor, and sometimes to allow the legatee to take possession and rely upon possession and the receipt of the rents and profits, or some other act of the executor *in pais* as showing assent. In cases where the document of assent is in writing two works of authority—Jarman's edition of Bythewood's Conveyancing and Hughes' Concise Precedents—state that no stamp duty is payable on the instrument, and I understand the Attorney-General to admit that it cannot be shown that the Crown has ever required such assents to be stamped. In that state of the law the Land Transfer Act, 1897, has in section 1 established a real representative, and has provided that upon death the real estate of the deceased shall vest in his personal representative, executor, or administrator, as the case may be, as if it were a chattel real; and by section 3 has provided that at the proper time the personal representative may assent to a devise or may convey to the person entitled. The present case raises the question whether an assent, not being under seal, is liable to stamp duty as a conveyance, as being an instrument whereby property on any occasion except a sale or mortgage is transferred to or vested in any person, and therefore chargeable with a fixed duty of 10s. under section 62 of the Stamp Act, 1891, and the first schedule thereto. It seems clear that the same liability as regards stamp duty must apply to such an assent to a devise of freehold estate as to a devise of chattels real, and that if the assent in the one case is subject to stamp duty it must equally be in the other. I should be loth by my judgment in this case to sanction the view that in every case where assents have been allowed to be executed without a claim for stamp duty a mistake has been made by the authorities; but I think that the burden is upon the Crown to show that the practice which has been adopted by conveyancers of repute, and which has not hitherto been challenged by the Crown, is not correct. I am therefore unwilling to hold that assents in writing to bequests of terms of years require a stamp, and if they do not, neither do assents in writing to devises of real estate. Counsel for the Crown relies on section 62 of the Stamp Act, 1891, and contends that the assent in writing of the executor operates to vest the property in the devisee, but in my view the assent is merely evidence that the executor has no longer any claim upon the property, which really vests under the will of the testator. But even if this be otherwise I think that the true view of section 62 is to read it *reddendo singula singulis*, and that the verb "transferred" relates to the noun "instrument," and the verb "vested" relates to the "decree or order of any court or of any commissioners."

For these reasons I think this instrument is not liable to stamp duty, and the appellant is entitled to judgment.

Appeal allowed.

Solicitor for appellant, *E. W. Williamson.*

Solicitor for the Crown, *Solicitor for Inland Revenue.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — March 27, 28.

LONGMAN v. BATH ELECTRIC TRAMWAYS (LIMITED). (a.)

Company—Shares—Certificate—Negligence—Estoppel—Proximate cause of loss—Duty of company.

A certificate is merely primâ facie *evidence of the title of the holder to the shares mentioned therein, and the fact that by the negligence of the company a certificate has got into the hands of the wrong person does not create any estoppel against the company so as to preclude their disputing the title of persons who have purchased from such wrongful holder on the faith of the certificate, there being no duty in the company either towards the public at large or towards persons desirous of becoming shareholders to retain the certificate, and the proximate cause of the loss not being the negligence of the company but the wrongful dealing with the certificate by the holder.*

This was an appeal from a decision of Farwell, J.

On the 19th of April, 1904, one Bennett became the registered owner of 1,500 shares in the defendant company, and a certificate of his ownership was made out but was not sent to him. On that same day there was presented to the secretary of the company a transfer by Bennett to two persons named Houselander and Madders, who had not executed the transfer at that time. It was presented for the purpose of obtaining a certification, which was given in this form, "Certificate forwarded to the company's office," and was signed by the secretary on behalf of the defendant company.

On the 22nd of April the secretary, under some mistake, sent the certificate to Bennett.

On the 28th of April Houselander and Madders returned the transfer executed by them for registration, and then at a subsequent date in May the plaintiffs made an advance of money to Bennett on the faith of the deposit of the certificate and a blank transfer of the shares. The plaintiffs sent in the transfer to the company for registration. That was not registered, and the shares had gone into the names of Houselander and Madders.

The plaintiffs, who had contracted to sell 250 of

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the shares, then brought the present action, in which they sought registration of the transfers for 1,500 shares and delivery of the certificates and damages for the company's default; and if the company were unable to register the transfers and deliver the certificates, then further damages to the amount of the value of the shares.

Farwell, J., held that the plaintiffs had no cause of action, and dismissed the action.

The plaintiffs appealed.

Bramwell Davis, K.C., and *Ashton Cross*, for the plaintiffs.

Upjohn, K.C., and *Sargant*, for the defendants.

Bramwell Davis, K.C., replied.

The following cases were referred to: *The Bank of Ireland* v. *Trustees of Evans' Charities*, 3 W. R. 573, 5 H. L. C. 389; *Staple Merchants' Corporation* v. *Bank of England*, 21 Q. B. D. 160, 36 W. R. Dig. 78; *Scholfield* v. *Earl of Londesborough*, 45 W. R. 124, [1896] A. C. 514; *Coventry* v. *Great Eastern Railway Co.*, 11 Q. B. D. 776, 32 W. R. Dig. 75; *Bishop* v. *Balkis Consolidated Co.*, 39 W. R. 99, 25 Q B. D. 712; *Balkis Consolidated Co.* v. *Tomkinson*, 42 W. R. 204, [1893] A. C. 396; *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175; *Johnson* v. *The Crédit Lyonnais*, 26 W. R. 195, 3 C. P. D. 32; *In re Ottos Kopje Diamond Mines (Limited)*, 41 W. R. 258, [1893] 1 Ch. 618; *Shropshire Union Railway and Canal Co.* v. *Reg.*, 23 W. R. 709. L. R. 7 H. L. 496; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482.

VAUGHAN WILLIAMS, L.J.—In this case Farwell, J., dismissed the plaintiffs' action, and this is an appeal against his judgment. Now in the main the plaintiffs' action is an action claiming registration by the company of transfers for 1,500 shares and delivery of certificates for those shares, and damages for the default of the company in registering the said transfers and delivering the said certificates; they ask "if from any cause the company shall be unable now to register the aforesaid transfers and to deliver certificates for the aforesaid shares, then further damages to the amount of the value of the aforesaid shares." Before I deal with this claim I may as well once and for all get rid of a matter that has been brought to our notice by counsel for the appellants in regard to paragraph 12 of the statement of claim. In paragraph 12 of the statement of claim it is stated "after the delivery to the company of the aforesaid transfer and the lodging with the company of the certificates for the 1,000 shares comprised in the transfer to the plaintiff T. W. Longman, he, the said plaintiff, sold 250 of the said shares, and being unable through the default of the company to transfer such shares to the purchaser thereof, the said plaintiff has been compelled to purchase and has purchased other shares for delivery to the respective purchasers in lieu thereof, and by reason of such sale and purchase the said plaintiff has sustained damage to the amount of £27 2s. 8d., which ought to be made good to the said plaintiff by the company." Now, although the paragraph does not in terms say so, it is quite plain from the way the case has now been presented to us what is alleged. It is said that, the plaintiffs being lulled into a sense of security by the giving of two receipts which have been read to us, and by some letters in the early part of 1904, were induced to make these sales which are referred to in the paragraph. The answer which is made to that is: "You did not prove anything of the sort." No one was called to say that in truth or in fact the plaintiffs were induced to make these sales by being lulled into a sense of security through the conduct of the defendants through their secretary and the writing of these letters. The appellants meet that by saying: "Our statement of claim is admitted"; but paragraph 12 of the statement of claim does not itself allege anything of the sort, and under these circumstances it seems to me that this part of the plaintiffs' claim may be conveniently disposed of at once by saying that this part of the case has certainly neither been alleged nor proved. I may say, before leaving this part of the case, that with regard to these two receipts of the 11th and 12th of May they are in the same form, and run thus: "Received of the Securities Exchange (Limited)"—they were agents for the plaintiffs—"one transfer of 1,000 preferred ordinary shares for registration in favour of Thomas William Longman, Esq., subject to the approval of the directors." Then there is, "Transferor, P. Bennett. From ——— to ——— 1,000"; then there is, "Fee paid, 2s. 6d.," and that is signed by the secretary. And then there is this: "This receipt must be returned to the company's office, as above, in exchange for the respective share certificates, which will be ready on the 18th inst." I wish to say, with regard to that receipt, that if the plaintiffs did rely upon it as a recognition of their title, and as a promise binding on the company that the share certificate should be given to them, they were, in my judgment, having regard to the terms of this document, relying upon that upon which they had no right at all to rely. When one considers the course of business it would be very wrong indeed to assume that a secretary, in giving a receipt of this kind, ever intends to recognize in the way suggested the title of the person lodging the transfer so as to bind the company to issue at the date named a share certificate. It is plain that the opportunities for making such examination as would justify the giving of such a receipt cannot occur upon presentation of the transfers and the application for a receipt; and even if the secretary himself intended to give a recept which would so bind the company, in my judgment he had no authority to do anything of the sort.

Having disposed of that part of the case I will now try shortly to dispose of the rest of the case. The case is really based upon estoppel, and the alleged estoppel is said to arise in this way: It is based upon what happens in the course of what is called on the Stock Exchange "certification," and it is said that in the course of this certification there arose a duty by the defendant company towards the plaintiffs, and that the defendant company by their neglect of that duty, and by their conduct in carrying out that duty, caused the plaintiffs to alter their position by believing in a state of facts which has turned out not to be true, and they say that under those circumstances the defendant company ought to be estopped from denying that state of circumstances in which the plaintiffs were led to believe by their neglect of duty and conduct, and that under those circumstances they are entitled to bring this action for the non-registration of their 1,500 shares, and to have damages if they cannot have registration. Now with regard to certification one cannot more concisely state what the practice is than to take the statement in Lord Lindley's judgment, which appears in the case of *Bishop* v. *Balkis Consolidated Co. (Limited)*. The particular passage in Lord Lindley's judgment to which I refer appears on p. 519 of 20 Q. B. D., and I do not think that I can do better than read that statement. [His lordship read the judgment from "The practice of giving certificates . . . from such person to the transferor," and continued:] In the present case the facts may be put very shortly. In the statement of claim it is alleged that "on or about the commencement of May, 1904, the

said Peter Bennett duly made and executed to the plaintiff William Longman a transfer for value of 500 of the aforesaid shares . . . and a few days subsequently he duly made and executed to the plaintiff Thomas William Longman a transfer for value of the remaining 1,000 of the said shares. . . . The first-mentioned transfer was made and taken in the name of the said William Longman as a trustee for the plaintiff, Thomas William Longman. On the execution of the aforesaid transfers the said Peter Bennett handed over to the plaintiff the aforesaid certificates for the 1,500 shares." Then it is alleged, "On the 11th and 12th of May, 1904, the plaintiffs caused copy transfers of 1,000 and 500 shares respectively to be left at the office of the company for registration, and they produced to and left with the company the certificates for 1,500 shares which had been delivered to them by the said Peter Bennett. On so leaving the said transfers respectively the plaintiffs paid and the company accepted the fee for registration of 2s. in each case." Then in paragraph 5 there is the allegation: "On or about the 18th of May the plaintiffs tendered the aforesaid receipts to the company and requested delivery of the new certificates in exchange"; and then there is the allegation of the refusal to register. The facts so far as I have read them I think may be taken to have been admitted from the course which was taken at the trial. Then we find some additional facts which also now are to be taken as common ground; they are set forth in the third paragraph of the defence. The defence begins with a statement of the issue of the original certificates on the 19th of April, 1904, to Peter Bennett; and then in paragraph 3 there is this: "About the same time as the registration of the said Peter Bennett and the making out of the said certificates in his name there was lodged for certification with the company by two persons named William Houselander and John Messenger Madders a transfer for value from the said Peter Bennett to the said William Houselander and John Messenger Madders of the said 1,500 preferred shares. In view of the fact that the said Peter Bennett was the registered holder of the said shares, the company duly and in the ordinary course of business certified the said transfers and returned them as so certified to the said William Houselander and John Messenger Madders. The said transfers have since been registered by the company, and the said William Houselander and John Messenger Madders thereupon became the registered holders of the said 1,500 preferred shares, and they or those duly deriving title under them are still the registered holders of the said shares." Then in paragraph 4 it is stated: "Subsequently to the certification and return of the aforesaid transfers to the said William Houselander and John Messenger Madders—namely, on or about the 22nd of April, 1904, the secretary of the company having occasion to forward to the said Peter Bennett a certificate or certificates for other shares in the company, and in forgetfulness of the facts as to the transfers to the said William Houselander and John Messenger Madders, sent a letter to the said Peter Bennett, enclosing by mistake the certificates in his name for the aforesaid 1,500 preferred shares. The said mistake was discovered afterwards—namely, some time prior to the close of the said month of April, and application was forthwith made to the said Peter Bennett to return the said certificates for the said 1,500 shares, which he promised to do but never in fact did." And then in paragraph 5 is this: "It was under the circumstances aforesaid and not otherwise that in or about the 23rd of April, 1904, and as from that date the said Peter Bennett held the certificates in the first paragraph of the statement of claim mentioned, and save as aforesaid the company do not admit any of the facts alleged in the said statement of claim." I think I have read enough of the statement of claim and of the defence to show what really are the circumstances. The plaintiffs say that they were induced to make advances to Peter Bennett by reason of his possession of these certificates which had been issued to him by the company. They say that having regard to the practice of the Stock Exchange and of those who frequent the Stock Exchange, with regard to certification, this certificate having once been lodged by Houselander and Madders, and their transfers having been certificated, it was wrong for the company to return these certificates to Bennett at all, and that it is only in consequence of this wrong return by the secretary of the company of these certificates to Bennett that Bennett has been able improperly to produce these certificates to the plaintiffs and get them to part with their money. According to my view of the facts of this case, and having regard both to the evidence and to some admissions which were made on behalf of the defendants in the course of the argument of the case, I have no doubt at all myself that according to the practice of the Stock Exchange and to the practice of companies who make this certification for the purpose really of assisting in the dealings with shares on the Stock Exchange as described by Lord Lindley in his judgment which I have read, if on a proposed transfer of shares a company has once got certificates lodged with it and has so certified the accompanying transfer, the company does in practice retain the certificates which come with the transfer and retain them until the proposed transfer has been carried out, in which case the company does not return the certificates which have been lodged, but cancels those certificates and issues fresh certificates, one for the number of shares transferred and another for the balance of the shares not transferred, the company retaining these until they have proper information of the determination of the proposed transfer transaction between the proposed transferor and the purchaser. That is my view of the evidence. And if I had only to deal with the question of the duty of the company towards Houselander and Madders—which we have not got to deal with at present—I should be disposed to say that upon the evidence that I have referred to in this case there was a duty upon the company towards Houselander and Madders to retain the certificates, and to deal with them in the way in which I have described. But at present we have no evidence whatsoever before us to lead us to suppose that either by the practice of companies in the certification of shares, or the common recognition of that practice on the Stock Exchange, any duty arises on a company in respect of the retention of these certificates and the dealing with the certificates after the certification of the transfer to any one else excepting the transferee preventing the transfer and the certificate for the purpose of registration. We have no evidence at all to show that either the company or those who frequent the Stock Exchange have ever recognized any duty on the company except that towards the persons coming for the certification and, of course, those claiming through them. In the present case it is said that immediately upon the lodging and retention of these certificates or the completion of the certification there arose a duty of the company towards—I think the expression used is—"persons who may desire to become shareholders in the company." All I can say is that I see no ground for supporting that proposition. As a matter of fact in the present case all that is proved is this, that Bennett being in possession of a certificate or certificates

which were properly issued to him by the company' when he became a member of the company, improperly used this certificate or these certificates and so obtained an advance or advances from the plaintiffs upon the security of this certificate or these certificates. It is not alleged and it is not the fact that the plaintiffs had any knowledge whatsoever with reference to these transfers having been presented for certification by Houselander and Madders, or of the fact of the certificates having been lodged with the company, or of the return of those certificates by the company to Bennett. All they knew was that they found Bennett in possession of certificates which were genuine certificates, and which were issued by the company. It is perfectly plain, therefore, that in no sense can the plaintiffs be said to have been parties to the original transaction of the presentation of this transfer and the lodging of these certificates for the purposes of certification. Nor can it be said that in any way the plaintiffs were parties to that certification. I do not think that there is any contest as to the conclusion of fact at which I have arrived, but the plaintiffs say, "Yes, but although this is so, you, the company, neglected your duty to retain these certificates, and your negligence is the real or proximate or direct cause of the loss which we have sustained in this case." Now, to put the conclusion that I have arrived at shortly, it seems to me that the answer to the plaintiffs' claim is, first, that there being admittedly no duty whatever to the plaintiffs personally, they have failed to establish any duty on the part of the company in respect of the retention of these certificates to the public or to any section of the public, or, to define the suggested section a little more closely, to persons desirous of becoming members of the company; and, secondly, that even assuming that any such duty of the company could be established towards persons desirous of becoming members of the company, I should say that it is not true to say that the returning of the certificates to Bennett was the proximate, direct, or real cause, whichever expression may be used, of the loss which the plaintiffs have sustained by having advanced money upon the security of certificates which as between Bennett and Messrs. Houselander and Madders, Bennett was not entitled to deal with, he having already given a good title to Messrs. Houselander and Madders which prevented him from giving a good title to the plaintiffs. It is quite plain that the mere return of the certificates to Bennett would have led to no loss to the plaintiffs whatever. What did cause the loss was the improper use of these certificates when they came into the possession of Bennett. For these reasons I think the plaintiffs' case fails. Speaking generally of these cases of estoppel, it is necessary that the plaintiffs should prove that they have been misled either by word of mouth or by conduct, and if by conduct, it must be by conduct in some transaction to which the defendants were a party. For the reasons I have given it seems to me that that part of the case fails. Then, if the plaintiffs cannot do that, they must prove generally that the defendants have omitted to do some act which it was their duty to do towards the plaintiffs or the public or some section of the public or, as is suggested, those who may be desirous of becoming members of the company. In my opinion, there is no proof of any such misleading, and no proof of negligence of duty towards the plaintiffs or towards any section of the public. The utmost that can be proved, according to my view of the case, is that there has been negligence, as admittedly indeed there has been. That is admitted not only in the third paragraph of the statement of defence but in the evidence of the secretary of the company, negligence in the custody of these certificates; but the mere fact of negligence in the retention of these documents, and I may say generally the mere fact of the proof of negligence, is not sufficient to raise estoppel. At all events ever since the decision in *Bank of Ireland* v. *Evans' Trustees* and the case of *Johnson* v. *Crédit Lyonnais* it cannot be said that mere negligence, will raise an estoppel; you must have more than that. You must at all events have negligence which is the real and immediate cause of the damage done. It will be remembered that Cockburn, C.J., in his judgment in *Swan* v. *North British Australasian Co.*, leaves it an open question whether or not such negligence, when it is mere negligence, irrespective of negligence of a duty towards the plaintiffs, might or might not raise some sort of estoppel when it is the real cause of the loss sustained by the plaintiffs. He says: "It is to be observed that in the case in the House of Lords to which I have referred"—that was the case of *Bank of Ireland* v. *Trustees of Evans' Charities*—"it was unnecessary to decide the larger question whether negligence leading to a forgery by which another party was defrauded estops the party guilty of it from disputing the genuineness of the instrument. The absence of negligence immediately leading to the result was at once a sufficient ground on which to dispose of the case." So I say in the present case there is the absence of evidence immediately leading to the result complained of, and therefore the estoppel is excluded. I think I have now dealt with all the grounds to which I need refer in the present case. I think that the judgment of Farwell, J., ought to be affirmed, because the plaintiffs have not been misled by any statement or conduct of the defendants; that the defendants have not been shown to have been negligent of any duty which they owed to the plaintiffs individually or as members of a section of the public, and that the negligence which has been shown in the custody of the certificate in question was not the immediate cause or the real cause which led to the loss by the plaintiffs. I think the judgment of Farwell, J., ought to be affirmed and the appeal dismissed with costs.

ROMER, L.J.—I also think that the appeal fails. I can give my reasons shortly. With regard to the main case of the plaintiffs, in the first place I may point out that they do not and cannot rely, as a cause of action against the company, on the certification given to Houselander and Madders. That certification may have placed the company under special obligations to those gentlemen to whom it was given, or to those who claim under them or had notice of the certification and relied on it; but the plaintiffs knew nothing whatever of the certification and cannot base any claim upon it. The ground alleged by the plaintiffs on which they claim to hold the defendant company liable in this action is one of estoppel by what is said to be culpable negligence on the part of the company in forwarding the certificates of the shares to Bennett after they had notice of the transfer to Houselander and Madders, and after recognition of that transfer by the company by the certification. Now I may assume that there was negligence on the part of the company in so forwarding the certificate as between the company and those persons who were entitled to rely on the certification which might have made the company liable to those persons; but, as I have pointed out, the plaintiffs are not such persons, and it appears to me to push the doctrine of estoppel by negligence too far to say that in the present case by forwarding the certificate to Bennett and by allowing him to retain it after he received it the company must be taken to have held out to the world at large or to any person dealing with Bennett that Bennett's title both

legal and equitable to the shares was good. The certificate was true on the face of it. Bennett was in truth (as stated by the certificate) the registered holder and owner of the shares, and it is to be remembered that a certificate of shares is not a negotiable instrument, nor is it a warranty of title on the part of the company issuing it: see, *inter alia*, *Shropshire Union Railways and Canal Co.* v. *The Queen* and *In re Ottos Kopje Diamond Mines* (*Limited*). I may, indeed, with regard to the certificate, repeat what Fry, L.J., said of title-deeds in the case of *Northern Counties of England Fire Insurance Co.* v. *Whipp*. He observed, at p. 493 of 26 Ch. D., that the title-deeds could not be regarded as being in the eye of the law analogous to "fierce dogs or destructive elements where from the nature of the thing the courts have implied a general duty of safe custody on the part of the person having their possession or control." I do not think that merely because the plaintiffs found the certificates in the hands of Bennett they were entitled to assume as against the company, without inquiry of the company, that there had been no dealings by Bennett with the shares, or that the company held out that the owner could give a good title to the shares. If the plaintiffs have suffered loss by their dealings with Bennett it arose, to my mind, from Bennett's fraud and from the plaintiffs taking upon themselves the risk involved in their accepting Bennett's title merely because he held the certificates, and not by any representation or breach of duty on the part of the company to or towards the plaintiffs. With regard to the small subsidiary point made on this appeal with regard to the item of damage mentioned in paragraph 12 of the statement of claim, all I need say is that that special cause of action urged by him was not pleaded nor proved, nor, as I understand it, even properly taken in the court below. It follows that the whole appeal fails and should be dismissed with costs.

STIRLING, L.J.—I am of the same opinion. The facts with which we have to deal are very short. [His lordship stated the facts as above, and continued:] Now, certification is not an act the performance of which is imposed upon the company either by any provision in the Companies Act or in the articles of association. It is, therefore, one which the company may see fit to do or may not do, but if the company do see fit to give a certification, then as at present advised I think that by that act the company does undertake a duty to any person who deals with shares on the faith of the certification. If the plaintiffs had so dealt with these shares, it would have been necessary to define the extent and nature of that duty, but the plaintiffs knew nothing whatever of the certification and did not act on the faith of it. Further, when the plaintiffs made their advance they knew nothing of the circumstances in which the certificate had been sent by the defendant company to Bennett, consequently they did not change their position, relying on the special circumstances in which the certificate came into Bennett's hands. What the plaintiffs did rely on was merely the certificate and the possession of it by Bennett. The certificate is in the ordinary form under the seal of the company, and simply certified that Bennett was the registered holder of certain shares specified subject to the memorandum and articles of association. The statements in the certificate were perfectly accurate, for at the date Bennett was the registered holder of these shares. Then as regards the possession of the certificate, by section 31 of the Companies Act a certificate is *primâ facie* evidence of the title of a member to the share or shares which are specified; but it is only *primâ facie* evidence, and a person who deals with another on the faith of only a *primâ facie* title is always liable to find that another and better title may be brought forward which will supersede that which is derived from the certificate. That is what took place here. The plaintiffs' title failed because Bennett had created a prior title in favour of Houselander and Madders and was not in a position to confer a good title on the plaintiffs. The case which is put forward on behalf of the plaintiffs is this, that the defendants were guilty of culpable neglect and are estopped from disputing that the plaintiffs have a title to the shares. The title by estoppel may be created no doubt by negligence. The limitations on the rule are stated and were very severely considered in the case of *Swan* v. *North British Australasian Co.* (*Limited*), 2 H. & C. 175. Blackburn, J., in dealing with the case states the rule thus. He refers to what has been stated by Wilde, B., in the Court of Exchequer, which was in these terms: "That if one has led others into the belief on a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards as against such persons to show that that state of facts did not exist." Blackburn, J., says: "This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake, and also as I think that it must be the neglect of some duty that is owing to the person led into that belief, or what comes to the same thing to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy." Now in my judgment not one of the limitations which Blackburn, J., there imposes on the application of the doctrine of estoppel by negligence is found satisfied in the present case. The neglect—and I think there was neglect—which occurred in this transaction was not in the transaction with the plaintiffs, it was in the transaction with Houselander and Madders. Secondly, the neglect was not the proximate cause of the plaintiffs' mistake, for the plaintiffs knew nothing of this neglect or of the duty or of the way in which the company had dealt with the certificates. Lastly, I think there was no neglect of duty to the plaintiffs. That there was a neglect of a duty owing to persons with whom the plaintiffs were not privy. I intended with regard to that to refer to what was said by Fry, L.J., in the case of *Northern Counties of England Fire Insurance Co.* v. *Whipp*, but that has been already read, and I need not refer to it again. I think, therefore, that the plaintiffs fail in establishing their case, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors, *Minton Slater & Co.; Paynes, Blyth, & Huxtable.*

House of Lords.

From C. A. (England). March 3.

CHAPMAN AND OTHERS v. PERKINS. (a.)

Will—Construction—Forfeiture clause—Marriage of a son or daughter within certain prohibited degrees—Marriage in testator's lifetime.

A testator devised all his real and personal estate to trustees upon trust for sale, and to be divided, after certain payments, among his children, sons and daughters (other than A., a daughter), in equal shares; he then inserted a clause to the effect that if any child should contract a marriage with any person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter without the previous written consent of the trustees or trustee of his will, then he or she should forfeit his or her right to the share in his trust estate. Subsequently the respondent, another daughter, married her first cousin in the testator's lifetime, and on his death claimed to be entitled to a share in his trust estate.

Held, that there was sufficient in the will to show that the testator intended that these acts of forfeiture should take effect only after his death, and that the respondent had not therefore forfeited her interest in his trust estate.

Decision of the Court of Appeal (52 *W. R.* 467, [1904] 1 *Ch.* 431) *affirmed.*

This was an appeal from an order of the Court of Appeal (Vaughan Williams and Stirling, L.JJ., Cozens-Hardy, L.J., dissenting) reversing an order of Kekewich, J.

The question was whether the respondent, who in the testator's lifetime had married her first cousin, Charles Steele Perkins, had forfeited her share in the trust estate of the testator and in the income thereof.

The facts are given at length in the court below, and are shortly as follows:

Edward Chapman, by his will dated the 24th of March, 1881, after devising all his real and personal estate to trustees upon trust for sale, and to be divided among his children (other than Alice) in equal shares, made the following provisions:

"And I declare that if any son or daughter of mine shall do or suffer any act whether by way of alienation, charge or otherwise, and including any act under any statutes of bankruptcy or for the relief of insolvent debtors for the time being, by reason or means whereof any part or share of him or her in any income or capital of my said estate to or of which he or she shall not have already become entitled in possession or be for the time being actually entitled to the receipt shall, or but for this present clause, would become wholly or in part vested in or payable to any other person or persons, or if he or she shall contract any marriage forbidden by me as hereinafter expressed, then, and in any such case his or her share, right, title, and interest of, in, and to my said trust estate, and the income thereof shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me without leaving any child or children living at my death. And I declare that the marriages forbidden by me are in the case of son or daughter marriage with a person of any degree of kindred unless more remote than third cousin and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will or if more than two of a majority of them."

The respondent married her first cousin on the 9th of November, 1886, and the testator died in 1902.

Kekewich, J., made an order declaring that the respondent had forfeited her share of the testator's trust estate and the income thereof, but this was reversed by the Court of Appeal.

Levett, K.C. (*Iselin* and *W. A. Russell* with him), for the appellants.—A will is only deemed to speak from death with respect to the property comprised therein: *Bullock* v. *Bennett*, 3 W. R. 291, 7 De G. M. & G. 283. In cases of bankruptcy or alienation, forfeiture has been enforced on the happening of the event before the testator's death: *Ancona* v. *Waddell*, 27 W. R. 186, 10 Ch. D. 157, and *In re Metcalfe*, *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, 40 W. R. Dig. 280.

Upjohn, K.C., and *Edward Clayton*, for the respondent, were not heard.

Earl of HALSBURY, L.C.—I do not propose to go over this elaborate argument again. It appears to me that the decision of Vaughan Williams and Stirling, L.JJ., is perfectly right. There is an intention on the part of the testator, to my mind, overwhelmingly established upon the words of the will itself, and I decline to go beyond that. The argument, from words used with reference to bankruptcy, seems to me to be disposed of by this consideration. Cases in which there was a desire on the part of the testator that his property which he was dealing with should not go to strangers, but should go to his children, and a plain intention shown that the forfeiture clause should apply if the thing happened during his own lifetime, have no reference to the subject-matter with which we are dealing. To my mind, the reasoning of Vaughan Williams and Stirling, L.JJ., as to the intention of the testator is perfectly satisfactory, and I move that the appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. I agree with the majority of the Court of Appeal. I think in this particular will the marriages forbidden are marriages taking place after the testator's death.

Lord JAMES OF HEREFORD.—I concur.

Lord LINDLEY.—So do I.

Appeal dismissed.

Solicitor for the appellants, *John F. Child.*

Solicitors for the respondent, *Ward, Perks, & McKay.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) April 7.

JACKSON v. WIMBLEDON URBAN DISTRICT COUNCIL. (a.)

Local government—Sewer or drain—Drain on private ground—Draining several houses—"Single private drain"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 41—*Public Health Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.

A drain conveying the drainage of two or more houses belonging to the same owner into a single private drain (as described by section 19 *of the Public Health Amendment Act,* 1890) *is a sewer, and not affected by section* 41 *of the Public Health Act,* 1875.

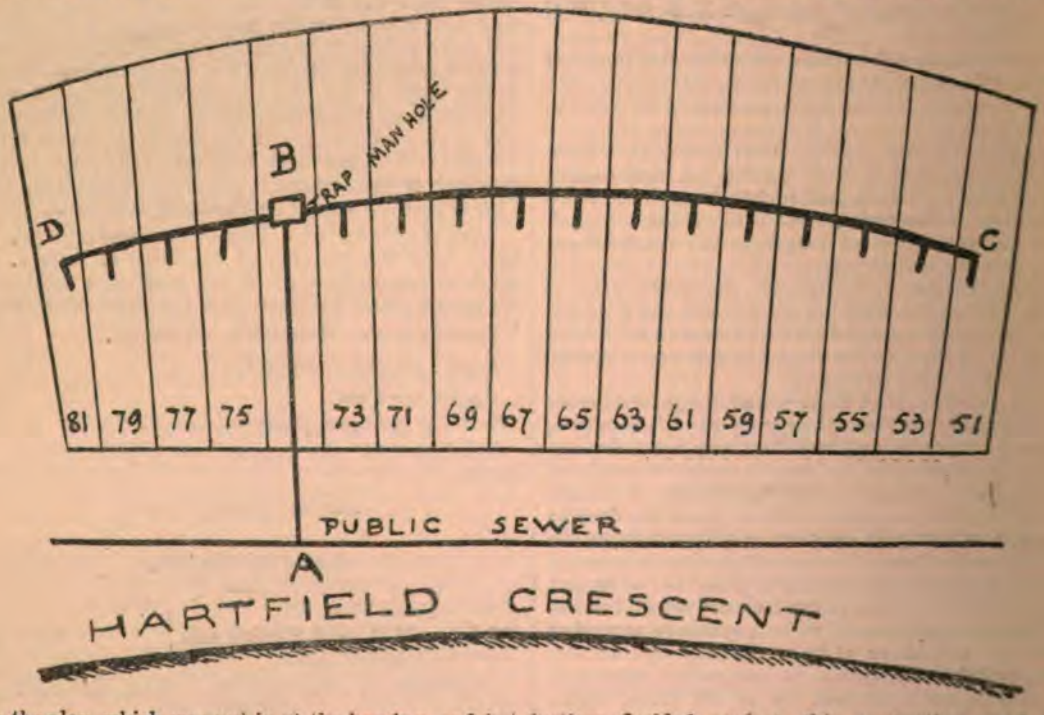
Decision of the Divisional Court *affirmed.*

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) upon a case stated by justices under the Summary Jurisdiction Acts.

On the 19th of August, 1903, the respondent Jackson appeared before a court of summary jurisdiction in obedience to a summons charging him with having made default in payment of the sum of £35 due from him to the appellants for expenses incurred by them in relaying the main drain at the rear of Nos. 51 to 73 (odd numbers), Hartfield-crescent, Wimbledon, and also with having made default in payment of £13 7s. 5d., being a proportion of the expenses incurred by the appellants in relaying a single private drain connecting No. 73 and No. 75, Hartfield-crescent with a certain public sewer.

On the north side of Hartfield-crescent, in the appellants' district, there are sixteen houses numbered with odd numbers from 51 to 81, both inclusive. The respondent is the owner of twelve of these houses, numbered from 51 to 73, both inclusive. At the rear of the sixteen houses runs a main or common drain which is connected with the public sewer by a branch drain which runs between Nos. 73 and 75 beneath a piece of land between those two houses. Each of the sixteen houses is connected with the main or common drain by means of branch drains conveying the sewage from each house.



In the plan which was put in at the hearing and is here reproduced so far as is material, the main common drain at the rear of the sixteen houses was marked D to C, and the branch drain which ran from a point between Nos. 73 and 75 to the public sewer was marked B to A and both the main drain D to C, and the branch drain B to A, were constructed wholly upon private property. Part III. of the Public Health Amendment Act, 1890, which includes section 19 of the Act, had been adopted in the appellants' district.

Complaint having been made to the appellants as the local authority under the Public Health Act, 1875, as to the drains in Hartfield-crescent, the appellants caused the drains to be inspected, and found it was necessary to relay the main or common drain D to C, and also the branch drain B to A, and caused notice in writing to be given to the owners of the sixteen houses requiring them, within a specified time, to do the necessary works. The owners of Nos. 75 to 81 inclusive duly executed the works required so far as affected the main or common drain D to B at the rear of these premises, but made default in executing the works required to the branch drain B to A. The respondent as owner of Nos. 51 to 73 inclusive did not comply with the notice at all, but made default in executing the works required to be done both to the branch drain B to A, and also to the main or common drain C to B, and the appellants accordingly executed the works and made an apportionment of the expenses by apportioning the expenses of relaying the branch drain B to A between the owners of the sixteen houses, and also the expenses of relaying the main drain B to C upon the respondent. The respondent having made default in complying with the demand of the appellants, proceedings were taken. The amount of the apportionment was not in dispute, and at the hearing the respondent admitted that the branch drain B to A was a single private drain within the meaning of section 19 of the Act of 1890, but he contended that the drain B to C was a sewer within the meaning of section 4 of the Act of 1875, and not a single private drain within the meaning of the Act of 1890. The justices decided against this contention, and the Divisional Court reversed the decision of the justices.

The Wimbledon Urban District Council now appealed.

Section 19 of the 1890 Act enacts: (1) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain an application may be made under section 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their

surveyor, or (in case of dispute) by a court of summary jurisdiction. (3) For the purposes of this section the expression "drain" includes a drain used for the drainage of more than one building.

Macmorran, K.C. (*George Humphreys* with him), for the appellants.—Your lordships sent back the case to the justices for further particulars, which have now been obtained, but do not in any way assist the court. Section 19 of the 1890 Act has effected a change in the law touching the liability for the repair of drains under section 41 of the 1875 Act. *Bradford* v. *Mayor, &c., of Eastbourne*, [1896] 2 Q. B. 205, 44 W. R. Dig. 93, dealt with section 19 and what is a single private drain under that section. The pipe B to A fulfils the condition of a single private drain both under section 19, sub-section 3, and within the *Eastbourne case*, as it receives the drainage from the houses of different owners, and in any case for the purposes of this case it is admitted to be a single private drain. As a result the respondent is liable, for "two or more houses are connected with a public sewer by a single private drain" under section 19 of the 1890 Act: see Lord Russell of Killowen, L.C.J.'s, judgment in the *Eastbourne case*, at p. 209, and Wills, J., at p. 215, on this point. *Thompson* v. *Mayor, &c., of Eccles, ante*, p. 211, [1905] 1 K. B. 110, decided in the Court of Appeal, approved the decision in the *Eastbourne case*. It would be an anomalous position to decide that the pipe from B—C constituted a sewer, the pipe draining No. 75 a single private drain, and the pipe draining Nos. 77-81 again a sewer.

Sylvain Mayer, for the respondent.—I submit that B to A is not a single private drain. [COLLINS, M.R.—You must argue this case on the footing that it is, for the respondent has admitted it to be the case, by payment of his proportion of the expenses.] To deal with the pipe B to C it is sufficient to state that the houses drained by it are now in the ownership of one person, Mr. Jackson, for *Kershaw* v. *Taylor*, [1895] 2 Q. B. 471, 43 W. R. Dig. 117, has decided that the drains must be taken as they are at the present moment. [MATHEW, L.J.—In that case the pipe was built as a sewer; was the pipe built as a sewer here; were the houses originally the property of one person?] See also *Heaver* v. *Borough Council of Fulham*, [1904] 2 K. B. 383, 52 W. R. Dig. 110. If this court decides against me it will virtually repeal the definition of drain in section 41 of the 1875 Act, which is certainly not repealed by the 1890 Act. The object of section 19 of that Act was to prevent persons with separate responsibilities throwing the burden of repairing their drains upon the local authority by means of what section 19 has called a single private drain, as is stated by Wills, J., at p. 215 of his judgment in the *Eastbourne case*; and it is to be noted that Wills, J., has taken part in all the leading cases on this subject. [COLLINS, M.R.—How do you get over the plain language of the statute? It says two or more houses connected by a single private drain to a public sewer. Here you have a single private drain B to A.] The statute means connected right up to the houses concerned by a single private drain. There is no difficulty in the same pipe being in part a drain, and in part a sewer: *Beckenham Urban District Council* v. *Wood*, (1896) 60 J. P. 490. This case is even stronger because C—B—A is not one pipe, but two pipes joined by the man-hole at B.

Macmorran, K.C., in reply.—It was deliberately intended by section 19 to take the burden off the local authority in cases such as these.

COLLINS, M.R.—This is an appeal from the decision of the Divisional Court upon a question arising out the construction of section 19 of the Public Health Amendment Act, 1890. That section has been frequently the subject-matter of discussion, and we have recently dealt with it in this court in the case of *Thompson* v. *Eccles Corporation*, where we followed what is now the leading case on the subject—viz., *Bradford* v. *Eastbourne Corporation*, in which Lord Russell, L.C.J., delivered an elaborate judgment, and Wills, J., who has taken part in the judgments of many of these cases, also delivered an instructive judgment. Wills, J., has taken part in the decision of the case we are called upon to review. [His lordship read section 19.] In this case we have what is admitted to be a single private drain extending from the point which has been marked B on the plan, to the point marked A, running at right angles to the street and connected with the main public sewer under the street. All along the street are houses. On the right-hand side of the drain A to B are twelve houses which all belong to one owner, Mr. Jackson, and there are four houses on the left-hand side of the vertical line representing the single private drain. As to these four houses, three belong to a Mrs. Eysoldt and the other to a Mr. Holliday. This single private drain leads out from a man-hole at B; into that man-hole the drainage from the houses on the left flows—namely, the three houses belonging to Mrs. Eysoldt and the other belonging to Mr. Holliday. This vertical drain is for the purpose of this case to be treated as a single private drain, as I have said, by reason of an admission of the respondent. Coming to the other side, the drainage of all the houses belonging to Mr. Jackson runs into a common drain under the ground at the backs of the houses, and passes into the public sewer through the vertical private drain.

The main contention of the appellants is that if in any portion of its course the sewage traverses a single private drain on the way to the sewer the case comes within section 19. They say that the houses on the right-hand side, although belonging to one owner, and the houses on the left-hand side belonging to other owners are all in the last resort connected by the single private drain so as to satisfy the section and to let in the liability of the owner. It seems to me that there is a short answer to that contention, and it is given in the court below. The *Eccles case* treats of the parties liable to repair and the pipe in respect to which the obligation to repair arises, which must be part of a single private drain. The court cannot turn that part into a single private drain by reason of the fact that it is connected with a single private drain and that the sewerage in part of its course flows through a single private drain. It is a condition of liability that the pipe itself is a single private drain; although the sewage is led by it through a single private drain, if it is not a single private drain itself the section does not apply. Now, the pipe that leads up to the man-hole at point B takes the sewage from the houses belonging to one owner only. The Public Health Acts prior to section 19 of the 1890 Act constituted a pipe taking the drainage of more than one house a sewer, and section 19 does not take it out of that category "unless two or more houses belonging to different owners are connected with a public sewer by a single private drain." As I have pointed out, the work to be executed must be work on that which is the subject-matter to which the statute applies, and unless it is in respect to a single private drain within the meaning of section 19, that section does not apply. The Lord Chief Justice and Wills, J., have followed up the course of this drain, and I think it is no answer that because for a certain part of the drainage,

the sewage passes through a single private drain that that fact makes the anterior part of the pipe a single private drain. Unless there is some magic in the fact that it passes into a single private drain which changes the nature of it, the pipe is regulated by existing law, and is not controlled or affected by this section dealing with the passage of sewage from houses belonging to different owners. Therefore, for the reasons given in the court below, with which I I agree, I think that the judgment is right and in strict conformity with the decision in *Bradford* v. *Eastbourne Corporation* and our own decision in the case of *Thompson* v. *Eccles Corporation*. It was submitted to us when the case came before us on the first occasion, that it was material to see whether all these houses were in the ownership of Mr. Jackson, and whether at one time they did not belong to different owners, the suggestion being that what was originally a single private drain could not be turned into a sewer by reason of the houses passing into the hands of one owner. In point of fact the presumption is that they did belong to one owner; they are at present in the hands of one owner, and no suggestion to the contrary was made in the court below. The court below proceeded on that presumption. It seems to me that the onus of proof was upon the person who set up the contrary contention. The matter went back to the justices with a view of obtaining their finding upon that point. The justices have not found anything inconsistent with the contention that the ownership of the houses has all along been that of one person, and we have had affirmative evidence which tends to show conclusively that they have been always in the hands of one owner. There is no evidence to the contrary which would require us to send back the case to the magistrates. We are entitled to found our decision on the same materials as the court below, and on these materials I think the decision is perfectly correct.

STIRLING and MATHEW, L.JJ., concurred.

Appeal dismissed with costs.

Solicitors for the appellants, *Sharpe, Parker, & Co.*, for *Butterworth*, Wimbledon.

Solicitors for the respondent, *W. W. Young, Son, & Ward.*

From Liverpool Court of Passage. (Mathew and Cozens-Hardy, L.JJ.) } April 4.

WILLIAMS *v.* MERSEY DOCKS AND HARBOUR BOARD. (*a.*)

Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-section* (a)—*Limitation of time—Negligence causing death—Action by personal representative—Fatal Accidents Act*, 1846 (9 & 10 *Vict. c.* 93).

The plaintiff's husband was injured by a negligent act of the defendants, done in the execution of a public duty, and in consequence thereof he died after the expiration of six months from the date of his injuries, without having brought an action against the defendants to recover damages. Within six months after his death his widow, who was his personal representative, brought an action under the Fatal Accidents Act, 1846, *to recover damages for his death.*

Held, that as the negligent act of the defendants causing the injury occurred more than six months before the death of the injured man, an action by the latter to recover damages would have been barred by section 1 (a) *of the Public Authorities Protection Act*, 1893, *and therefore the action by the plaintiff was barred.*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from a decision of Judge Taylor, K.C., at the Liverpool Court of Passage.

The action was brought under the Fatal Accidents Act, 1846 (commonly called Lord Campbell's Act), by a widow to recover damages for the death of her husband, owing to his falling into a lock belonging to the defendants, which was being repaired, and which, it was alleged, was not properly guarded. The accident happened on the 24th of December, 1902, and the injured man died on the 30th of December, 1904, in consequence of the injuries so received. He did not bring an action in his lifetime against the defendants, but his widow, who was his personal representative, brought this action on the 2nd of February, 1905, in the Liverpool Court of Passage. The defendants, who were admittedly a public authority, pleaded that the action was barred by section 1 (*a*) of the Public Authorities Protection Act, 1893. That section provides that where an action is brought for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the action "shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." It was ordered that this preliminary objection should be heard before the trial of the action.

The judge of the Court of Passage held that as the cause of action under the Fatal Accidents Act, 1846, was the wrongful act, neglect, or default and the death of the injured person, the action had in fact been commenced within six months next after the matter complained of, and that therefore the action was not barred by section 1 of the Public Authorities Protection Act, 1893.

The defendants appealed.

Carver, K.C., and *Leslie Scott*, for the defendants.—Lord Campbell's Act only enables the personal representative of a person who is killed by the negligence of another person to bring an action when the deceased could have maintained an action: *Senior* v. *Ward*, 7 W. R. 261, 1 E. & E. 385; *Read* v. *Great Eastern Railway Co.*, 16 W. R. 1040, L. R. 3 Q. B. 555, 37 L. J. Q. B. 278; *Griffiths* v. *Earl of Dudley*, 30 W. R. 797, 9 Q. B. D. 357; *Haigh* v. *Royal Mail Steam Packet Co.*, 52 L. J. Q. B. 640; *Markey* v. *Tolworth Joint Isolation Hospital Board*, [1900] 2 Q. B. 454, 48 W. R. Dig. 99. The deceased man at the time of his death could not have maintained the action, as it had not been commenced within six months after the happening of the injury.

Rigby Swift, for the plaintiff.—Lord Campbell's Act gives the personal representative a new cause of action beyond what the deceased man himself would have had if he had lived: *Blake* v. *Midland Railway Co.*, 18 Q. B. 93, at p. 110; *Pym* v. *Great Northern Railway Co.*, 11 W. R. 922, 4 B. & S. 396, at p. 406. The parties, the damages, and the circumstances are all different. The only thing in common is the act of negligence. The plaintiff's right to bring an action only accrued on the 30th of December, 1904, when her husband died. She brought the action within six months from that date, and therefore it is not barred. At the moment of his death the previous wrongful act, neglect, or default gave her a cause of action.

He also referred to *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503; *The Vera Cruz*, 33 W. R. 477, 10 App. Cas. 59.

MATHEW, L.J.—This is an appeal from the judg-

ment of the judge of the Court of Passage of the City of Liverpool upon a preliminary point of law, which was ordered to be first disposed of before the trial of the action—namely, whether the defendants are liable to an action by the plaintiff for damages by reason of the death of her husband. It is contended on behalf of the defendants that they are protected by the Public Authorities Protection Act, 1893, which is an Act "to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." The accident to the deceased man happened in 1902, and the action was brought by his widow after his death, which occurred at the end of 1904. It is contended for the plaintiff that her action under Lord Campbell's Act is one quite independent of the cause of action vested in the husband, and first accrued to her upon the death of her husband, and is therefore brought in time. The case turns upon section 1, sub-section (*a*), of the Public Authorities Protection Act, 1893. In the particular case before us the deceased man did not bring an action in respect of the injury to him. The action was brought by his widow a long time after the accident. The question is whether the action is maintainable. In my opinion it is not. The "act, neglect, or default" in respect of which the action is brought occurred more than six months before the commencement of the action. We have had a number of cases cited to us upon the question. The test of the right to bring an action under Lord Campbell's Act is whether the action could have been brought by the deceased man himself. That was settled by the cases referred to by Mr. Carver. Here the deceased man, if he had lived, could not have maintained the action himself. Therefore his personal representative cannot now maintain the action. For instance, if the original claim of the injured man was settled, his personal representative could not maintain an action. It is said that the action by the personal representative is a different one from that which was open to the deceased man, the cause of action and the considerations applicable to the two actions being different. The provisions of Lord Campbell's Act are, in my opinion, against that view. If, for instance, the deceased man was guilty of contributory negligence, his personal representative could not recover. The principle is that, whenever an action was not maintainable by the deceased man, his representative has no cause of action. After the expiration of six months from the date of the injury the deceased man could not have brought an action. His widow, therefore, cannot sue. The appeal must be allowed, and judgment must be entered for the defendants.

COZENS-HARDY, L.J.—I am of the same opinion. The case of *Read* v. *Great Eastern Railway Co.* is a strong enunciation of the principle applicable to this case; and, as was pointed out in the course of the argument, the effect of the Statute of Limitations was stated by Blackburn, J., in that case (see 37 L. J. Q. B., at p. 280), where he asked: "If he had lingered for seven years, do you say that this action would not have been barred by the Statute of Limitations?" And counsel said in reply that "the plaintiff is bound to contend that there would be no such bar." That is to say, the contention there was, that if the death of the injured man occurred at any lapse of time after the negligence causing the injury, the negligent person would be liable to be sued by the deceased man's personal representative. That is contrary to the principle of the cases which have been referred to. In *The Vera Cruz*, 10 App. Cas., at p. 70, Lord Blackburn said: "I think that when that Act"—Lord Campbell's Act—"is looked at, it is plain enough that, if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived." In the present case the deceased man could not, after the lapse of six months from the date of the injury, have maintained an action, and it follows that his representative cannot now maintain this action.

Appeal allowed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *Rees, Matthew, Jones, & Rees*, Liverpool.

Solicitors for the defendants, *Rawle, Johnstone, & Co.*, for *W. C. Thorne*, Liverpool.

High Court of Justice.

Chan. Div. } April 13, 15.
Buckley, J. }

In re SOUTHERN BRAZILIAN RIO GRANDE DO SUL RAILWAY CO. (LIMITED). (*a*.)

Company—Winding up—Power to borrow—Irredeemable debenture stock—Floating security—Perpetual annuity—Explanation of memorandum by articles.

A railway company incorporated under the Companies Acts, 1862 to 1880, one of whose objects, as stated in the memorandum of association, is to borrow money by the issue of debenture stock, cannot in consequence grant perpetual annuities by the issue of such stock. The granting of such annuities is not borrowing, nor is it a purpose subsidiary to the objects of a commercial company, and therefore contemporaneous articles of association of such a company cannot be looked at for the purpose of construing the above-mentioned object to mean the raising of money by the granting of perpetual annuities. And when such a company is wound up the debenture stockholders are entitled to nothing more than the payment of the amount secured by the stock with interest.

Originating summons.

The question to be decided in this summons was whether the above company could issue irredeemable debentures.

The company was incorporated in 1882 under the Companies Acts, 1862 to 1880, with its registered office in England.

By clause 3 of the memorandum of association one of the objects for which the company was established was: "(7) To borrow money by the issue of any mortgages, debentures, debenture stock, bonds, or obligations of the company, either at par, premium, or discount, and also to borrow money upon the security of unpaid calls of the company, or by any other means, and upon such other securities as the company may from time to time determine."

Article 17 of the articles of association, which were of the same date as the memorandum of association, stated that the board of directors "may also create and issue for the purposes of the company, debenture stock, bonds, or debentures, to be secured upon the undertaking, revenues and property of the company for the time being, or any part thereof, and such debenture stock, bonds, or debentures shall bear interest at such rates not exceeding 6 per cent., and be irredeemable or redeemable in such manner and at such times and upon such terms and conditions as the board may determine."

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

On the 29th of June, 1883, the board resolved: "(1) That in exercise of the authority conferred upon the board by the seventeenth article of association, irredeemable debenture stock be created to the nominal amount of £295,150, bearing interest at the rate of £6 per cent. per annum, payable half-yearly on the 1st of April and the 1st of October in each year, forming part of an aggregate amount" described; and "(2) that such aggregate amount of debenture stock or debentures . . . be a first charge upon so much of the property and undertaking of the company as shall consist of the railway from Rio Grande do Sul to Bagé with its rolling stock and the Government guarantee of interest thereon *pari passu*, and shall until default in payment by the company of any sum payable under such charge constitute a floating charge only." Debenture stock was accordingly issued pursuant to the resolutions, and Mr. R. H. Baird, the applicant in the summons, became the holder of the stock to the amount of £2,000. In February, 1905, after approving of the proposed agreement next mentioned, the company went into voluntary liquidation. In March, 1905, the company agreed to sell its railway and undertaking to the Government of Brazil in consideration of moneys which as to a large part were payable in certain Railway Guarantee Rescission Bonds, and in further consideration of the Government paying, redeeming, or satisfying the debenture stock of the company. This involved a scheme of arrangement which was sanctioned by the court, but which bound the contributories only and did not affect the rights of the applicant. The liquidator proposed to pay off the applicant and other debenture stockholders at the par value of their stock, with interest up to date.

The applicant took out this summons against the liquidators asking whether he was entitled, as he claimed, to have some, and if so what sum paid to him out of the assets of the company over and above the par value of his stock and interest, as a term of the redemption of such stock, or as compensation for the loss caused to him by payment off of his stock contrary to the terms of issue.

Buckmaster, K.C., and *Harman*, for the applicant.—The company had power to grant perpetual annuities by the issue of irredeemable debenture stock, and they have done so, and they are not now entitled to pay off the stock and cease paying the 6 per cent. interest without giving compensation to the stockholders for the loss of their annuities. Debenture stock differs from debentures in this respect. A power to issue debenture stock is a power to issue irredeemable debenture stock: *Attree* v. *Hawe*, 26 W. R. 871, 873, 9 Ch. D. 337, 349; *Samuel* v. *Jarrah Timber and Wood Paving Corporation (Limited)*, 51 W. R. 439, 52 W. R. 673, [1903] 2 Ch. 1, 15, [1904] A. C. 323. The articles of association expressly authorized the issue of irredeemable debenture stock, and being contemporaneous with the memorandum they may be referred to for the purpose of explaining it: *Harrison* v. *Mexican Railway Co.*, 23 W. R. 403, L. R. 19 Eq. 358; *In re South Durham Brewery Co.*, 34 W. R. 126, 31 Ch. D. 269. The memorandum of association states that to borrow money is one of the objects of the company, and article 17 shows how that object is to be carried out. Even if the company cannot issue irredeemable debenture stock, they are still bound by contract not to call the stock in, and if they do so are liable to the holder of the stock for damages for breach of contract.

Haldane, K.C., and *E. H. Cole* (originally instructed for the Brazilian Goverment), and *Younger, K.C.*, and *Bischoff*, for the respondents.—The irredeemable stock for the issue of which article 17 provided meant stock irredeemable only so long as the company was a going concern. The stock is issued as a floating security, and the winding up of the company renders it immediately payable: *Wallace* v. *Universal Automatic Machine Co. (Limited)*, 42 W. R. 428, [1894] 2 Ch. 547; see also Palmer's Company Precedents, vol. 3, at p. 10. The memorandum and articles only authorize borrowing money, and not selling annuities, and this was the purpose for which the debentures were issued.

Buckmaster in reply.—The resolutions of the board show that the issue of the debenture stock was intended to be a grant of a perpetual annuity. According to the contention of the respondents, a company which had issued debentures not redeemable for twenty years could go into liquidation at any time, and thus become entitled to pay them off at once.

Cur. adv. vult.

April 15.—BUCKLEY, J.—Two contentions have been put forward as to the nature of this stock. The one is that it is irredeemable under all circumstances, and that the applicant is entitled simply to a perpetual annuity. The other is that it is irredeemable only in the sense that the company is not, at its option, entitled to redeem it except under circumstances, and that the winding up is a circumstance under which the stock ceases to be irredeemable. If the applicant is the holder of a perpetual annuity, the question is whether the company had power to grant such an annuity. Clause 3 (7) of the memorandum of association authorizes the company "to borrow money by the issue of any mortgages, debentures, debenture stock, bonds, or obligations of the company." The applicant argues that "debenture stock" there bears the meaning attributed to it in the Companies Clauses Acts, that it means a perpetual annuity. He seeks to evolve this meaning from the fact that this is a railway company, and that railway companies, meaning by that expression companies under the Companies Clauses Acts, issue debenture stock which is perpetual. I think the argument unsound. This is not a railway company governed by the Companies Clauses Acts. Then he contends further that a company such as a railway company, which necessarily has a permanent undertaking in the sense that the permanent way is useless except for the purposes of a railway undertaking, may be more readily supposed to be taking power to issue perpetual debenture stock than a company of a less permanent character. The same argument would apply, say, to a telegraph cable company, and to other companies which might be suggested. The permanence of the undertaking does not, I think, throw light upon the nature of the instrument which the company is taking power to issue. And if it did, I must add that the concession held by this company is only for a term of years and that the Government is entitled to cut short even that term by purchasing after the expiration of the first thirty years from the completion of the railway. Such a company can scarcely contemplate the issue of debenture stock extending beyond the term of its own commercial life. The words of the memorandum are "to borrow money by the issue of" debenture stock. Borrowing necessarily implies repayment at some time and under some circumstances. The applicant seeks to read the clause as if it were to borrow "or raise" money by the issue of debenture stock. Those are not the words. The memorandum of association uses language which, I think, necessarily confines the issue of debenture stock to debenture stock issued in respect of a borrowing involving the obligation at some time to repay. The granting of a perpetual annuity is therefore, in my judgment, not within the memorandum of association.

But next it is argued that article 17 specifically mentions irredeemable debenture stock, and that the memorandum and articles of association may for some purposes be read together, and that in this matter the construction of the memorandum of association can be assisted by the articles. Upon this, my first observation is that article 17 is not expressed as creating any power, but as defining the authority which may exercise for the company an existing power. The words are "the board may create and issue." Further, the purposes for which the articles can be read to explain or supplement the memorandum do not extend to explaining or supplementing the memorandum in respect of a matter which, under the Companies Act, 1862, must be contained in the memorandum of association. An authority to borrow is not properly an object of the company at all, and need not be found in the memorandum of association. The articles may, therefore, I think, be referred to for the purpose of explaining the manner in which a company is by its memorandum authorized to borrow. But the granting of perpetual annuities is not borrowing, and is not a purpose subsidiary to the general objects of a commercial or trading undertaking. The granting of annuities for lives could not be authorized by words in articles of association seeking to explain a clause in the memorandum relating to the borrowing of money. The granting of perpetual annuities stands in like case. I am therefore not entitled to read article 17 for the purpose of saying that clause 3 (7) of the memorandum must be construed to mean something which is not borrowing. I can read the articles in order to explain the sort of borrowing which the memorandum contemplated. But I cannot read the articles for the purpose of saying that the memorandum did not mean borrowing, but meant the granting of perpetual annuities. For these reasons I think that the granting of perpetual annuities by this company is *ultra vires*, and, if this be so, it results that the applicant's right, if this be a perpetual annuity, cannot be greater than to have the return of the money paid to the company upon the stock. But, secondly, it is said that article 17 and the resolutions of the 29th of June, 1883, may be read as expressing a certain contract of borrowing—namely, a borowing upon the terms that the company, while it is a going concern, shall not be at liberty to call upon the debenture stockholder to accept the repayment of his loan, but shall pay him 6 per cent. upon it. For this purpose it is pointed out that article 17 speaks of the debenture stock, bonds, and debentures alike as capable of being irredeemable, and speaks of the annual sum payable by the company as interest, and that the resolutions provide that the aggregate amount of the debenture stock shall be a charge and shall until default by the company constitute a floating charge only. From this it is argued that this was a borrowing on the terms that the company should have no option to repay so long as there was an undertaking to answer the annual sum. If this second contention be right, then I think it follows that this applicant who asks by his summons a determination of what is the proper amount to pay for redemption is not entitled to receive more than the amount which upon this view was borrowed—namely, the £2,000 paid upon the stock. In either view it appears to me that the applicant is entitled to no more than the interest to date and the par value of his stock. The right declaration upon the summons, I think, is that the applicant is not entitled to receive out of the assets of the company any sum over and above the par value of his stock and the interest upon the same.

Solicitors, *Withers & Withers; Dawes & Sons; Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

Chan. Div.
Warrington, J. } May 6.

In re B——'S TRUSTS.

Practice—Payment out of court—Evidence—Presumption of death.

Where an application is made for the payment out of court of funds by persons claiming as upon the presumption of death by reason of seven years' absence of the person to whose credit the funds stand, and the court is satisfied with the evidence, it is not in accordance with modern practice for the court to require security to refund before making the order for payment out.

Petition.

The testator in this case gave one fourth part of his residuary estate to his brother J. B. and the nine children of J. B. by name, including H. C. B., or such of them as should be living at the death of the testator, in equal shares.

The testator died on the 9th of July, 1898, and his will was duly proved.

H. C. B. was up to the 9th of January, 1898, a lieutenant in the Warwickshire regiment, then stationed at Chatham. On that day he parted from a friend in Piccadilly-circus, stating that he was going to Chatham that evening to rejoin his regiment. He never rejoined his regiment and had never since been heard of. He was of the age of twenty-six years and in good health and spirits when last seen.

The testator's executors distributed nine-tenths of the said one-fourth share and paid the remaining one-tenth, representing the share of H. C. B. in case he survived the testator, into court under the Trustee Act.

Seven years having elapsed since the 9th of January, 1898, J. B. and the eight other children presented this petition for payment out to them of the funds in court, being a sum of £687 Consols or thereabouts, in equal shares upon the footing that H. C. B. must be presumed to be dead and to have predeceased the testator in the absence of evidence that he survived.

A. C. Nesbitt, for the petitioners.—There is a question as to whether the practice requires the petitioners to give security to refund in cases of this kind, such security having been required in *Dowley* v. *Winfield*, 14 Sim. 277. In *In re Hanby's Trusts*, 25 W. R. 427, on the other hand, security was not required, and in Seton (6th ed.), vol. 2, p. 1655, it is stated that modern practice does not require it.

T. H. Carson, K.C. (*amicus curiæ*), mentioned *In re Mileham's Trust*, 15 Beav. 507, where security to refund was required before the order was made.

WARRINGTON, J., held upon the evidence that H. C. B. must be presumed to be dead, and to have predeceased the testator, and made the order for payment out, without requiring any security to refund, holding that the modern practice was for the court to make the order when satisfied upon the evidence; and when not completely satisfied, instead of taking security, to refuse the order.

Solicitor, *W. T. de B. Barwell.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 5.

EAST HAM URBAN DISTRICT COUNCIL v. AYLETT. (a.)

Local government—Streets—Paving expenses—Owner at time of completion of the works—Owner in default—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

The owner of the premises when the works are completed is the person liable to summary proceedings in respect to expenses incurred by the local authority in respect of work executed by such authority for which notice has been given under section 150 *of the Public Health Act,* 1875, *although he be not the owner at the time the notice was served.*

Case stated by justices of Essex, sitting at a petty session, held at Stratford, Essex, in respect to an information preferred by the East Ham Urban District Council, the appellants, against George Henry Aylett, the respondent, for the recovery of moneys claimed to be due to the appellants by the respondent under sections 150, 257 of the Public Health Act, 1875.

The material paragraphs of the case are: (2) It was proved that the part of Nelson-street to which the matter of the said information relates is not a highway repairable by the inhabitants at large, and that it was not sewered, levelled, paved, metalled, flagged, channelled, and made good to the satisfaction of the urban authority. (4) (a) On the 28th of August, 1900, a copy of this notice (*i.e.*, the notice required by section 150) was served by registered letter as prescribed by section 267 on C. A. Nicholl, as owner, he being then in receipt of the rack-rents of the premises as agent for some other persons, not the respondent. The said notice was addressed to the said C. A. Nicholl by name. (7) The appellants carried out the works and completed the same in the month of July, 1901. (8) The respondent became the owner of the said premises by purchase on the 27th of March, 1901, and he sold the premises on the 25th of June, 1902. (9) Cost of such work was duly apportioned by the surveyor to the appellants in the month of July, 1903, and the notice of such apportionment and demand for payment of the apportioned sum was duly served upon the respondent on the 10th day of March, 1904. (12) It was admitted both by the appellants and respondent (a) That the respondent was not the owner of the said premises, Nos. 2 to 28 (even numbers), Nelson-street, at the time when the notice to do the work was served; (b) that he was the owner of the premises in July, 1901, the date when the works were completed; (c) that he was not the owner at the date of the apportionment and demand for payment—namely, the 10th of March, 1904. (14) The respondent contended that he was not liable, as he was not the owner at the date when the apportionment was made and money demanded.

The question for the opinion of the court was whether, under all the circumstances of the case, the magistrates were justified in dismissing the case on the information.

The Public Health Act, 1875, s. 150, enacts: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . is not sewered, levelled, paved, metalled, flagged, channelled . . . to the satisfaction of the urban authority, such authority may by notice addressed to the respective owners or occupiers of the premises fronting . . . such parts thereof as may require to be sewered . . . require them to sewer . . . within a time to be specified in such notice. If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority. . . ."

Section 257 enacts: "Where any local authority have incurred any expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act . . . such expenses may be recovered . . . from any person who is the owner of such premises when the works are completed . . . and until the recovery of such expenses and interest the same shall be a charge upon the premises in respect of which they were incurred."

Macmorran, K.C. (*Temple Martin* with him), for the appellant council. — It has never yet been decided that the owner, who was not the owner at the time when the notice under section 150 was served, is liable for paving expenses although he be owner at the time of the completion of the works. But section 257 is quite clear that the expenses may be recovered from any person who is the owner of such premises when the works are completed. It says nothing about the owner in default. In the recently reported case in the Court of Appeal, *Millard* v. *Balby-with-Hexthorpe Urban District Council, ante* 165, [1905] 1 K. B. 60, it is quite true the person made liable was both the owner in default and when the works were completed, but the judgments only proceeded upon the latter distinction and in his judgment Collins, M.R., apparently deals with this case. On p. 64 he says: "Whether in the terms of the section alone (*i.e.*, section 150) the owner making default in doing the works required by the notice would remain permanently liable, although he did not continue to be owner at the time of the completion of the works, it is not necessary to consider. For, when we come to section 257, we find that in absolutely unambiguous terms it makes the person who is owner when the works are completed liable. Whether any other person would also be liable it is not necessary to consider." A case very near the present, where there was a charge on the premises under section 257, is *In re Allen and Driscoll's Contract,* 52 W. R. 680, [1904] 2 Ch. 226. There the purchaser had to bear the burden of the charge, as he was the owner at the completion of the works, although the vendor was the owner in default. Of course now that we have the decision in the *Balby case* the question of ownership at the time of apportionment and demand no longer arises.

I. A. Symmons (*Maurice N. Drucquer* with him), for the respondent.—Cases of charges under section 257 are not authorities for cases of summary proceedings under the same section, otherwise there would have been little reason to take the *Balby case* to the Court of Appeal, for *In re Buttersworth and Richer,* [1888] 37 Ch. D. 535, would have been ample authority. In the *Balby case* the judgments were based upon the fact that the owner Millard was the owner in default. See Collins, M.R., at p. 64, and Stirling, L.J., at p. 67: "If that be the meaning Millard remains liable, for he was the owner of the premises when the notice to do the work was given and he failed to comply with it, and he was also owner when the works were completed. Therefore it appears to me in the words of the Act his liability is clearly made out." If a

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

decision is given against the respondent then the words of section 150 "may recover in a summary manner the expenses from the owners in default" become meaningless. They must mean either (1) the owners who are owners at time of completion of the works; or (2) who are not owners at time of completion. *Reg.* v. *Swindon Local Board*, 27 W. R. 732, 4 Q. B. D. 305, decided against the latter view, and an adverse decision would make the former view unnecessary, because ownership in default would be altogether unnecessary to ground liability.

Lord ALVERSTONE, L.C.J.—Without saying that the point is exactly covered by *Millard* v. *Balby-with-Hexthorpe Urban District Council*, it is absolutely necessary for Mr. Symmons, and he has ably sought to do so, to explain the passage from the judgment of the Master of the Rolls where, speaking of section 257 and of the persons liable under that section, he says: [His lordship repeated the passage quoted by Mr. Macmorran.] Unless we say that was absolutely unnecessary for the decision or was not the point he was considering, it would have great weight. On looking at section 257 it seems to me to fix the liability upon the person who is the owner of the premises at the time of completion because it provides that "where any local authority have incurred expenses whereof the owner of the premises for or in respect of which the same are incurred, is made liable under this Act . . . such expenses may be recovered from any person who is the owner of the premises when the works are completed." It hence refers to the person upon whom the notice is served under section 150 and supposes the possibility of a change of ownership and instead of saying "may be recovered from such person," it says, "from any person who is the owner of the premises when the works are completed." It does contemplate a different period of time, viz., the time of completion as distinguished from the time of default, and it does contemplate the possibility of a different person being the owner at the time of the completion of the works. Moreover, although I agree that for the purposes of considering the liability to summary proceedings under section 150 and section 257, the cases dealing with a charge on the premises are not really authorities and that vendor and purchaser cases should not be cited as authorities on the point, yet *In re Allen and Driscoll's Contract*, [1904] 2 Ch. 226, does show that for the purpose of ascertaining when the actual liability arises, the period of completion of the work is the period to be taken into consideration; for in that case the person in default was the vendor, but the person who was the owner of the premises at the time of completion of the work was the purchaser, and it was held that the purchaser must bear the burden. I come to the conclusion that the person liable is the owner of the premises at the time of completion, whether we take the words of section 257 itself or whether we take the view that a contrary decision could not be supported in the face of *Millard* v. *Balby-with-Hexthorpe Urban District Council*, [1905] 1 Q. B. 60; for I think the Master of the Rolls used language by way of *obiter dicta* which was intended to cover this case, although Stirling, L.J., did not go quite so far. The appeal must be allowed with costs and the case go back to the justices with an order to convict.

KENNEDY and RIDLEY, JJ., concurred.

Appeal allowed.

Solicitors for appellants, *Wilson & Son.*

Solicitors for respondent, *Surtees & Surtees.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 5.

TROUGHTON v. MANNING. (*a.*)

Motor-car—Reckless driving—"Having regard to all the circumstances of the case"—Motor-car Act, 1903 (3 *Ed.* 7, *c.* 36), *s.* 1, *sub-section* 1.

The offence, created by section 1, *sub-section* 1, *of the Motor-car Act*, 1903, *of driving a motor-car on a public highway recklessly or at a speed which is dangerous to the public, having regard to all the circumstances of the case, is not committed when the speed is in itself reasonable and the person injured is a person not on the highway but on the car itself.*

Case stated by the justices of Ramsgate on an information by the appellant against the respondent, a collector of bridge tolls at Sandwich, for that the appellant on the 23rd of July, 1904, drove a motor-car recklessly, contrary to the Motor-car Act, 1903, s. 1, sub-section 1.

The justices convicted the appellant, and fined him £20 with costs £3 18s.

The material facts as set out in the case were: The appellant on the 23rd of July, 1904, drove his motor-car over Sandwich Bridge, crossing the River Stour from the Ramsgate side, being stopped by the respondent a short distance from, and before reaching the toll-gate, situated on the bridge at the side nearer to Sandwich. No demand was made upon the appellant for payment of any toll before he entered on the bridge, although certain notices were exhibited in the roadway. The appellant was informed by the respondent that a toll was payable for the passage of the bridge, but he declined to pay, and told the respondent to take the registered number of the car and backed it off the bridge, on the same side on which he had entered it—namely, the Ramsgate side, and turned it round with a view of proceeding in the direction in which he had come. The respondent thereupon placed himself in front of the car with a view to prevent its proceeding further. The appellant, having warned the respondent to keep clear, set the car in motion. The respondent thereupon proceeded to the near side of the car with a view to seizing and detaining it or some part of it. The appellant proceeded along the the road to Ramsgate at a pace which was admitted to be not more than twelve miles an hour, with the respondent hanging on the side of the car, and the respondent was carried 213 yards in that position with his heels on the ground. The respondent asked the appellant to stop, which he failed to do, and eventually the respondent let go the car and fell to the ground and was picked up in an insensible condition. The speed of the car while the respondent was hanging thereon was in itself a reasonable speed, and no danger was caused to any person other than the respondent. It was contended for the respondent that the driving was reckless within section 1, sub-section 1, and for the appellant that it was not.

The justices convicted the appellant of reckless driving in view of all the circumstances of the case.

Section 1, sub-section 1, of the Motor-car Act, 1904, enacts: "If any person drives any motor-car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under the Act."

C. W. Mathews, for the appellant.—There is no evidence here of reckless driving, the justices having found to the contrary. The words in the section "having regard to all the circumstances of the case" do not apply to reckless or negligent driving: *Smith* v. *Boon*, 49 W. R. 480, 84 L. T. 593.

Drury, for the respondent.—The only question is whether there was evidence of reckless driving. It is really a question of fact. Reckless driving has no necessary relation to speed at all. The man actually asked the driver to stop, and it was reckless driving to drive when the man was evidently in a dangerous position.

Cur. adv. vult.

Lord ALVERSTONE, L.C.J.—This is a case which raises a question of considerable difficulty, and was very properly put by Mr. Drury in arguing the case. It depends entirely upon whether there was evidence upon which the justices could find, under the circumstances of this case, that there had been reckless driving within the meaning of section 1, sub-section 1, of the Motor-car Act, 1903. The facts bearing upon the point are that the toll-keeper, quite rightly, tried to get toll from the motor-car driver when the car had passed over the bridge and had turned back. The driver refused to pay. The toll-keeper got on to the car, which was at that time off, or very nearly off, the bridge, and hung on to it for some distance. Then, according to what was stated in paragraph 5 of the case, "the respondent asked the driver to stop" to let him get off. The next paragraph of the special case is also material: "The speed at which the car was running was a reasonable speed, and no danger was caused to any person other than the respondent." It was contended by Mr. Mathews that the magistrates were wrong in taking into consideration, with respect to negligence and reckless driving, the words "having regard to all the circumstances of the case, including the nature, condition, and use of the highway . . ." It is quite impossible, in my opinion, to consider a case of negligent driving without having regard to these matters mentioned in the section. It is contended that these words "having regard to the circumstances of the case" only relate to "at a speed or in a manner which is dangerous to the public." I do not think it makes much difference, for they are the kind of considerations which people must take into view before it could be said that there was negligent or reckless driving. I have come to the conclusion, with some hesitation, that this conviction cannot be supported. Before I give my reasons why I think it cannot be supported I wish to say I am not countenancing the practice which it seems to me does prevail with drivers of motor-cars where there is only one person on the road. As a fact they think under such circumstances, so long as they blow their horn, they may go at any rate of speed within the statutory limit, and persons must get out of their way. It seems to me that that is not the case which arises here, and although the magistrates have thought it a serious one, it seems to me that there is no evidence of any breach of the section, having regard to what is intended to be considered by the section. Possibly some question may arise as to the personal liability of the driver to the toll-keeper. The magistrates have held that the speed was reasonable in itself, and that there was no danger threatened to any person other than the respondent. That being so, the personal grievance of the toll-keeper against the driver in respect to his conduct is not sufficient as evidence of reckless or negligent driving having regard to all the circumstances of the case. It does seem a case of an unfortunate occurrence which may have been caused by want of reasonable care towards this particular man, but I think we should be straining the statute if we made it a criminal offence in a case where there was no reckless or negligent driving in respect to any person on the highway, but where a man got upon the car and was injured by the neglect of the driver to stop. In a case where the justices have got any evidence before them of an offence within the statute, we should be slow to interfere with their finding, but we ought not to strain the statute or put upon it a construction which would make it a criminal offence to injure a person independent of whether it could be regarded as reckless or negligent driving within the statute. The appeal must be allowed.

KENNEDY, J.—There is very little which I can usefully add to what my lord has said. I may express my view a little differently. The toll-keeper was, as the case says, a person who, rightly or wrongly, had a notion that he could seize in some way part of the car. I do not know what that means. It was suggested by counsel that he thought he could levy a distress. However, he became by clinging on, a sort of uninvited and undesirable traveller on the car—no doubt not on a comfortable seat, but, on the contrary, in a position of danger, perched, if I may say so, on the side of the car. The intention of the section is to deal with misconduct in the management of the car. I do not think the intention of the section is to punish a person for reckless conduct which may have an ill effect upon a person on the car itself. It means to prescribe a punishment for conduct in the management of the car occasioning injury to persons on the highway lawfully using it, though acting negligently themselves. Here the person injured became a passenger on the car, against the will of the owner no doubt, and it seems to me that the Act does not mean to deal with speed or management of the car which may be dangerous to those on the car itself, whether by right or by invitation or as trespassers. We can imagine the case where the speed was such that there would be a real danger of the occupants being thrown out. But could the man be said to be driving recklessly within the meaning of the Act to the danger of persons in the car but to nobody else? I think not. It was not intended to create an offence in respect of persons in the car, whether trespassers or not. The appeal must be allowed.

RIDLEY, J.—I agree.

Appeal allowed.

Solicitors for appellant, *Sandford & Co.*

Solicitors for respondent, *Hare & Co.*, for *Hardman*, Deal.

C. C. R.
(Lord Alverstone, L.C.J., and Kennedy, Ridley, Channell, and Phillimore, JJ.)

Jan. 28; Feb. 20.

REX v. OSBORNE. (a.)

Criminal law—Indecent assault—Evidence—Complaint by prosecutrix—Admissibility.

Upon the trial of a prisoner on a charge of indecent assault on a girl under the age of thirteen, her consent therefore being not material to the charge, a complaint made to a third party in the absence of the prisoner is

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

admissible in evidence, not as part of the res gestæ *or as evidence of the truth of the things alleged, but as confirming the testimony of the prosecutrix.*

Reg. v. Lillyman, 44 *W. R.* 654, [1896] 2 *Q. B.* 167, *considered.*

Case stated by the chairman of the Worcestershire Quarter Sessions.

The prisoner was indicted on two counts, first for indecently assaulting one Keziah Parkes, and on a second count with a common assault upon her.

It was proved that he kept a fried fish shop in Kidderminster at a distance of five minutes' walk from where the prosecutrix resided, and on the day in question Keziah Parkes, a girl of the age of twelve years, her sister Nelly Parkes (aged eight) and a girl named Mary Moule (aged eleven) went to the prisoner's shop about 3.30 p.m. to buy potato chips. They had been in the habit of going to the shop and selling dripping to the prisoner. Mary Moule asked the prisoner if he wanted any dripping, and he replied that they could fetch him some if they would come back at once. Mary Moule and Nelly Parkes went back to fetch the dripping. Keziah Parkes asked if she should go with them, but the prisoner said: "No, stop with me." As soon as the other girls were gone the prisoner took Keziah Parkes into the back kitchen, pulled her on to his lap, and indecently assaulted her. Keziah Parkes offered no resistance or objection. The prisoner left the kitchen to attend to a customer in the shop, and when the customer left the prisoner returned to the kitchen and asked Keziah Parkes to come back on to his lap, but she refused and ran off towards home. On her way home she met Mary Moule and her sister coming back to the shop, and they asked her "why she was going home, and why she did not wait till they came back." She had not spoken to them till this question was asked. Mary Moule was called, and was asked when she met Keziah Parkes in the street, "Did you speak to her?" Moule replied, "Yes, I asked her why she did not stop for me." The question was then asked, "What did she say?" Counsel for the prisoner objected to the question on the grounds (*a*) that an answer given by a prosecutrix to a question on a charge of indecent assault could not be given in evidence, as such an answer was not a complaint within the meaning of *Reg.* v. *Lillyman*, 44 W. R. 665, [1896] 2 Q. B. 167; and (*b*) that as the prosecutrix was under the age of thirteen her consent was not material to the charge, and consequently any statement she made, whether in reply to a question or not, could not be given in evidence, as the rule in *Reg.* v. *Lillyman* applied only to cases where want of consent was a material element to the charge. Counsel for the prisoner relied upon the decision in *Reg.* v. *Merry*, 19 Cox C. C. 442 that an answer to the question was not a complaint; and also upon the decision in *Rex* v. *Kingham*, 66 J. P. 393, that where consent is not a material element the statement of the prosecutrix is not admissible. Counsel for the prosecution relied upon the decision in *Reg.* v. *Kiddle*, 19 Cox C. C. 77, where it was decided that the rule in *Reg.* v. *Lillyman* applied to cases where the girl on whom the offence was alleged to have been committed was of such tender years that the court directed her evidence to be taken, but not upon oath, and where the question of her consent was immaterial.

The chairman, being of opinion that the conduct of the prosecutrix in running away home and not waiting for her companions was part of the *res gestæ*, and that her statement would be evidence why she ran away home, allowed the question to be put, on the authority of *Reg.* v. *Jolly*, 60 J. P. 569, and *Reg.* v. *Kiddle*. Moule replied to the question why the prosecutrix did not stop for her, "Because she did not like the prisoner, and would not go near him again, as he unbuttoned her drawers. That was all she said." The prisoner, when charged at the police station, said: "She came and sat on my lap herself. She has done it many times, and is more to blame than me." The chairman, in summing up, told the jury that it was immaterial whether the girl consented or not to what was done to her, but that they ought not to convict unless in their opinion there was corroborative evidence, and that the only corroboration of the child's story was the prisoner's statement at the police station. He did not refer in any way in his summing up to the answer given by the girl Keziah Parkes to the question asked her by Mary Moule. The prisoner was convicted and judgment was postponed.

The questions of law for the court were: Whether the fact that a statement made by a prosecutrix to a third person immediately after the alleged indecent assault was in answer to a question from such a person, prevented such statement from being given in evidence in accordance with the rule laid down in *Reg.* v. *Lillyman*? (2) If such a statement could be given in evidence, although it was in answer to a question, did the fact that the offence charged was one where the consent of the prosecutrix was immaterial make such statement inadmissible? (3) Could such statement be given in evidence when the prosecutrix did not state that the act charged was against her will?

J. R. V. Marchant, for the prisoner.

J. B. Mathews, for the prosecution.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Feb. 20.—The judgment of the COURT was read by

RIDLEY, J.—In this case the prisoner Osborne was tried at the Worcestershire Quarter Sessions on an indictment containing two counts, the first for indecent assault and the second for common assault on Keziah Parkes, a girl twelve years old. It appeared that Keziah Parkes, along with a younger sister and another girl named Mary Moule, of a similar age, went to a shop kept by the prisoner for the purpose of buying chips. Two of the girls—namely, Moule and the younger sister—went out of the shop on an errand, and during their absence the alleged assault was committed by him on Keziah. She then left the shop, and on her way home met Mary Moule with her sister coming back to the shop. Mary Moule was called at the trial and was asked, when she met Keziah Parkes in the street, "Did you speak to her?" Moule replied, "Yes, I asked her why she did not stop for me." The next question put to the witness was, "What did she say?" Objection was then taken for the prisoner that the witness's answer was not admissible in evidence, but the chairman admitted the evidence. The girl's answer was as follows: "Because she did not like the prisoner, and would not go near him again, as he unbuttoned her drawers. That was all she said." The prisoner was convicted, and the point raised for our decision is whether this ruling was right. It was contended for the prisoner that the evidence was inadmissible. First, because the answer made by the girl was not a complaint, but a statement or conversation having been made in answer to a question, and secondly, because as Keziah Parkes was under the age of thirteen her consent was not material to the charge. As to the first point, the case of *Reg.* v. *Merry* was quoted. In that case a question had been put to a girl of nine years old by her mother in a case of indecent assault, and the learned judge ruled that as the proposed evidence was a

statement made in answer to a question it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report what the question was that was put to the girl. It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will indeed have that effect and will render it inadmissible, but a question such as this, put by the mother or other person, "What is the matter?" or "Why are you crying?" will not do so. These are natural questions which a person in charge will be likely to put. On the other hand, if she were asked, "Did So-and-so (naming the prisoner) assault you?" "Did he do this and that to you?" then the result would be different and the statement ought to be rejected. In each case the decision on the character of the question put as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make it is not rendered inadmissible by the fact that the questioner happened to speak first. In this particular case we think that the chairman of quarter sessions acted rightly and that the putting of this particular question did not render the statement inadmissible.

Upon the second point it was contended that although under the decision of *Reg.* v. *Lillyman* the particulars of a complaint made may in some circumstances be given in evidence on a charge of rape that ruling does not extend to charge of criminal knowledge or indecent assault, where, as in the present case, consent is not legally material. This contention is supported by *Rex* v. *Kingham* decided in 1902, but, on the other hand, in *Reg.* v. *Kiddle*, 19 Cox. C. C. 77, decided in 1898, it was ruled that the decision in question does extend to all charges of this character whether consent is a defence or not. In *Reg.* v. *Lillyman* the prisoner was charged on an indictment containing three counts: First, attempt to have carnal knowledge of a girl above thirteen and under sixteen; second, an assault with intent to ravish her; third, an indecent assault. The prisoner was found guilty upon the first count only, and upon that count, in order to establish guilt, it was not necessary to prove want of consent. But the prosecutrix swore that what was done to her was done without her consent, and the court in giving judgment said that as she had so deposed the complaint was admissible. Two points were taken and argued, first, whether the fact that the complaint was made was evidence; second, whether particulars of it could be given; and it is to the latter of these that the greater part of the judgment relates. This point was not argued before us as distinguished from the first point on the present occasion, and the only question, therefore, for our determination is whether where consent is no part of the charge the complaint is admissible. By the judgment in *Reg.* v. *Lillyman* it was decided that the complaint was admissible not as evidence of the facts complained of nor as being a part of the *res gestæ* (which it was not), but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as being inconsistent with her consent to that of which she complains. Mr. Marchant argued upon this that the reasons so given were one only, and that the consistency of the complaint with the story given by the prosecutrix was material only so far as the latter alleged non-consent. If, however, the argument were sound, the words in question might have been omitted from the sentence and it would have been sufficient to say that the complaint was admissible only and solely because it negatived consent. We think, however, if it were a question of the meaning of words that the better construction of the judgment is that while the court dealt with the charge in question as involving in fact though not in law the question of consent on the part of the prosecutrix, yet the reasons given for admitting the complaint were two—first, that it was consistent with her story in the witness-box, and secondly, that it was inconsistent with consent. The reasoning proceeded thus: On the second and third counts consent was material in law, on the first it was material in fact, there is for this purpose no difference between the two. It is not therefore because the charge itself involves proof of the absence of consent that the evidence is admissible, on the contrary the prosecutrix herself can make it evidence by deposing that she did not consent when that is no part of the charge. In other words, whether non-consent be legally a necessary part of the issue, or whether, on the other hand, it is what may be called a collateral issue of fact, the complaint becomes admissible. But how does non-consent become a collateral issue of fact? The answer must be in consequence of the story told by the prosecutrix in the witness-box. And the judgment treats the two cases on the same footing. If non-consent be a part of the story told by the prosecutrix, or if it be legally a part of the charge, in each case alike the complaint is admissible. But if that is so does not the reasoning apply equally to other parts of the story, and not merely to the part in which the prosecutrix has denied consent. If not, it seems illogical to allow, as the court did allow, that the whole of the story may be given in evidence. The true result is, we think, that while the decision in *Reg.* v. *Lillyman* is not strictly on all fours with the present case, yet the reasoning which it contains answers the question now raised for decision. But however that may be, it appears to us that in accordance with principle such complaints are admissible, not merely as negativing consent but because they are consistent with the story of the prosecutrix. In all ordinary cases, indeed, the principle must be observed which rejects statements made by anyone in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought under proper safeguards to be admitted. Their consistency with the story told is from the very nature of such cases of special importance. Did the woman make a complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is important for the jury.

It is in accordance with this view that in early times it was incumbent on the woman who brought an appeal of rape to prove that while the offence was recent she raised "hue and cry" in the neighbouring towns and showed her injuries and clothing to men, and that the appellant might raise as a defence the denial that she had raised the hue and cry. The passages in Bracton De Coronâ, lib. 3, fol. 147, and in the Pleas of the Crown, Selden Society, vol. 1, and Warwickshire Eyre, A.D. 1221, p. 109, as also in the Mirror of Justices, Selden Society, vol. 7, and Exceptions, cap. 21, p. 103, are interesting and instructive as showing that the distinction in this special class of case has been recognized from the earliest times. The hue and cry was the phrase used generally for the pursuit of a felon, but we have not found any other case than rape in which it was for the prosecu-

tion to show that they had raised it or in which it was a defence to show that it had not been raised. It is, however, right to refer to a passage in Bracton De Coronâ, lib. 3, fol. 139, in which he describes the objection made by an appellant that the hue and cry had not been raised as *ista generalis exceptio et primâ*: see this passage referred to in the late Mr. Justice Stephen's History of Criminal Law, vol. 1, p. 246. But it seems to have been specially applicable to this class of case only. A further weighty authority for the existence of this exception to an acknowledged general rule is to be found in Hale's Pleas of the Crown, vol. 1, p. 633, where it is stated that the party ravished is to give evidence on oath, and her credibility must be left to the jury. "For instance, if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of the injury . . . these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself. But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain . . . and she made no outcry when the fact was supposed to be done when and where it is probable she might be heard by others, these and the like circumstances carry a strong presumption that her testimony is false or feigned." We think these words may be adopted as stating the law accurately, and they indicate that these complaints are to be admitted not only because they bear on the question of consent, but also because they bear on the probability of her testimony in a case in which without such or other corroboration reliance might not be placed on her testimony. Our attention has been called to the case of *The Commonwealth* v. *Cleary*, (1898) 172 Mass. 175, decided in 1898 by the Supreme Judicial Court of Massachusetts. In that case the indictments were for unlawfully abusing a child under the age of sixteen years. The girl had made a complaint, and the fact was given in evidence. No question arose as to the admissibility of its details, but the point reserved for the decision of the court on conviction of the prisoner was whether the proof of this complaint could be admitted. The argument proceeded on the question whether it was too remote in point of time, but Holmes, J., in giving the judgment of the court, said: "It is not argued that the common law in cases of rape does not apply: see *Commonwealth* v. *Roosnell*, (1886) 143 Mass. 32; *Commonwealth* v. *Hackett*, (1898) 170 Mass. 194, 196. The rule that in trials for rape the Government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal: Glanville, xiv., 6; Bracton, fol. 147*a*; Fleta, 1, c. 25, s. 14; Statute 4 Ed. 1, Statute 2. Appeals became obsolete and left rape to be dealt with by indictment before the development of the modern law of evidence." He then quotes the passage from Hale, P.C., above set out, and says: "If it means what it has been taken to mean, that the Government can prove fresh complaint as part of its original case, it cannot be justified by the general principles of evidence which now prevail. . . . The evidence is not admitted as part of the *res gestæ*, or as evidence of the truth of the things alleged, or solely for the purpose of disproving consent, but for the more general purpose of confirming the testimony of the ravished woman: *Reg.* v. *Lillyman*." And further on he says: "The test is whether according to the principles of the exception her having made the complaint tends to corroborate testimony given by the child at the trial." For these reasons the evidence was in that case held to be admissible.

With that statement of the law we concur. We are at the same time not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply, and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and when consent is in issue, of the absence of consent. For these reasons we think the conviction should be affirmed.

Solicitor for the prosecution, *G. A. Weston*, Kidderminster.

Solicitors for the defence, *Stallard & Turner*, for *A. Spencer Thursfield*, Kidderminster.

House of Lords.

From C. A. (England). March 24.

OGDENS (LIMITED) v. NELSON.
OGDENS (LIMITED) v. TELFORD. (*a*.)

Contract — Construction — Agreement to participate in profits of business for a specific period—Sale within that time—Implied stipulation.

The appellants, who were wholesale tobacconists, agreed with the respondent in consideration of his undertaking to become a customer and not to sign any agreement with any company or firm which would prevent him from buying or selling the appellants' goods, and to continue to buy and sell such goods, that the respondent should for four years share in a distribution by the appellants of an annual bonus among such of their customers as should purchase direct from them, the distribution to be made according to the purchases for the year. Before the expiration of the four years the appellants sold their business and went into liquidation. The respondent had fulfilled his part of the undertaking.

Held, that there was an implied undertaking on the part of the appellants that they would continue to carry on their business, and would not do any voluntary act which would make it impossible to distribute the sums which they had undertaken to distribute, and therefore that by parting with their business there was a breach of contract, which entitled the respondent to damages.

Decision of the Court of Appeal (*ante*, p. 71, [1904] 2 *K. B.* 410) *affirmed.*

Appeal from a decision of the Court of Appeal (*ante*, p. 71, [1904] 2 K. B. 410) (Collins, M.R., and Romer and Mathew, L.JJ.), affirming that of Lord Alverstone, L.C.J. (51 W. R. 696, [1903] 2 K. B. 287).

The case is set out at length in the court below. Shortly stated it is as follows:

The appellants sent out a circular to retail tobacconists to the following effect: "Bonus distribution.—Our entire net profits and £200,000 per year

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

for the next four years, commencing the 2nd of April, 1902. We will for the next four years distribute to such of our customers . . . net profits on goods sold by us in the United Kingdom and £200,000 per year, &c. . . . ." Distribution to be in proportion to purchases made. Accompanying this circular there was a form of contract. "Messrs. Ogdens (Limited), Liverpool—Dear Sirs,—I beg to inform you that I have not signed the agreement with the Imperial Tobacco Co. (Limited), dated March, 1902, and in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom and £200,000 per year for the next four years, as set out in your particulars, I hereby agree not to sign it . . . and I also undertake to continue to buy, display, and sell your goods." This the respondent signed and sent to the appellants.

Pursuant to the bargain so made, the respondent dealt with Ogdens, and in July, 1902, received a share of £50,000, being one quarter of the £200,000, for the three months ending on the 2nd of July, 1902; and also received credit in account for his share of the bonus for the three months ending the 2nd of October, 1902.

In September, 1902, the appellants sold their business in the United Kingdom to the Imperial Tobacco Co., they ceased to carry on business in the United Kingdom and went into voluntary liquidation.

It was held by the Lord Chief Justice that it was an implied term of the contract that Ogdens would continue to carry on their business for the full period of four years, and that the respondent was entitled to damages. The Court of Appeal were of the same opinion.

Ogdens appealed.

Asquith, K.C., and *F. E. Smith* (*Rufus Isaacs, K.C.*, and *Hemmerde* with them), for the appellants.

J. R. Randolph (*Bankes, K.C.*, with him), for the respondents.

Earl of HALSBURY, L.C.—In this case, I am of opinion that the judgment of the Court of Appeal was right and ought to be affirmed. I very much doubt whether in dealing with this contract we can get any light from other cases decided upon other forms of contract. I do not think the question here depends upon how much you can imply. That part of the contract upon which I rely, and on which the Court of Appeal relied, is that which is expressed.

It is clear that offers were made to the retail traders by rival associations in order to, as it was called, capture the tobacco trade. One association, the Imperial, offered for a named period to give them a certain amount of the profits, or a certain percentage of the profits, and to distribute by way of bonus £50,000. Upon which the appellants telegraphed to the customers generally, or at all events to this particular litigant: "Advise you not to sign Imperial agreement. See our circular in the morning." Now, the circular in the morning, which forms part of the contract, offers this bonus distribution: "Our entire net profits and £200,000 per year for the next four years." Is it possible to talk about there being no bargain in respect of this matter, and that you are to look to an implication for it? It appears to me that there is a definite offer, and that that distribution is to occupy four years. Then the acceptance seems to me to be equally free from doubt.

The acceptance is prepared for the signature of the intending customer by those who are making the offer, so that it is their own language which they get the customer to sign. Once that bargain is made and the customer signs it, whatever else may happen, there is undoubtedly not an implied but an express contract to distribute for four years during that period annually £200,000. There is no doubt that the meaning of this contract was that it was to last for four years. The customer was entitled to say: "I have given you my signature, and I have thereby enabled you—at all events, it is supposed by you that I have enabled you—to continue this strife between two associations. I have performed my part of this contract; now perform yours." It may be that the customer cannot compel them in law to carry on their business; it may be that he cannot prevent them from selling themselves as they did; but having done it they are bound to pay the damages which are consequent upon their having put it out of their power to carry on the business, and having failed to perform their contract to pay the respondent a proper proportion of the £200,000 a year, which is all that is now insisted on by him.

Under the circumstances I construe this document without any reference to any other documents. I confess I am very jealous of attempting to interpret one contract by another contract made under different circumstances. I look at this contract alone, and I cannot entertain a doubt that there was a breach of the contract, and I move that the appeal be dismissed with costs.

Lords MACNAGHTEN, JAMES, and LINDLEY concurred.

In the second appeal, which was similar, there was no argument.

Orders of the Court of Appeal affirmed, and both appeals dismissed with costs.

Solicitors, *A. Middleton Rickards; Smith, Rendell, & Dodds*, for *A. H. Bullock*, Cardiff; *Bell, Brodrick, & Gray*, for *Cousins, Botsford, & Phœnix*, Cardiff.

From C.A. (England). Feb. 17.

BOLITHO & CO. v. GIDLEY AND OTHERS. (a.)

Married woman — Separate property — Restraint on anticipation—Judgment—Income due after judgment —Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 19.

Income of a married woman which she is restrained from anticipating, accrued due since a judgment against her, cannot be taken in execution under that judgment.

Whiteley *v.* Edwards, 44 *W. R.* 530, [1896] 2 *Q. B.* 48, *approved.*

This was an appeal from an order of the Court of Appeal (Romer and Cozens-Hardy, L.JJ.) affirming that of the judge at chambers.

The respondents were trustees of a married woman with separate property subject to a restraint on anticipation, and her income was regularly paid to her bankers, the appellants.

The appellants, to whom she was indebted, recovered judgment against her, and obtained a garnishee order *nisi* against the respondents to attach all debts due or accruing due from the respondents as trustees to the married woman. Between the judgment and the garnishee order the respondents received income of the married woman which was not due at the date of the judgment.

The Court of Appeal held that the judgment and garnishee order were ineffectual as against this income.

The bankers appealed.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Duke, K.C., and *Morten*, for the appellants.—*Whiteley* v. *Edwards*, 44 W. R. 530, [1896] 2 Q. B. 48, is indistinguishable, but the question has never been decided in this House.

They referred to *Hood-Barrs* v. *Heriot*, 44 W. R. 481, [1896] A. C. 174; the Married Women's Property Act, 1882, s. 1, sub-section 2, and section 19 of the Act of 1893; *Holtby* v. *Hodgson*, 38 W. R. 68, 24 Q. B. D. 103; *Hyde* v. *Hyde*, 36 W. R. 708, 13 P. D. 166; *Cox* v. *Bennett*, 39 W. R. 401, [1891] 1 Ch. 617; *Hood-Barrs* v. *Cathcart*, 42 W. R. 628, [1894] 2 Q. B. 567.

Danckwerts, K.C., and *Abrahams*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—So far as I am concerned I have listened with great attention to the very ingenious argument presented by the learned counsel at the bar, but it appears to me that the whole question comes back to what has been the operation of the Acts of Parliament referred to. I have been unable to follow any suggestion which would not have the effect of defeating the Acts of Parliament if the proposition insisted upon here were maintained.

I do not think the matter is susceptible of very lengthened exposition. In my view the Acts of Parliament have prohibited in effect the execution which is insisted upon here; and beyond saying that that is my view of the true construction of the two Acts referred to, I am unable to go any further. It appears to me to be hopeless to expound in any clearer way the operation of the statutes otherwise than by the language of the statutes themselves.

Under these circumstances I content myself with saying that I think this appeal ought to be dismissed.

Lord MACNAGHTEN.—I am entirely of the same opinion. The case appears to me to be absolutely clear, and in my opinion the judgment appealed from is perfectly right. I think if effect were given to the contention of the appellants it would render all restraints upon anticipation absolutely inoperative. No doubt a married woman restrained from anticipation would still be prevented from entering into a contract with regard to the property as to which she was restrained; but she would have nothing to do but the very thing which the testator or settlor desired to prevent her doing—that is to say, run up debts; and then there might be a judgment against her of an anticipatory character, swooping down upon her property from time to time as it was received, so getting rid altogether of the restraint on anticipation.

I entirely agree in the judgment which has been proposed.

Lord LINDLEY.—I think this is a hopeless appeal. The Married Women's Property Acts emancipated married women from legal disabilities, but it left them under the disability which the courts of equity had put them under when they invented the restraint on anticipation. Whether that was a good policy or bad we have nothing to do with; but they did not emancipate them from that—they left them bound. This matter was very carefully considered in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120; *Hood-Barrs* v. *Cathcart*, and *Whiteley* v. *Edwardes*. Those cases are all opposed to this appeal. The reasoning is based, of course, upon the language of the Act which was before the court in those days, and I do not see any answer at all to that reasoning. If you look at the cases on the other side, there is not one which helps the appellants. *Holtby* v. *Hodgson* does not help them; nor does *Hyde* v. *Hyde*, nor does *Cox* v. *Bennett*, nor *Hood-Barrs* v. *Heriot*. As regards the Act of 1893, whatever may be said of it, it does not help the appellants. It appears to me that this is really a hopeless appeal.

Appeal dismissed.

Solicitors for the appellants, *Woodward & Co.*, for *Woollcombe & Sons*, Plymouth.

Solicitors for the respondents, *Blair & W. B. Girling*, for *G. Gidley & Son*, Plymouth.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — May 2.

In re NORTH OF ENGLAND STEAMSHIP CO. (LIMITED AND REDUCED). (*a.*)

Company—Special resolution—Confirmation—Notice of meetings—Contingent notice—Articles of association—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

A provision in the articles of association of a company to the effect that whenever it is intended to pass a special resolution the two meetings may be convened by one notice, and that it shall be no objection that the notice convenes the second meeting contingently on the resolution being duly passed at the first meeting, is not ultrà vires *the company as being inconsistent with section* 51 *of the Companies Act*, 1862, *and a contingent notice given in conformance with such a provision is valid.*

Alexander *v.* Simpson, 38 *W. R.* 161, 43 *Ch. D.* 139, *distinguished.*

Decision of Buckley, J. (ante, *p.* 442, [1905] 1 *Ch.* 609), *reversed.*

This was an appeal from a decision of Buckley, J. (reported, *ante*, p. 442, [1905] 1 Ch. 609) dismissing a petition presented by the above-named company for confirmation by the court of a reduction of capital in accordance with a special resolution of the company.

On the 4th of February, 1905, a notice in writing was given to the members of the company that an extraordinary general meeting of the company would be held on the 15th of February, at the place and time in the notice mentioned, at which the subjoined resolution (which was a resolution for the reduction of the company's capital) would be proposed. The notice also stated: "Should such resolution be duly passed by the required majority the same will be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting of the company, which will be held on Friday, the third day of March, 1905, at the same time and place." Article 70 of the company's articles of association was in the following terms: "Seven clear days' notice shall be given to members of any meeting of the company, and whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection to such notice that it only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting." The resolution was passed by a three-fourths majority at the meeting held on the 15th of February, and was duly confirmed at the meeting held on the 3rd of March.

Buckley, J., was of opinion that the notice of the second meeting did not comply with section 51 of the Companies Act, 1862. He held, therefore, that the

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

special resolution had not been passed in the manner provided by the Act, and dismissed the petition.

The company appealed.

Martelli, for the company, cited *Alexander* v. *Simpson*, 38 W. R. 161, 43 Ch. D. 139; *In re Espuela Land and Cattle Co.*, 48 W. R. 684; *In re The Jenner Institute*, 15 T. L. R. 394; *Tiessen* v. *Henderson*, 47 W. R. 459, [1899] 1 Ch. 861.

VAUGHAN WILLIAMS, L.J.—The question which we have to determine is whether the confirmatory meeting which was essential to the passing of this resolution was a meeting of which due and proper notice was given. It was said that the notice given was not a due and proper notice because it was not a notice of a meeting which would in any event take place, but was notice of a contingent meeting, which would take place only if something happened before the day fixed for the meeting—in other words, a notice that the meeting would be held for the purpose of confirming a resolution if the resolution submitted to the first meeting was duly passed. It was said that notice of such a contingent meeting was a bad notice, and the proceedings consequent upon it are invalid. And it was said that we ought so to hold in this case by reason of the decision of the Court of Appeal in *Alexander* v. *Simpson*. For myself I do not think that the decision in *Alexander* v. *Simpson* obliges us to hold that the notice of this confirmatory meeting was bad. When one looks at the judgments in that case one finds from the judgment of Bowen, L.J., that he was in no way dealing with section 51 of the Companies Act, 1862, but he was dealing with article 52 of the articles of association of the particular company there in question. With regard to that company, article 52, on which the question turned, provided: "Seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting, but the non-receipt of such notice shall not invalidate the proceedings at any general meeting." Those being the terms of article 52, notice was given of an extraordinary general meeting, and then the notice continued: "Should such resolutions be duly passed the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on Monday, the 29th of July, 1889, at the same time and place." The question which was really argued was what was the proper construction of that notice. Did it mean that the second meeting would in any event be held on the 29th of July, and the resolution for confirmation would then be submitted, provided such resolution had been previously passed, or did it mean that the meeting called for the 29th would only be held in the event of the resolution being passed previously subject to confirmation? The court held that according to the natural construction of that notice any shareholder would properly come to the conclusion that the second meeting would only be held contingently on the resolution being passed at the first meeting, and they refused to accede to the argument that the notice should be construed as a notice that the second meeting would be held in any event, and the resolution would be submitted for confirmation if passed at the earlier meeting. That is all that the court had to decide there, and it is remarkable that in the argument on behalf of the appellants this is said at p. 146 of 43 Ch. D.: "If the notice had said, 'If the resolutions are passed, a meeting to confirm them will be held on the 29th of July,' that, no doubt, would not have been a good notice; but what they say is, in substance, 'A second meeting will be held on the 29th of July, and if the resolutions are passed at the first meeting they will be submitted to the second for confirmation'; and that, we say, is a sufficient notice." It is plain, therefore, that the whole point there was the construction of the notice. The appellants there admitted that if the construction was that the meeting would only be held contingently upon the resolution being passed at the first meeting, the notice would, having regard to the terms of article 52, be invalid and insufficient. But we have nothing to do here with article 52. Those who drew the articles of this company were obviously desirous of having an article which differed from the article in *Alexander* v. *Simpson*. Accordingly there were added to the first part of article 70, which substantially coincides with the article in question in *Alexander* v. *Simpson*, concluding words which entirely differentiate it from article 52. It seems to me that the notice which has been given in the present case, which in effect is the same as the notice which was given and discussed in *Alexander* v. *Simpson*, has been made a proper notice so far as the articles of association are concerned by those words introduced into the concluding part of article 70. I think those words do amply justify the notice which has been given in the present case.

That being so, we have to decide in this case a question upon section 51 of the Companies Act, 1862. We have here article 70, which, in my judgment, does justify the notice given, and the notice, therefore, is valid unless article 70 is, by reason of the words at the conclusion of it, *ultrà vires*, and that depends upon section 51 of the Act. When one looks at that section I can see nothing to render article 70 *ultrà vires*. [His lordship read section 51, and continued:] The regulations of the company in the present case prescribe that notice may be given in effect in the form in which this notice has been given, and I myself am unable to see that there is anything in this article, which authorizes the giving notice of a contingent meeting, which is inconsistent with either the spirit or the letter of section 51. That section does not say in express words, nor, as it seems to me, by any implication, that there may not be a notice of a meeting which shall take place contingently upon the passing of a resolution at a former meeting. I can quite understand that there might be an article with reference to notice of meetings which really would be inconsistent with the spirit if not with the letter of section 51. The substantial intention of the Legislature in section 51 is that there ought to be a first meeting at which a resolution should be submitted to the shareholders, and that then there should be a proper interval of time, not too long and not too short, within which the shareholders should be able to consider the question. If an article authorizes giving notice in such a form as substantially to deprive the shareholders of the opportunity of consideration which the Legislature intended that they should have, I can see that such an article might be held to be *ultrà vires*; but I cannot come to the conclusion that an article which authorizes the giving notice of the two meetings required by section 51 in one notice, and subject to the proviso that the second meeting would only take place if there had been such a resolution passed at the first meeting as would or could be the subject of confirmation at the second meeting, could deprive any member of the company of any protection which the Legislature intended that he should have. The fact is that, word it how you will, if you have a provision like that in section 51 requiring two meetings, and that the resolution shall only become effective if confirmed at the second meeting after the stated interval of time, you cannot prevent the second meeting being contingent

upon the passing of the resolution at the first meeting. It must necessarily be contingent. It was said that as that is so, there should always be two notices, and that notice of the second meeting should not be given until the contingency had occurred by the passing of the resolution at the first meeting. I think that that is a mere matter of detail. As I understand the judgments, both of Chitty, J., and the Lords Justices in *Alexander* v. *Simpson*, all of them seem to have assumed that you might by a proper statement that the second meeting would be held whether the contingency contemplated by the Act occurred or not have made the notice a valid notice. In those circumstances the Court of Appeal seem to me to have in effect said that there is nothing, in the mere fact that notice of both meetings is comprised in one document, to make the article which authorizes that in any way *ultrà vires*. It seems to me, therefore, that there is nothing in article 70 which is invalid or which in any way interferes with the rights or the protection which the Legislature intended the shareholders to have. I think that the substance of Buckley, J.'s, decision is that article 70 is *ultrà vires*. I do not agree with him. I should like to say that with respect to any decision of Buckley, J., especially upon such a subject as this, I never differ from him without feeling that I am taking a step which I should not like to take without strong conviction; but I think that his decision in this case is wrong because it is based upon a wrong idea both of section 51 and of the effect of the decision of the Court of Appeal in *Alexander* v. *Simpson*. In these circumstances I think that we ought to allow this appeal and to sanction the reduction of the capital of this company.

ROMER, L.J.—I have come to the same conclusion. I know of no sufficient reason for saying that an absolute notice cannot be given of a meeting for the purpose of considering and, if thought fit, of passing a resolution upon a subject which is of necessity contingent. I think that a notice given for such a meeting is not in itself necessarily bad because it proposes to deal with a contingent matter as the subject of the resolution—for instance, notice of a meeting to appoint a liquidator of a company if the company at the same meeting or before passes a resolution for a voluntary liquidation. I cannot see why that notice should not be good and be acted upon if the resolution to wind up is duly passed. If, therefore, a meeting has to be called to pass a resolution which in its nature is contingent, in construing the notice of such a meeting the substance should be looked at, whatever the wording may be, and in order, if possible, to make it valid the notice should be construed, if it fairly can be, not as a contingent notice, but as an absolute notice of a meeting for the purpose of considering a matter which is contingent. Of course, if the subject-matter to be dealt with is contingent, it will be obvious that it will not be necessary to attend if the contingency does not arise. Speaking for myself, I should have thought, but for the decision that was arrived at, that the notice in *Alexander* v. *Simpson* might well have been treated, not as a contingent notice, but as an absolute notice of a meeting to deal with a matter which was contingent, and which only took a contingent form because obviously it would be no use to attend the meeting if the resolution to be confirmed had never passed. But there is the decision in *Alexander* v. *Simpson*, and we are bound by it; but personally I am not disposed to extend it if I can help doing so. I think that the ground of that decision must be taken to be that the court was of opinion that the notice of the second meeting was not such as complied with the articles of association of the company, and that the informality of the notice could not be got over, because there might be some shareholders who relied upon the terms of the articles and might be misled by the form of the notice. But in the case before us, as was pointed out by my lord, article 70 expressly provides that notice of the second meeting may be given contingently upon the resolution being passed at the first meeting. I can see no reason for holding that such a provision in the articles is *ultrà vires*, either as offending against the statutory provisions of section 51 of the Companies Act, 1862, or on any other ground. That being so, I think that the notice should be held to be a valid notice binding upon all the shareholders, and accordingly that the meeting summoned by it was duly held and the resolution passed at that meeting duly passed, and that resolution, which is binding upon all the shareholders and valid, ought to be acted upon. The petition, therefore, ought to have been heard on the merits. We have heard it, and we think that the prayer ought to be granted.

STIRLING, L.J.—I am of the same opinion. The question we have to consider is whether the special resolution has been duly passed by the company. Under section 51 of the Companies Act, 1862, such a resolution must be passed at one meeting and confirmed at another meeting. The Act provides that notice must be duly given of the second meeting, and then it proceeds to say that a notice shall be deemed to be duly given when given in manner prescribed by the regulations of the company. We are therefore referred by the Act itself for the purpose of ascertaining the validity of the notice to the articles of association. There is no question here but that the first meeting was duly held. The difficulty arises as to the second meeting, and it arises because notice of both meetings was given by the same document. There is no question that that notice is in entire conformity with the articles of association of the company. Article 70 by the last clause provides for giving notice in this precise form. Why then are we not to hold that this notice was duly given and this meeting duly held? The learned judge in the court below referred to *Alexander* v. *Simpson*, and he held, and rightly, that that case did not govern the present. He so held for this reason, that the question arising there was upon the construction of the articles of association of the company in question, and those articles were, so far as material to this question, entirely different in form from those with which we have now to deal. The words in article 70 have obviously been inserted to meet the difficulty which that decision gave rise to, and unless it appears that this article infringes against the terms of the Companies Act we are bound to give effect to it. I cannot see that this article does infringe against either section 51 or any other part of the Act. If the provisions of section 51 were to be read in the strict way in which the articles of association in *Alexander* v. *Simpson* were construed it would give rise to considerable difficulty in cases where a large proportion of the shareholders are resident at a distance from the registered office of the company. I do not for myself see that this article (Article 70) infringes in any way against the provisions of the Act or deprives the shareholders of any protection to which they are entitled. I think, therefore, that the second meeting was duly held in accordance with the articles of association, and that this appeal should be allowed.

Solicitors, *Gibson & Weldon*, for *Bertrand Watson*, Stockton-on-Tees.

From Chan. Div. (Vaughan Williams and Stirling, L.JJ.) March 2.

ORMEROD, GRIERSON, & CO. v. ST. GEORGE'S IRONWORKS (LIMITED). (a.)

Practice—Discovery—Production and inspection of documents—Liberty to take copies—Right to make copies—R. S. C., 1883, *ord.* 30, *rr.* 14, 15; *ord.* 65, *r.* 27, *sub-rule* 18.

Under an order for production of documents in the common form, giving the person obtaining the order liberty to inspect and peruse the documents produced, and to take copies and extracts therefrom, the person obtaining such order has the same right to make copies of the documents himself as he had under such an order by the old practice of the Court of Chancery before the passing of the Judicature Acts. Such right is not taken away by sub-rule 18 *of rule* 27 *of order* 65, *the object of that sub-rule being only to deal with the costs in cases in which an application for copies of documents is made to the opposing party.*

This was an appeal from an order of Joyce, J., which raised a question as to the right of a party to an action who had obtained an order for inspection to make copies of the documents.

By an order in the above action dated the 17th of February, 1903, made upon the application of the plaintiffs, the defendants were ordered to make affidavits of documents and produce the documents which should by such affidavits appear to be in the possession or power of the respective defendants, the production as to the defendants, the St. George's Ironworks (Limited), to be at the office of their solicitor. The order continued: "And the applicants, their solicitors and agents, are to be at liberty to inspect and peruse the documents so produced and to take copies and abstracts thereof and extracts therefrom as the applicants shall be advised."

By a further order dated the 8 h of June, 1904, it was ordered that the plaintiffs be at liberty at all reasonable times, upon reasonable notice to the solicitor to the defendants, the St. George's Ironworks (Limited), to attend with Sir Eustace Piers, Bart., the father and duly appointed agent of the plaintiff Charles Piggott Piers, at the office of the defendants' solicitor, "to inspect the documents disclosed by the said defendants in this action, and to take copies and abstracts thereof and extracts therefrom as the applicants shall be advised."

Sir Eustace Piers attended with a clerk of the plaintiffs' solicitors at the office of the solicitor of the defendants, the St. George's Ironworks Co., and proceeded to make copies there of the documents disclosed.

After a time the defendants declined to allow Sir Eustace Piers to make any further copies, but offered to supply copies in accordance with sub-rule 18 of ord. 65, r. 27.

The plaintiffs then applied that the defendants, the St. George's Ironworks Co., might be ordered to bring the documents disclosed by their affidavit into court.

On this application the defendants, the St. George's Ironworks Co., contended that by reason of the provisions in sub-rule 18 of rule 27, order 65, the plaintiffs, on the true construction of the order for affidavits and production of the 17th of February, 1903, were only entitled to receive copies of documents from the defendants and not to make copies themselves except in the event of the defendants refusing to supply them.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The question was argued in chambers before Joyce, J., who gave a written judgment to the effect that the order for affidavit and production was in the time-honoured form in use before the Judicature Act and since continued. That form of order authorized the person inspecting to take or make copies or extracts: *Pratt* v. *Pratt*, 30 W. R. 837. The only question was whether R. S. C. ord. 65, r. 27 (18), directly or indirectly altered the effect of such an order. In his lordship's opinion all the rule did was to provide what the charge was to be, when the inspecting party formally (by writing) required a copy or extract to be made for him by the other party. He did not see how the rule contended for by the respondents could practically be worked, and how was the line to be drawn between what the inspecting party might copy and what he might not.

The result was that the respondents must either undertake to allow the applicants to copy as they please or the documents must be brought into court (*Prestney* v. *Corporation of Colchester*, 31 W. R. 757, 24 Ch. D. 376), which was the strict course, production at the office of the solicitor being in truth an indulgence permitted for the convenience and with the assent of the parties or one of them: *Brown* v. *Sewell*, 29 W. R. 295, 16 Ch. D. 517.

In accordance with this judgment an order was made dated the 8th of February, 1905, that "unless the said defendants forthwith undertake to allow the applicants, their solicitors and agents, to copy the said documents as they please, the said defendants, the St. George's Ironworks (Limited), by their secretary or other proper officer, do within ten days from the service hereof produce and leave at the Central Office, Royal Courts of Justice, London, the documents mentioned in such affidavit, except such of the documents which they thereby object to produce. And it is ordered that the applicants and the said defendants and their solicitors and agents are to be at liberty to inspect and peruse the documents so produced and left, and to take copies and abstracts thereof and extracts therefrom as they may be advised."

Liberty was given to the St. George's Ironworks Co. to appeal.

The St. George's Ironworks Co. appealed.

The following are the rules cited in the argument and judgments:

Ord. 72, r. 2.—Where no provision is made by the Acts or these rules the present procedure and practice remain in force.

Ord. 31, r. 14.—It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such cause or matter as the court or judge shall think right, and the court may deal with such documents, when produced, in such manner as shall appear just.

Ord. 31, r. 15.—Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice, in which case the court or judge may allow the same

to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

Ord. 65, r. 27.—The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature:

Sub-rule 18.—As to taking copies of documents in possession of another party, or extracts therefrom, under rules of court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4d. per folio, and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

Danckwerts, K.C., and *Bathurst*, for the appellants.—The constant attendance of the plaintiffs' agent with a clerk at the solicitor's office caused great inconvenience and prevented the solicitor carrying on his own business. We submit that the plaintiffs have no right to make copies themselves of documents, at any rate so long as we are willing to supply copies. The orders only authorize them to "take" copies—that is, to accept copies from us, not to make these copies themselves. The right of inspection has been held by implication to carry with it the right to make copies in certain cases, but the right to make copies is not an invariable incident of the right to inspect. In the present case the right to make copies is excluded by the express terms of sub-rule 18 of rule 27 of order 65.

The following authorities were referred to in the course of the argument: *Brown* v. *Sewell*, 29 W. R. 295, 16 Ch. D. 517; *Bonnardet* v. *Taylor*, 9 W. R. 452, 1 J. & H. 383; *Pratt* v. *Pratt*, 30 W. R. 837; *Prestney* v. *Mayor of Colchester*, 31 W. R. 757, 24 Ch. D. 376; *Bevan* v. *Webb*, 49 W. R. 548, [1901] 2 Ch 59; *Mutter* v. *Eastern and Midland Railway Co.*, 36 W. R. 401, 38 Ch. D. 92; *In re Balaghât Gold Mining Co.*, 49 W. R. 625, [1901] 2 K. B. 665; *Prentice* v. *Phillips*, 2 Hare 152; *Coleman* v. *West Hartlepool Harbour and Railway Co.*, 5 L. T. 266; *Republic of Peru* v. *Weguelin*, 7 C. P. 352, 20 W. R. Cb. Dig. 89; Bray on Discovery, p. 174; Daniel's Chancery Practice (7th ed.), vol. 2, p. 1574; Seton on Judgments (6th ed.), p. 80; Kerr on Discovery, p. 24.

Cassel, for the respondents, was not called upon.

VAUGHAN WILLIAMS, L.J., stated the facts, and after reading from the judgment of Joyce, J., continued: I do not think that it was contended that under the practice of the courts before the Judicature Acts an order in the form that we have here would not have given the person who had obtained the order, the right to make copies of documents himself if he thought fit. But it is said that that effect of the old form of order has now been taken away. As I understand the argument of counsel for the appellants, they contend that it is taken away by the words of sub-rule 18 of rule 27 of order 65. [His lordship read sub-rule 18, and continued:] It is said that in this sub-rule 18 the word "take" is used in the sense of obtaining copies from the other side, and that it was intended by this sub-rule to say that the old right to make copies of documents upon production and inspection is taken away from the party who is making the inspection. I cannot accede to that argument. In the first place it seems to me manifest that the words "take copies" are frequently used in legal documents to cover the case of a copy being made by a party inspecting as distinct from the case of his getting a copy from the other side. A good deal of reference has been made to the case of *Mutter* v. *Eastern and Midland Railway Co.* Now, that case is really an illustration of the fact that the words "take copies" can be used in the sense of making copies because I find in the judgment of Chitty, L.J., at p. 98 of 39 Ch. D.: "In regard to the other right according to the mere words of the enactment it is a right to inspect, and to inspect only, but there is no prohibition on the shareholder, during the time that he makes his inspection, making notes of that which he inspects. As was said, he might, if he could, commit the whole register to memory. That, of course, would be a difficult thing to do. But there is nothing in the Act which prevents his making a note, and if he may make a note, I do not see why he may not make a complete note of any particular part; in other words, why he may not make an extract, and from that it seems to follow that he may make a reasonable use of the inspection and take a copy." In that portion of his judgment it seems to me plain that the learned judge is speaking of what the party inspecting may do himself, and he contemplates that the party inspecting may make copies for himself, and describes that process by the word "take," and Lindley, L.J., on p. 101, employs the word "take" in the same sense. I shall say no more about the application of the word "take" to copies made by the party inspecting with his own hands. It is plain that the word "take" can be used in the sense of making copies, though in sub-rule 18 it is otherwise.

Then it is said that that though a right of inspection will generally give a right to take copies, yet that right is negatived, and as an instance of the negation of that right the case is cited of *In re Balaghât Gold Mining Co. (Limited)*. In that case the right of inspection of the register of members of a company was given by section 32 of the Companies Act, 1862, and the court held that the only right of taking copies that existed was the right which was defined by the statute, that is to say, the right of being furnished with copies. It is argued that because sub-rule 18 enables copies to be obtained for a price, we ought in this case to hold that that negatives the ordinary inference that a party to whom the right of inspection is given has the right to make copies. I say "ordinary inference" because ordinarily speaking, the right to make copies is necessary to a full enjoyment of the right of inspection, as appears from the case of *Mutter* v. *Eastern and Midland Railway Co.*, in which the court held that the right to take copies was a necessary consequence of the right to inspect and peruse the register of debenture stockholders of a company, given by section 28 of the Companies Clauses Act, 1863. It is true that in both these cases the right to inspect was a statutory right, and the statute must be looked at to see whether a right to take copies is consequential on the right of inspection. But the distinction between the two cases is pointed out by Smith, M.R., in *In re Balaghât Gold Mining Co.* [His lordship read the judgment: "I quite agree with what fell from Lindley, L.J., . . . the person who inspects can get such copies as he requires by paying for them," and continued:] In my judgment neither of these cases assists us in the particular case we are now dealing with. When once you have ascertained that the word "take" covers the case of a person making copies for himself, the only question that remains to be decided is whether there is anything in the Acts or the rules which ought to lead us to say that it was intended that in future the sole right should be the right to purchase copies from the other side, and that the right to make copies was no longer in existence. I can find nothing in the

Acts or the rules to lead us to that conclusion. It was said that the making of copies by the person inspecting might cause great inconvenience in the office of the solicitor where the documents are produced. I do not think that that is a sufficient reason for saying that the settled practice has been altered and that there is now no longer any right to make copies. In my opinion, Joyce, J., was perfectly right in making the order which he made. The defendants were in default in refusing to allow copies of the documents to be made. The real answer to the argument of the defendants was pointed out by Page-Wood, V.C., in *Bonnardet* v. *Taylor*, that the practical result would be, if their contention were right, that it would be necessary to bespeak copies of whole documents when only portions of such documents were required. I think that the appeal ought to be dismissed, and dismissed with costs.

STIRLING, L.J.—I am of the same opinion and I agree with the reasoning of Joyce, J. The real question is what was the meaning of the order made by Joyce, J., on the 17th of February, 1903? That order is the common order for production of documents and is practically in the Form 18 in Appendix K to the Rules of the Supreme Court, and it is, as Joyce, J., observes, the form which was in use in the Court of Chancery prior to the Judicature Act. Now as to the meaning of the order when made by the court before the Judicature Act, there is, I think, no doubt. There is no dispute as to the meaning, and if authority is wanted it is to be found in *Bonnardet* v. *Taylor*. Page-Wood, V.C., in that case says: "The common order gives the plaintiffs power to go themselves and make copies and extracts, though the usual practice is to take the copies from the solicitors of the defandants." There can, I apprehend, be no question as to what was the meaning of the order at that time or that the word "take" in such an order included "make." The second order made by Joyce, J., on the 8th of June, 1904, was practically in the same form, and again if that order had been made before the Judicature Act there can be no question but that the word "take" would have included "make." That being so, the question is whether there is anything to lead us to suppose that the meaning of the order has been altered since the Judicature Act. [His lordship read rule 14 of order 31]. By these two orders of the 17th of February, 1903, and the 8th of June, 1904, the court did direct the production of documents by the defendants, and also gave liberty to the plaintiffs to take such copies and extracts as they might be advised. Rule 15 of the same order is also noteworthy. It deals with a more limited matter, the production for inspection of documents which are mentioned in pleadings or affidavits, and it provides that every party shall be entitled to give notice to the other party to permit him "to take copies" of such documents. It is not disputed that the word "take" there includes "make." Now we come to sub-rule 18 of rule 27 of order 65. That order deals with "costs," and rule 27 deals with "Special Allowances and General Regulations." [His lordship read sub-rule 18, and continued:] It is said that the effect of that sub-rule is to deprive a litigant of a right which before the Judicature Act he would certainly have had under an order made in this form, the right, that is, of himself making copies of the documents produced. In my judgment that right of making copies or extracts is one which is valuable to a litigant. It is valuable because it may save expense to a poor man, and it might be valuable in other ways. It might hamper litigants if they were deprived of that right. Is that the true effect of sub-rule 18? In my opinion it is not. I think that if it had been intended to deprive litigants of rights which they enjoyed before the Judicature Acts it would have been done by express words. It appears to me that this sub-rule was only intended to deal with the costs of copies of documents obtained from the opponent. That was the view taken by Joyce, J., and I agree with him. It was said that the practice is inconvenient. I agree, and no doubt it is one which is not often resorted to. But as regards the inconvenience it is always in the power of the court to make an order which will minimize the inconvenience, and Joyce, J., has made such an order in the present case. As regards its being rarely resorted to, I do not think that that circumstance ought to take away the privilege. I think that the order of Joyce, J., should be affirmed and the appeal dismissed.

Solicitors, *Robert Kent; Lewis & Lewis.*

High Court of Justice.

Chan. Div. Kekewich, J. — April 7, 14.

In re COULL'S SETTLED ESTATES. (a.)

Settled land—Settlement by will—Subsequent settlement of other land to same uses, subject to incumbrance—Compound settlement—Discharge of incumbrance on purchased land by mortgage of lands comprised in both settlements—Trustees for the purposes of the Settled Land Acts—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* 1, 8; *s.* 45, *sub-section* 1—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 16, *sub-section* 1.

By his will R. C. devised a residential estate in settlement. Subsequently a tenant for life under the will purchased a neighbouring property, and, having mortgaged it, settled it on the subsisting uses of the will, but subject to the mortgage and the repayment to himself of the costs, charges, and expenses arising out of the transaction. There were no trustees of the original settlement. On an application by the tenant for life to have the amount of the mortgage and costs raised by a mortgage of both properties,

Held, that the main settlement and the subsidiary settlement constituted a compound settlement, and that trustees of the compound settlement should be appointed for the purposes of the Settled Land Acts, with power to raise by mortgage of the entire property what was required to discharge the incumbrance on the lands comprised in the subsidiary settlement, together with the costs of this application, and to apply the amount raised accordingly.

Summons.

By his will dated the 21st of July, 1870, Robert Coull devised a residential estate in Northumberland upon certain uses.

The present applicant, the tenant for life under the said will, purchased an estate situate in the midst of the said residential estate for £7,800, and mortgaged it for £7,000, himself providing the balance. The purchase of this additional estate was clearly proved to be most desirable and beneficial in the interests of all concerned.

By a deed dated the 5th of December, 1904, the tenant for life settled this subsidiary estate on the subsisting uses of the said will, but subject to the mortgage and repayment to himself of the costs, charges, and expenses arising out of the transaction.

(a.) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

The deed contained a proviso that the trustees thereof should have full power by sale or mortgage of the property thereby assured to raise the amount of the costs, charges, and expenses above referred to. There were no trustees of the main settlement within the meaning of the Settled Land Acts.

The present application was made by the tenant for life in order to obtain the sanction of the court to his raising the amount of the incumbrance, together with the costs, charges, and expenses, by means of a mortgage of both properties, and that the trustees of the deed of the 5th of December, 1904, might be appointed trustees for the purposes of the Settled Land Acts of the compound settlement created by that deed and the said will.

P. Ogden Lawrence, K.C., and *Stone*, for the applicant.

Austen-Cartmell, for the infant remainderman.

Fischer Williams, for the trustees of the subsidiary settlement.

KEKEWICH, J., in giving judgment, said: The question is whether it will suffice to appoint trustees of either one or other of the settlements, or whether there ought to be appointed trustees of the settlement compounded of the two. The phrase compounded is not to be found in the Settled Land Acts, but has been conveniently invented to describe what is distinctly mentioned and contemplated by the Act of 1882, s. 2, sub-section 1. This is a distinct settlement as contemplated by that enactment and conveniently styled a compound settlement. It seems to me that, regarding the question merely as one depending on the construction of that enactment, there must be appointed trustees of the compound settlement to whom notice may be given pursuant to section 45, sub-section 1, and that unless trustees are appointed of the compound settlement there will be none to whom notice can properly and adequately be given pursuant to that section.

The case of *In re Lord Stafford's Settled Estates* (reported only before Warrington, J.), 52 W. R. 536, [1904] 2 Ch. 72, is very similar to this, and (referring to the judgment [unreported] of Byrne, J.) it is impossible to find a more distinct decision that in such a case as is now before the court an appointment of trustees of the compound settlement must be made before the application of capital money arising under the subsidiary settlement to purposes with which the main settlement is also concerned can be sanctioned. [His lordship then referred to the cases of *In re Mundy's Trust*, 39 W. R. 209, [1891] 1 Ch. 399; *In re Byng's Settled Estates*, 40 W. R. 457, [1892] 2 Ch. 219; and *In re Lord Monson's Settled Estates*, 46 W. R. 330, [1898] 1 Ch. 427; and said:] While I have three cases in which the question whether trustees of the compound settlement ought to be appointed might have been raised but was not raised, I find in no one of them any indication of opinion that such an appointment is not necessary, whereas, on the other hand, I have the fully considered opinion of Byrne, J., that it is necessary, and that was acted on by Warrington, J.

It was argued that the proviso in the subsidiary settlement was a power of sale within the meaning of the Act of 1882, s. 2, sub-section 8, and that therefore the trustees of that settlement were trustees of it within the meaning of the Settled Land Acts. It was further argued that if they are trustees within the meaning of the Acts of the subsidiary settlement, they therefore are also trustees of the main settlement by reason of section 16, sub-section 1, of the Act of 1890. I doubt this, because I do not think that they are trustees of the subsidiary settlement within the meaning of the Acts. Mr. Wolstenholme, in a note to section 2, sub-section 8, of the Act of 1882, says: "It is conceived that executors with power to sell for payment of debts are not, but that persons with a general power of sale are, trustees within this section. The power must be general." This, in my judgment, is correct.

Application granted.

Solicitors, *Crossman, Prichard, Crossman, & Block*, for *Brumell & Sample*, Morpeth.

Chan. Div.
Buckley, J. } May 3, 4, 5, 11.

MAYOR, &c., OF SWANSEA v. NATIONAL TELEPHONE CO. (LIMITED). (a.)

Telephone—"Restricted intercommunication"—"Proper facilities"—Telegraph Act, 1899 (62 & 63 *Vict. c.* 38), *s.* 3 (5)—*Telegraph* (*Telephonic Intercommunication*) *Order*, 1899.

Where a licensee of the Postmaster-General providing public telephonic communication in a defined area requests another licensee to give facilities for intercommunication between the subscribers of their respective systems, in the absence of an order of the Postmaster-General prescribing the terms and conditions of such intercommunication, the court will not prescribe any particular method; but if the method insisted on by the party applied to amounts, in the opinion of the court, to a refusal of proper facilities, the court may declare that the party applied to has so refused, and that the other party is entitled to be afforded proper facilities, and may order the party applied to to grant such facilities.

Action.

This was an action brought by the plaintiff corporation for the purpose of enforcing against the defendant company rights which the plaintiffs claimed to possess under section 3 (5) of the Telegraph Act, 1899.

The statement of claim asked (1) for a declaration that under that sub-section the plaintiffs were entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of the Telegraph (Telephonic Intercommunication) Order, 1899, between the systems of the plaintiffs and defendants, and that the defendants were bound to make certain specified connections between the defendants' exchange at Swansea and certain junction lines laid by the plaintiffs; and (2) to have it determined what further works ought to be done, and by whom, for the purposes of such intercommunication, and how the costs of the necessary works should be borne.

On the 29th of November, 1884, the defendants obtained from the then Postmaster-General a general licence to carry on the business of transmitting telephonic messages for a period of thirty-one years from 1st of January, 1881. By the Telegraph Act, 1892, certain special privileges were granted to licensees from the Postmaster-General in connection with certain areas to be defined by the Postmaster-General, and a further licence was granted to the defendants on the 25th of March, 1896 under which the defendants were given the special privileges provided for by the Telegraph Act, 1892, in respect of the area defined in the licence as the Swansea area, which area was modified by a deed-poll under the hand of the Postmaster-General, dated the 25th of March, 1898.

The Telegraph Act, 1899, s. 3 (5) provides as follows: "If the licence of an existing company is,

(a.) Reported by H. H. KING, Esq., Barrister-at-Law.

under the provisions of this section, extended in respect of any exchange area for a period of not less than eight years beyond the term existing at the passing of this Act, the company shall, at the request of any other licensee of the Postmaster-General providing public telephonic communication in the whole or any part of that exchange area, and under such circumstances and on such terms and conditions as may, within six months from the passing of this Act, be prescribed by an order of the Postmaster-General, made with the approval of the Treasury, afford all proper facilities for the transmission of telephonic messages between persons using the system of the company (either in the whole or in part of the exchange area, as the Postmaster-General may prescribe) and persons using the system of such other licensee, provided that the licensee so requiring intercommunication shall in any such case afford similar facilities."

On the 27th of September, 1902, the plaintiffs were licensed by the Postmaster-General to provide public telephonic communication in the Swansea area for a term to commence on the 1st of October, 1902, and terminating on the 31st of December, 1920.

By a deed of the same date the licence granted to the defendants by the deeds of the 29th of November, 1884, and the 25th of March, 1896, was extended, so far as regards the Swansea area, to the 31st of December, 1920; but this extension was only to take effect upon the establishment by the plaintiffs of a system of public telephonic communication in the Swansea area in competition with the existing system of the defendants.

The Telegraph (Telephonic Intercommunication) Order, 1899, was made in pursuance of section 3 (5) of the Telegraph Act, 1899, and provided: (1) "When the subscribers of the new licensee (*i e.*, in the present case the plaintiffs), at the date when intercommunication is requested, equal or exceed in number one-fourth of those of the company at that date, in the area specified in the new licence, or number 500, whichever first happens, but not before, mutual intercommunication shall be afforded by the company and the new licensee between their respective subscribers and other persons using their respective systems in the area specified in the new licence only; such intercommunication as aforesaid is hereinafter referred to as 'restricted intercommunication'"; and (5) "Any new licensee requesting facilities for intercommunication shall satisfy the Postmaster-General that such licensee possesses the required number of *bonâ fide* subscribers actually working."

On the 1st of January, 1904, the plaintiffs made a written request to the defendants for restricted intercommunication between persons using their respective systems, and at the same time they informed the Postmaster-General that the request had been made, and subsequently satisfied him that they possessed the requisite number of subscribers.

The plaintiffs and defendants both have telephone exchanges at Swansea and also at two other places, Mumbles and Morriston, within the Swansea area. The plaintiffs laid junction cables from their exchange at Swansea to a point close to the defendants' exchange at Swansea, and their contention was that these cables ought to be connected with the defendants' exchange, and that the means of intercommunication afforded by this connection and by connecting the exchanges at Mumbles and at Morriston would be sufficient and workable. The defendants took up the position that the plaintiffs were bound to make connections from their central exchange at Swansea to each of the defendants' sub-exchanges in the Swansea area, and refused to allow any intercommunication at all until this was done.

Buckmaster, K.C., and *R. J. Parker*, for the plaintiffs.—The object of the Act and order is, where you have two systems, to so connect them that a subscriber on one may communicate with a subscriber on the other. The defendants want us to connect with each of their exchanges within the area; we are not bound to do this under the statute; it might be impossible, and would, at any rate, cause great delay; but the defendants say that until it is done they will not let us communicate through their exchange at Swansea. The question is, what are proper facilities for putting all the subscribers on one system in communication with all those on the other. When the systems have been linked up, each may then have to increase its accommodation, and there may be payments to be made by one party to the other. There is nothing in the order to say what particular thing is to be done, and at whose expense.

Astbury, K.C., *Danckwerts, K.C.*, and *H. H. Guise*, for the defendants.—The defendants have no desire to obstruct the plaintiffs in obtaining such intercommunication as they are entitled to, but we say that it can only be done in what we consider a fair and proper way. Our contention is that section 3 (5) contemplates that the Postmaster-General shall be able to lay down, within six months of the passing of the Act, the terms and conditions upon which intercommunication is to be established. If he does lay them down they are binding on the parties, but if he does not lay them down, the party applying for intercommunication, and being entitled to it, can agree them with the other party, or failing agreement the party applying can go to the court and ask it to declare that the terms on which the party applied to is willing to effect intercommunication are a breach of the statutory right, and amount to a refusal to comply with the section. The court cannot order the defendants to do any particular thing. A system may be suggested by experts which may meet with the approval of the court, but the court cannot force it upon us; it can only approve or disapprove of the system which we put forward. The only authority which has the power to prescribe a particular system is the Postmaster-General, and he has omitted to do so. The Railway Traffic Acts afford an analogy. Section 2 of the Railway and Canal Traffic Act, 1854, gives power to direct a railway company to afford certain facilities, even though the doing so may necessitate structural alterations; but there is no power to order any particular works to be carried out: *South-Eastern Railway Co.* v. *Railway Commissioners*, 6 Q. B. D. 586, 25 W. R. Dig. 109; Brown & Theobald (3rd ed.), 405. That case held that all the commissioners could do was to consider whether the facilities offered were proper. The trunk lines of our system are laid for a particular purpose, and are not part of our system in the sense that any other persons but the particular subscribers for whose use they were laid can have the right to use them. "Proper facilities" are not such as can be given by one act once for all, they require a series of acts to be done all day and every day such as the court could not order, because it could not supervise their performance. [They referred to *Gas Light and Coke Co.* v. *South Metropolitan Gas Co.*, 62 L. T. 126, 129, 38 W. R. Dig. 83.] The question of what are proper facilities must be determined with reference to the nature of telephonic communication. As soon as one party puts the section into operation the other party has correlative rights, and both are entitled to proper facilities—that is, to facilities proper in the interest of both parties. Sections 1 and 2 of the order of 1899 do not apply to

areas which are coterminous, and that is the meaning of the word "only." For the purposes of this case there is no Postmaster-General's order of 1899 at all. The Postmaster-General may have intended that there should only be intercommunication where the parties could agree on what facilities should be given, and this is all the more probable owing to the uselessness of intercommunication without harmony. [They also referred to *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*, 9 Ch. App. 331, 22 W. R. Dig. 121, and *Ryan* v. *Mutual Tontine Westminster Chambers Association*, 41 W. R. 146, [1893] 1 Ch. 116.] We say that equality is the keynote of the section; let each party lay the wires rendered necessary by business originating on their system, and then there will be facilities for equal communication between the subscribers on the two systems. Whatever we propose for the plaintiffs to do we are prepared to do ourselves.

Buckmaster, K.C., in reply.—The argument that the Postmaster-General did not intend that there should be intercommunication between conterminous areas is impossible. The order recites the Act, and section 1 of the order contemplates every case except those covered by section 2. If intercommunication is only to come if and when the parties agree, there there is no virtue in the statute. What the defendants suggest is not intercommunication between the two systems as a whole, but they offer us the use of only so much of their system as connects their subscribers to the nearest exchange. *South-Eastern Railway Co.* v. *Railway Commissioners* does not apply because the point there was as to the special powers of the commissioners under a special Act (6 Q. B. D., at p. 599)

Cur. adv. vult.

BUCKLEY, J.—This, I am told, is the first case in which application has been made to the court to construe or enforce the Telegraph Act, 1899, with reference to intercommunication between competing telephonic systems within the same area. As the matter is one of considerable public importance, I reserved my judgment with a view to expressing as clearly as I am able the view which I take of the Act and of the remedies available for its enforcement. The third section of the Telegraph Act, 1899, contemplates a state of circumstances in which an existing company, enjoying a non-exclusive licence from the Postmaster-General, has provided a system of public telephonic communication in an exchange area, and it is proposed to grant another licence to the local authority, or to another company, to provide public telephonic communication in the same area. Subject to certain conditions being complied with, sub-sections 1 and 4 give the existing company certain benefits, the former a benefit in respect of underground wires, and the latter a benefit by way of extension of the term of its existing licence. Then follows sub-section 5, upon which the question in this action arises. It is a sub-section in favour of the new licensee. It provides that if the licence of the existing company is, under the Act, extended for a certain substantial time (not less than eight years), the new licensee shall have the benefit of a certain option. The new licensee can, by request addressed to the existing company, require the existing company to afford all proper facilities for the transmission of telephonic messages between persons using the system of the existing company and persons using the system of the new licensee, provided that the new licensee so requiring intercommunication shall in such case afford similar facilities. The sub-section provides that these facilities shall be afforded under such circumstances and on such terms and conditions as may within six months from the passing of the Act be prescribed by an order of the Postmaster-General. It is obvious that, if a right to intercommunication arises, many questions may present themselves as to the terms which may be fair as between the existing company and the new licensee in the matter. I may instance the following: First, the question as to how the expenses of connecting the two systems are to be borne between the two companies, or by one and which of them; secondly, the question who is to do the work of making the connections, whether each company can call on the other to do the necessary work on its own land, or can without trespass go upon the land of the other party for the purpose of doing the work itself; thirdly, the question whether, as between the two undertakings, the one ought to make to the other any and what payment for the advantages arising from intercommunication to their respective customers. The one undertaking might be of extensive mileage, with a large number of exchanges, having a complicated reticulation of junctions between them, and a large staff of clerks. The other might be of very small dimensions in all these respects. It is not self-evident that intercommunication would in justice be given without providing for a payment to be made by the one undertaking to the other. As to all this and other like matters which might be suggested the Act is silent. If they are to be provided for it must be by the order which the Postmaster-General had power to make. It was, I think, competent to him to have dealt with all these under the words "terms and conditions." He might probably have dealt with other matters under the words "under such circumstances." The defendants argued that under one or other of those expressions the Postmaster-General could have done more, and could have determined what are proper facilities, and that he ought to have done so, and further (for the argument was actually carried to this length), that, inasmuch as he has not done so, I cannot determine, and no authority can determine, what are proper facilities, and that the parties must agree amongst themselves as to what they are, and, failing agreement, the Act breaks down. I do not accede to the argument or any part of it. The Postmaster-General could by his order determine the circumstances under which, and the terms and conditions upon which, proper facilities shall be afforded. But the Act does not remit it to him to say what proper facilities are, and the statutory right cannot be a right to that which the parties agree. That is equivalent to saying that there is no statutory right, for either party could in that case defeat the statute by refusing to agree. Within the six months the Postmaster-General did make an order within the Act of Parliament. Its effect, for any purpose relevant to the matter before me, is only this, that by article 1 it provided that the new licensee must have a certain number of subscribers before it could demand intercommunication, and by article 4 provided for certain terminal charges which might be made by the old company and the new licensee respectively, and by article 5 that the new licensee who requested the facilities should satisfy the Postmaster-General that he had complied with article 1. The order did not deal in any way with any of the questions which I have said above would seem to require adjustment as between the two undertakings. A system of public telephonic communication comprises and includes, I think, at least the following factors: First, one or more exchanges, at which by means of switchboards any particular subscriber can be put into communication with any other subscriber; secondly, where there is more than one exchange, junction, or trunk lines running between the exchanges; thirdly, a staff of

persons at each exchange to control the switchboards and make the communications; and, fourthly, separate lines from what is called a station (that is to say, a customer's residence or place of business) to the exchange which is nearest to that place. The proper facilities mentioned in sub-section 5 are facilities for the transmission of telephonic messages between the customers using the one system and the customers using the other system, and those must be, I think, proper facilities for using all such of the several component parts of the system which I have described as are in a proper course of the business appropriate for the transmission of the messages. If intercommunication is established, then the customer of company A is to have proper facilities for using all those parts of the system of company B which are appropriate for the purpose of communicating telephonically with the customer of company B. It is singular, no doubt, that if undertaking A be a large one, with extensive mileage, a number of exchanges, a large staff employed, and the like, and company B an undertaking small in all these respects the Act and the order made under it should have entitled B to call upon A for intercommunication without providing for any payment to be made by B to A for the advantage. I see, however, two grounds upon which this may not be unreasonable. First, when the customer of company A and the customer of company B enjoy the benefit of telephonic communication, it may be said that each enjoys equally the reciprocal advantage of hearing from and speaking to the other. The customer of company A has the right as between him and his company to use all the appropriate wires and other parts of the system of company A; the customer of company B has a like right as regards the wires and other parts of the system of company B. The intention of the Act and order may be, and I think is, that when the statutory right of intercommunication has arisen each of the two customers shall be entitled to converse over the aggregate mileage, over some part of which each has by contract with his company the right of communication. Whether this be so or not, it seems to me that the Act and order have created the right, and that if the right to intercommunication has arisen and intercommunication has been established the right of the customer of company B is to have proper facilities over every part of the system of company A just as much as if he were a customer of company B. Secondly, it is noticeable that the new licensee need not request intercommunication unless he desires it, so that no consideration necessarily arises as to whether it would be fair that that company should receive a payment, and that the existing company only becomes bound to give intercommunication upon request, if it has availed itself of the right within sub-section 4 of having the term of its licence extended, so that no consideration necessarily arises as to whether it would be fair that that company should receive a payment. In other words, each company may if so minded so conduct itself as that intercommunication under the Act will not result, so that it cannot be said that anything unfair is being imposed upon either company if it does result.

Having said thus much upon the Act of Parliament, I pass to a statement of the facts in this case. The revelant facts are that the defendants had before September, 1902, established a system of public telephonic communication in the Swansea area, and that in September, 1902, the Postmaster-General granted a new licence to the plaintiffs over the same area. At the same time the Postmaster-General, again under the Act, granted the defendants an extension of their then existing licence for a period such as to call section 3, sub-section 5, into operation. In November, 1903, the plaintiffs had established and then opened their system. On the 1st of January, 1904, they made a request for intercommunication within section 3, sub-section 5. They had at that time the number of subscribers required to satisfy article 1 of the order of the Postmaster-General. Before the 2nd of February, 1904, they had, within article 5 of the Postmaster-General's order, satisfied him as to that fact, and the defendants, by a letter of the 2nd of February, 1904, were informed by the Postmaster-General that he was so satisfied. That the corporation had the requisite number of subscribers is not now in dispute, but I must say something further as to it, because it goes to costs. By a letter of the 8th of August, 1904, the defendants waived any objection based upon their allegation that the facts were not as above stated, and by another of the 1st of September they repeated that they were prepared to accept the Postmaster-General's certificate as to the fact. Notwithstanding this, by paragraph 6 of the defence they denied it. It is only by reason of the fact that at the bar their counsel again admitted it that the plaintiffs have been relieved from calling evidence to prove it. The defendants upon the correspondence raise various other contentions to which I need not refer beyond saying that I am satisfied, as indeed Mr. Gaine admitted in the box, that the defendants desired to raise every objection which could be (Mr. Gaine says legitimately could be) put forward to prevent the plaintiffs from obtaining the intercommunication which they had a right to request, and requested, under the Act. The defendants had received the benefit of the extension of their licence, but intended to put every obstacle (they say legitimate obstacle) in the way, to prevent the resultant benefit to the new licensee of obtaining intercommunication. With one exception these objections are not now relied upon.

The remaining contention is that upon which arises the whole question which I have to decide in the action. That contention is as follows: The defendants have a central exchange at Swansea and eleven or twelve subsidiary exchanges. After a contention which varied from time to time, and which is to be found in its several forms in letters from the defendants of the 7th of March, the 10th of August, the 1st of September, and the 20th of September, 1904, the defendants, by their last contention, as stated in the letter of the 20th of September, required that the plaintiffs should provide junction circuits to directly connect the plaintiffs' exchange in Swansea with the defendants' exchange in Swansea, and with each of nine of the defendants' subsidiary exchanges in different parts of the area, and junction circuits to connect the two Mumbles exchanges with the two Morriston exchanges. A reference to plan A, which for the purpose of illustration has been used in the course of these proceedings, is the shortest way of conveying what this contention involves. There existed already junction or trunk lines running from Swansea—that is, from the defendants' exchange in Swansea—to each of these subsidiary exchanges. The defendants say that there must be duplicate junction or trunk lines from Swansea—that is, from the plaintiffs' exchange in Swansea—to each of these same subsidiary exchanges. In other words, they contend that every line running from Swansea to a subsidiary exchange must be duplicated by laying another junction or trunk line from Swansea to the same point. To make plain that which follows I must state that the defendants discriminate between the case in which, after intercommunication is established,

the originating call comes from a customer of the plaintiffs and that in which it comes from a customer of the defendants. They say that when a customer of the plaintiffs makes the originating call the plaintiffs must perform upon their own trunk lines the whole service of the message until it reaches that exchange of the defendants which is nearest to the station of the customer to whom the call is addressed, and they say that they are willing to accept the like obligation when the originating call is made by the defendants' customer. I fail to find any justification in the Act of Parliament, or founded upon reason or good sense, for this contention. On the contrary, it seems to me to be directly in contravention of that which the Act of 1899 intended to secure. The object is not to duplicate the systems so that each of the two undertakings shall have junction or trunk wires running to every exchange in the area, but that the customer of each company shall use the trunk line of the other company running to the customer of the other company whom he wishes to address. A concrete instance will probably most readily convey the contention put forward. The plaintiffs have a junction or trunk line from Skewen to Swansea. The defendants have a junction or trunk line from Swansea to Pontardulais. Assuming the plaintiffs' exchange at Swansea to be connected with the defendants' exchange at Swansea, I understand the Act to mean that the plaintiffs' customer at Skewen is to have from the defendants all proper facilities for the transmission of his telephonic message to Pontardulais, and for that purpose to have the use of all the appropriate parts of the defendants' system. The defendants say, "No, you are not entitled to use our trunk line from Swansea to Pontardulais; the only part of our system which you shall use for the purpose of this message shall be our exchange at Pontardulais, our staff at that place, and the subscriber's separate wire from that place to his house." There are, however, other parts of the defendants' system appropriate for use for telephonic communication from Skewen to Pontardulais—namely, the defendants' exchange at Swansea, the defendants' staff at Swansea, the defendants' trunk line from Swansea to Pontardulais. The defendants say, "No, you have no right to use any of these for the purpose of this message: you, the plaintiffs, must bring the communication on your own wires to our Pontardulais exchange, and you cannot require anything more from us than that we should from that point send it on to our subscriber." The contention is extravagant and directly in destruction, as it seems to me, of that which the Act intended to give. "But further," say the defendants, "our junction or trunk lines are now fully occupied," meaning by that expression that at the busiest hour of the day they can carry no heavier load, and of course it is desirable that the system shall be competent to deal with the busiest hour of the day without congestion. This is a matter to which consideration is due, I think, in the sense that an obligation to give proper facilities does not necessarily involve that the servient company shall, at a moment's notice and without reasonable time to adjust itself to the new demand, accept and deal with a large addition of traffic. But except in this sense the consideration is not relevant. The defendants are bound to give to every intending customer within the area telephonic communication on proper terms. Their undertaking is one which, from its nature, requires extension by increase in the trunk lines as traffic develops. The effect of the Act is to introduce to the defendants, and to require them to provide for, additional customers who are entitled to service by virtue of the provisions of the Act, and if the defendants' lines are insufficient to carry the load, then I apprehend it is their business, after, of course, a sufficient reasonable margin of time, to provide the lines necessary for its transmission, just as much as it would have been their business so to provide for any new customers of their own. The Act nowhere contemplates that the new licensee shall, to the extent of any deficiency in the system of the existing company to meet the new traffic, increase for the existing company the capacity of the system of the existing company. Moreover, the defendants' lines are not congested in the sense that they cannot bear a heavier load at times other than the busiest hour of the day. There is plenty of margin at other times, and if intercommunication were established at once there would be a reasonable possibility of dealing with the additional traffic, not necessarily as speedily as is desirable, but nevertheless to the advantage of the customers, and by degrees the service could be improved, when by increase in the number of lines the congestion which I will assume would at first result at the busiest hour could be removed. Eighty-five per cent. of the plaintiffs' traffic is in Swansea, and a junction between the Swansea exchanges would at once give the means of dealing with this without raising any question of trunk lines being congested. Throughout the arguments addressed and evidence adduced by the defendants there has run a fallacy which was continually repeated—namely, that they are being called upon to do something for the plaintiffs' customers to the injury of their own customers. When intercommunication is established the increased facilities enure not for the plaintiffs' customers only, but for the defendants' customers equally. The latter are able to enjoy a facility which they could not enjoy before—namely, that of communicating telephonically with persons lying outside the defendants' service. In the events which have happened, the defendants' customers are entitled as much as the plaintiffs' customers to the benefit of intercommunication. Every conversation which takes place by way of intercommunication is a conversation to which a customer of the defendants is necessarily a party, and of which he has the benefit. Many months ago the plaintiffs, at their own expense, laid from their Swansea exchange to a manhole closely adjacent to the defendants' Swansea exchange junction lines, said to consist of 217 pairs, for the purpose of connecting the two exchanges at Swansea. The defendants refused to connect them. The plaintiffs on the 31st of August, 1904, offered further to make connections at each place at which the two undertakings have sub-exchanges closely adjacent to each other—namely, at Mumbles and at Morriston, and they further offered to connect any further sub-exchanges which the plaintiffs might provide in other parts of the area where the defendants already had an exchange if the defendants on their part would do the like. The defendants did not accede. Their letter of the 20th of September, 1904, to which I have already referred, constituted, in my opinion, a refusal to give intercommunication except upon the terms there stated. And that refusal was repeated by Mr. Gaine in the box. On the 3rd of November, 1904, the writ was issued.

The question for determination is whether the defendants have refused to afford proper facilities. In my opinion they have. "But then," say the defendants, "the remedy of the plaintiffs, if any, is only in damages; they cannot have an order that the defendants do afford proper facilities." They so contend upon two grounds—first, that this court cannot determine what proper facilities are; and, secondly, that if it can, an order to afford facilities would involve that the court should enforce the performance of a continuous act. As to

the former of these, it may well be that the court could not order a definite number of junction lines to be laid, or a staff of a defined number to be employed, or the business to be conducted in any particular way, or anything of that kind. But the court may, in my judgment, indicate that a certain way of carrying out intercommunication is the proper one, leaving it to the companies to determine how, as matter of working, it can be carried into effect, and negatively the court can interfere by determining, as I have done in the former part of this judgment, that a particular way of carrying out intercommunication is not the right one. This is a course familiar in many cases that might be adduced. In cases of nuisance, for instance, the court does not take in hand the conduct of the business which is causing the nuisance and continuously supervise it and ensure that it be so carried on as that there shall not be a nuisance. The court grants an injunction, indicates sometimes for the benefit of a defendant the course which, upon the report of an expert referee, the court thinks may be adopted to abate the nuisance, and gives the defendant an opportunity to take that course. He may take it with or without modifications, or refuse to take it if he likes, but if he does refuse the court holds the means of compelling him. So here, I do not propose to order the defendants to give facilities in any defined or exhaustive form, but I will indicate what I think upon the evidence they at least ought to do, and if they do not in that way, with or without such modifications as the nature of their business requires, give proper facilities, I shall have the means of enforcing the order. The details, no doubt, must be left to those who have the conduct of the undertaking, but the powers of the court are not rendered nugatory if the defendants will not apply their minds so to conduct their undertaking as to give effect to the plaintiffs' statutory rights. As regards the second objection, I am not pressed with the contention. The defendants do not come here to say that they refuse to give intercommunication. On the contrary, Mr. Gaine has said in the box that if he cannot legitimately support any of the objections which he has raised, he is prepared to comply with the defendants' statutory obligation to give intercommunication. The question between the parties is not whether intercommunication shall be given, but how it shall be given. Upon the evidence before me, I think that proper facilities include the establishment of junctions between the following exchanges of the plaintiffs and defendants respectively—viz., first, between the two exchanges at Swansea; secondly, between the two exchanges at the Mumbles; and thirdly, between the two exchanges at Morriston, and I think that the cost ought to be borne equally by the parties. The proper incidence of the cost has not been disputed before me. The order which I propose to make will not involve that the court shall intervene to enforce the continuous doing of a succession of acts. The order will enforce the establishment of intercommunication. Under the instruments which govern the defendants they are bound, as between themselves and the Postmaster-General, not to give favour or preference to any person whomsoever as a customer of the company. They must serve the customers of the plaintiffs, who under the Act become entitled to facilities for transmission of their messages, as much as the customers of the defendants themselves. The court may safely leave it to the Postmaster-General to ensure that the obligations of the service shall be observed after the intercommunication has been established.

The judgment which I pronounce is as follows: I declare that under section 3 (5) of the Telegraph Act, 1899, and the order, and in the events which have happened, the plaintiffs are entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of the order between persons using the defendants' system and persons using the plaintiffs' system, and I declare that the defendants have improperly refused to give such proper facilities. There will be an order that the defendants do give such proper facilities, and there will be liberty to apply. The defendants must pay the costs of the action. Under the liberty reserved either party can apply to the court; and, if the defendants are really in any difficulty as to the connections which they ought to make or the facilities they ought to give, they can come to the court under this liberty and not leave the matter to be determined in the most inconvenient way—viz., by a motion for sequestration. I may say for their guidance that, as at present advised, I think that junction circuits at the three places which I have named and facilities for using them will be, for the present at any rate, a compliance with the order; and experience will best show whether anything and what further is required.

Solicitors, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *J. Thomas*, Town Clerk, Swansea; *W. E. L. Gaine*.

Chan. Div. } April 6, 7, 14.
Buckley, J. }

In re ANDERSON.
PEGLER *v.* GILLATT. (*a*.)

Estoppel—Disposition by testatrix under incapacity—Entry of tenant for life under will and acquisition by him of possessory title—Rights of remaindermen.

Where a married woman, married before 1883, disposed of freehold property, over which she had a power of appointment, in favour of her husband for life, and by a codicil purported to devise certain other of her freehold property (over which she had no power of appointment) to her husband for life with remainders over, and the husband entered and held both properties for twenty-one years,

Held, that the husband was not estopped from denying the validity of the disposition by the codicil of the property therein comprised, and that the rights of the remaindermen were barred.

At the date of her marriage, on the 9th of March, 1871, with William Anderson, Ann Anderson was entitled in fee simple in possession to certain property (in this case referred to as the Litchurch property), and was also entitled in fee simple in reversion expectant on the death of Elizabeth Miller to certain other property (in this case referred to as the Worksop property).

By an ante-nuptial settlement, dated the 17th of February, 1871, the Litchurch property was conveyed to the use of such person or persons as Ann Anderson should in writing appoint, and in default of appointment to the separate use of Ann Anderson for life, with remainders over. The settlement contained no covenant to settle after-acquired property.

By her will, dated the 29th of April, 1871, Ann Anderson, in exercise of her power of appointment under the settlement, devised the Litchurch property to the use of her husband, William Anderson, for life, with remainder to her brother, Edwin Johnson, upon trust to sell and divide the proceeds among her three brothers, William, Frederick, and Edwin, and their heirs, share and share alike.

(*a*.) Reported by H. H. KING, Esq., Barrister-at-Law.

By the death of Elizabeth Miller, on the 5th of November, 1872, the reversionary interest in the Worksop property fell into possession, and by a codicil, dated the 20th of December, 1873, Ann Anderson purported to dispose of the Worksop property in favour of her husband for life, with remainder to her brother Edwin Johnson, upon trust to sell the same and divide the proceeds between her three brothers, share and share alike. The codicil provided that in case of the death of any of her said brothers in the lifetime of her husband leaving issue, such issue should take their parent's share of the property bequeathed either by the will or the codicil, and in case of such death without leaving issue the share in both properties of the brother so dying should go to the survivors.

Ann Anderson died on the 29th of May, 1882, leaving her husband and her three brothers her surviving.

William Anderson thereupon entered into possession of both the Litchurch property and the Worksop property and continued in undisputed possession until his death on the 8th of December, 1903. The question raised by the summons was, shortly, whether, having so entered on both properties, either under the will and codicil of his wife or otherwise, he could claim the Worksop property against the persons entitled in remainder under the codicil, on the ground that, being married before 1882, his wife had no power to dispose of the Worksop property.

The summons was taken out by Ann Elizabeth Pegler, the only child of Edwin Johnson, and her husband for the determination of the question whether Ann Elizabeth Pegler (William and Frederick Johnson having both died in the lifetime of William Anderson without issue) was entitled in fee simple in possession to both the Litchurch property and the Worksop property.

The defendant Jane Gillatt was the legal personal representative of the widow (and universal devisee and legatee) of William Johnson, the eldest brother and heir-at-law of Ann Anderson.

William Anderson left a will, of which probate was granted to the defendant Mary Mason as attorney for the executor to whom he had devised his real estate.

Buckmaster, K.C., and *S. Leeke*, for the plaintiffs.—Ann Elizabeth Pegler is entitled to the Worksop property as well as to the Litchurch property, as the sole surviving issue of Ann Anderson's three brothers. Ann Anderson had power under the settlement to dispose of the Litchurch property, but being married before 1883 had no power to dispose of the Worksop property. William Anderson, having taken the interest given to him by the will in the Litchurch property, could not dispute that Ann Anderson's codicil disposed of the Worksop property, though in fact she had no power to so dispose of it, and those claiming through William Anderson cannot deny that the dispositions made by the codicil were valid: *Dalton* v. *Fitzgerald*, 45 W. R. 685, [1897] 2 Ch. 86. As was said by Mellor, J., in *Board* v. *Board*, 22 W. R. 206, L. R. 9 Q. B. 48, 54, a person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will. William Anderson's possession must be treated as possession under the will, and his possession was for the benefit of those claiming under the will. The property therefore goes on the death of William Anderson to Ann Elizabeth Pegler, who claims under the will.

Astbury, K.C., and *W. S. Sherrington*, for Jane Gillatt.—This defendant's interest is that of the heir-at-law of Ann Anderson, and it cannot be disputed that the claim of the heir-at-law has been barred by adverse possession.

Cann, for Mary Mason.—This defendant is entitled to the Worksop property as legal representative of of William Anderson. William Anderson, by being in possession from 1882 to 1903 acquired a good statutory title to the Worksop property as against all the world. The argument of the defendants in *Dalton* v. *Fitzgerald*, before Stirling, J., is applicable to this defendant's case. The authorities may be divided into two classes: First, cases where the testator has no title but makes a devise which would be effective to pass the property if he had a title, such as *Board* v. *Board* and *Hawksbee* v. *Hawksbee*, 11 Hare 230; and secondly, cases where the testator has a good title but cannot make an effective devise, such as *Paine* v. *Jones*, 22 W. R. 837, L. R. 18 Eq. 320, and *In re Stringer's Estate*, 25 W. R. 815, 6 Ch. D. 1. In the latter class of cases a person who enters under the impression that he is taking under the will is not estopped thereby from setting up a title against the remainderman. The present case falls into the latter class. Ann Anderson had a good title but no testamentary capacity. In *Paine* v. *Jones* Malins, V.C., distinguishes *Hawksbee* v. *Hawksbee* and *Anstee* v. *Nelms*, 1 H. & N. 225. Under the old law by which a testator could not dispose of lands acquired after the date of the will, if a will was insufficiently executed to pass realty, no case of election arose, the will, so far as it purported to affect realty, being considered as non-existent (*Sheddon* v. *Goodrich*, 8 Ves. 481), and so, too, where the testator was incapacitated by infancy or coverture: *Hearle* v. *Greenbank*, 3 Atk. 695; *Rich* v. *Cockell*, 9 Ves. 369; and Theobald on Wills (6th ed.), 111, 112.

Buckmaster, K.C., in reply.—The argument for Mary Mason rests upon *Paine* v. *Jones*, but in that case there were special circumstances. Mary Mason can only escape from *Dalton* v. *Fitzgerald* by saying that *Paine* v. *Jones* lays down a principle and applies where the facts are partly but not wholly the same as there. Lopes, L.J., lays down a principle in *Dalton* v. *Fitzgerald* which covers this case, and Mellor, J., lays down the same principle, though less distinctly, in *Board* v. *Board*.

Cur. adv. vult.

BUCKLEY, J.—At the date of her will, on the 29th of April, 1871, Ann Anderson, who was married on the 9th of March, 1871, was, by virtue of a power contained in her marriage settlement, dated the 17th of February, 1871, competent to dispose of the Litchurch property, and she made a testamentary disposition of it under which her husband William Anderson took a life estate. At the date of her codicil, on the 20th of December, 1873, Ann Anderson was entitled for an estate which had fallen into possession by the dropping of a life on the 5th of November, 1872, in the Worksop property, but, being a married woman married before the Married Women's Property Act, 1882, she had no testamentary power over it. By her codicil she purported to devise it to her husband, the said William Anderson, for life, with remainder over, and confirmed her will. Ann Anderson died on the 29th of May, 1882, and thereupon William Anderson entered into possession of both properties, and so continued until his death on the 5th of December, 1903. Under these circumstances Ann Anderson's heir does not dispute that he is barred as regards the Worksop property by adverse possession. The question is whether William Anderson's estate is entitled, or whether the gift of the Worksop property after William Anderson's death contained in Ann Anderson's codicil is to have effect as against William

Anderson and those deriving title under him. Is it a true proposition that William Anderson entered under Ann Anderson's testamentary disposition, and that he and those claiming under him are estopped from saying that her testamentary disposition of Worksop was invalid because she had no testamentary power. The plaintiff, who claims under the testamentary disposition, says that Mellor, J.'s, sentence in *Board* v. *Board*, L. R. 9 Q. B. 48, at p. 54, applies—viz., "A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will." *Board* v. *Board* was a case of a testamentary instrument validly executed by a person who had no title to the property in dispute. Its principle does not, I think, apply to the case of a person who has a title but does not (because she cannot) devise. An analogy is, I think, to be found in the cases as to election under the old law when a man could not dispose by will of lands acquired after the date of his will. In those cases it was held that if there was a will validly executed and expressing a clear intention to dispose of the after-acquired lands the heir was put to his election, but that if the will was insufficently executed to pass realty, or the testatrix by reason of infancy or coverture was incompetent to dispose by will, no case of election arose: *Hearle* v. *Greenbank*, *Sheddon* v. *Goodrich*, and see *Blicklock* v. *Grindle*, 17 W. R. 114, L. R. 7 Eq. 215. In *Hearle* v. *Greenbank*, 3 Atk. 695, at p. 715, Lord Hardwicke says: "But suppose the execution of the power is bad, yet it is said the plaintiffs have an equity to compel the infant to let them take the real estate, for she shall not take both by the will and against the will. In general this rule is right, and founded on proper premisses but a wrong conclusion; for this purpose see the case of *Noys* v. *Mordaunt*, in 2 Vern. 581: see also *Morris* v. *Burrowes*, 2 Atk. 629. I am of opinion that the infant in the present case is not to be compelled to make her election. For the instrument here being void as to the real estate, there is no instance where an infant has in such a case been compelled to make an election, for here is properly no will at all as to the lands. It is like the case where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir-at-law, and the personal estate to the heir-at-law; this is a good will as to personal estate, yet for want of being executed according to the Statute of Frauds and Perjuries, is bad as to the real estate; and I should in that case be of opinion that the devisee of the real estate could not compel the heir-at-law to make good the devise of the real estate before he could entitle himself to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute." In a case like the present the question is not whether the same person can say that a will is valid for his benefit but invalid in other respects, but whether he can say that a certain part of a testamentary disposition is a will and another part is not a will. To such a case the language of Mellor, J., does not in my opinion apply. *Paine* v. *Jones*, L. R. 18 Eq. 320, is an authority which upon this point does not seem to have been affected by the subsequent decisions. In *Dalton* v. *FitzGerald*, [1897] 2 Ch. 86, 91, the decision of Malins, V.C., in *Paine* v. *Jones* is no doubt considerably shaken, but I cannot see that Lindley, L.J., threw doubt upon it upon the question which I here have to decide. On the contrary, the observations of the Lord Justice upon Sir George Jessel's decision in *In re Stringer's Estate*, 6 Ch. D. 1, which immediately follow upon what he said as to *Paine* v. *Jones*, lead me to think that he did not intend his language to throw any doubt upon *Paine* v. *Jones* in such a state of circumstances as the present. He seems to affirm an objection to the extension of the doctrine of estoppel to beneficiaries who do not dispute their testator's title, but do dispute that their testator made a valid disposition of property which was property of their testator.

In my judgment William Anderson and those who derive title under him are not, by reason of the fact that William Anderson under the will entered as tenant for life of the Litchurch property, estopped from denying that Ann Anderson made a good testamentary disposition of the Worksop property. It results that William Anderson's estate is entitled to the Worksop property. There is in any case no question of election, for the Worksop property was not the property of William Anderson.

Solicitors, *Few & Co.*; *Peacock & Goddard* for *Henry Vickers, Son, & Brown*, Sheffield; *J. H. Lee & Watts*, for *Whittingham & Williams*, Nottingham.

K. B. Div. (Bigham, J.) — May 4, 5.

SIMPSON STEAMSHIP CO. (LIMITED) v. PREMIER UNDERWRITING ASSOCIATION (LIMITED). (a.)

Insurance (Marine)—Construction of warranty—"Not to proceed east of Singapore"—Voyage to a port east of Singapore—Vessel lost before Singapore reached.

A time policy of marine insurance contained the following warranty: "Warranted not to proceed east of Singapore." The vessel was chartered to carry coals from Cardiff to a port east of Singapore. While on her voyage she was wrecked off the Tunis coast and lost.

Held, that the loss was covered by the policy, and that at the time of the loss there had been no breach of the warranty.

Action tried in the Commercial Court.

Claim for £1,000 under a policy of marine insurance on the steamship *Scaw Fell*, which was lost by stranding off the coast of Tunis on the 27th of April, 1904.

J. A. Hamilton, K.C., and *Bailhache*, for the plaintiffs.

Scrutton, K.C., and *D. C. Leck*, for the defendants.

The facts and contention appear in the following judgment:

BIGHAM, J.—This is an action on a time policy to recover for a total loss of a ship called the *Scaw Fell*, and the first question to be determined is whether the policy was in operation at the date of the loss. The policy ran from the 1st of March, 1904, to the 1st of March, 1905. On the 16th of April, 1904, the vessel sailed from Cardiff with a cargo of coals for Kiao-chau, a port well east of Singapore. When off the coast of Tunis, on the 27th of April, 1904, she was totally lost. The defendants refuse to pay upon the ground that before the loss occurred there had been a breach of a warranty in the policy, the effect of which was to cause the policy to cease to attach. The warranty is in the following words: "Warranted not to proceed east of Singapore except to Java and Australasia." The contention is that the moment the ship lifted her anchor at Cardiff and started on her voyage to Kiao-chau she was "proceeding east of Singapore," and therefore breaking the warranty.

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

I am clearly of opinion that this contention is wrong. There was at most merely an intention to proceed east of Singapore, and an intention to commit a breach of course does not itself constitute a breach. But it was said that the question is governed by authority, and two cases were referred to. In *Colledge* v. *Harty*, 6 Exch., p. 205, 20 L. J. Exch. 146, the policy was a time policy, and the warranty was that the ship was not "to sail to any port in the Belts." The ship did sail from Newcastle, bound for the Belts. The court held that the warranty had been broken and that the policy had ceased to attach. In *Simon Israel & Co.* v. *Sedgwick*, 41 W. R. 163, [1893] 1 Q. B., p. 303, the policy was a voyage policy on goods from the Mersey to "any port in Spain this side of Gibraltar." The goods left in a ship bound for Cartagena. The court held that a voyage to Cartagena was not one of the voyages covered by the policy. Neither of these cases, in my opinion, affects the question before me. In each of them the vessel sailed on a voyage to which the policy did not apply. In the present case the only prohibition was that the vessel should not navigate waters east of Singapore, and she never did.

The next question is whether there has been a breach of a condition indorsed on the policy. The defendants are a club, and the condition is in the following terms: "Every member shall, if required, when transmitting his proposal for insurance or as soon as practicable thereafter, deliver to the managers, duly filled up and completed, a slip or form provided by the association for the purpose, wherein he shall state the rate or rates of premium and conditions of all other insurances effected by him on the steamship, and/or other insurable interests connected therewith insured by the association, or if no other insurance has been effected, such slip or form shall be filled up accordingly. The managers may require the production of all policies referred to in such slip or form and/or all covering notes relating thereto. Any member who shall on request neglect, or who shall refuse to deliver such slip or form, duly filled up and completed or produce the policies referred to in such slip or form and or covering notes relating thereto, and any member who shall deliver any such slip or form containing any misrepresentation shall absolutely forfeit all claim which he shall or may have upon the association, unless the managers and directors shall decide otherwise." It is said that the plaintiff never delivered the slip or form referred to in this condition, and it is true that he did not do so in relation to this particular policy until after the loss; but as a matter of fact, and on the evidence before me, I find that the plaintiff never on request either neglected or refused to deliver the slip. He was no doubt asked for the slip more than once, but it happened to be at times when the information required for filling it up was not at hand. Thus some delay arose. It did not, however, occur to anybody, until after the loss, that there was any neglect on the plaintiff's part in the matter, and I am satisfied that there was not. Moreover, I doubt whether the condition in question applies to the present case. This action is brought upon a renewal policy, and no proposal was ever transmitted within the meaning of the condition by the plaintiff. As the condition stipulates that the slip is to be transmitted with the proposal, and there never was any proposal, I doubt whether the condition applies at all in the present case; but whether it does or not, I am satisfied that there was no breach of it. There must be judgment for the plaintiff for the amount claimed.

Solicitors for the plaintiffs, *Smith, Rundell, & Dods*, for *Vachell & Co.*, Cardiff.

Solicitors for the defendants, *Pritchard & Sons*.

House of Lords.

From C. A. (England). Feb. 27.

MAAS v. PEPPER. (*a*.)

Bankruptcy—Bill of sale—Hire and purchase agreement—Colourable transaction—Inference of fact—Registration—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

The appellant advanced £2,000 to a publican to enable him to complete the purchase of an hotel. It was arranged that the appellant should buy the furniture in the hotel from the vendor for £2,000, and should sell it to the publican under a hire-purchase agreement. This was carried out, the purchase was completed and the hotel carried on for some time. The publican became bankrupt, and his trustee claimed the furniture, which had already been seized by the appellant on default made in payment of one of the instalments under the hire-purchase agreement.

Held, that the £2,000 was a loan to the purchaser of the hotel, and that the hire-purchase agreement was a security for the loan, which was void for want of registration as a bill of sale.

Decision of the Court of Appeal (Mellor's Trustee *v.* Maas & Co.) *affirmed.*

This was an appeal from a decision of Court of Appeal, affirming that of Wright, J. (50 W. R. 111, [1902] 1 K. B. 137).

The respondent was trustee in the bankruptcy of Mellor, a publican.

On the 4th of May, 1899, Mellor entered into an agreement in writing with one Sykes, whereby Sykes agreed to sell and Mellor agreed to purchase a freehold property known as the Crown Hotel, Leamington, together with the furniture, fixtures, fittings, and effects therein, save certain specifically excepted furniture, for the sum of £30,000, whereof the sum of £750 was paid by Mellor as a deposit at the time of signing the agreement.

The hotel was subject to a first mortgage of £10,000, and it was a term of the agreement that the vendor should leave the sum of £12,500 on second mortgage of the hotel, subject to the first mortgage, and that such sums should be respectively reckoned as part of the purchase price of £30,000. Mellor further arranged for a third mortgage on the hotel of £4,500, leaving a balance of £3,000 of the purchase-money to be found by him.

The purchase was to be completed on the 15th of May, and shortly before the 15th of May, 1899, Mellor asked the appellant (Maas) to advance him £2,000, in order to enable him to complete the purchase, on the security of a further mortgage. This the appellant declined to do, but offered to lend the sum on a bill of sale, which Mellor refused. At length it was agreed between the appellant and Mellor that the former should purchase the furniture, fixtures, and fittings and effects from Sykes for £2,000, being the amount required by Mellor to enable him to complete the purchase of the hotel, and that the appellant should then re-sell the same to Mellor on a hire-purchase agreement.

On the 15th of May, 1899, the appellant bought the furniture for the sum of £2,000 from Sykes, and on the same 15th of May, and before the completion of the purchase, Mellor executed a hire-purchase agreement with the appellant, by which he agreed to hire the chattels and things specified in the receipt and inventory for a sum of £2,412 16s., pay-

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

able by equal quarterly instalments of £75 8s., extending over eight years, and upon the terms that on payment of the said sum of £2,412 16s. at the times and in the manner prescribed by the agreement, the chattels and things should become the property of Mellor. Mellor also signed an agreement, binding himself, as long as any money should be due under the hiring agreement, to purchase all his wines and spirits from the appellant's firm.

The purchase of the hotel by Mellor was then completed. Maas did not take possession of the furniture, which remained in the hotel, and the hire-purchase agreement was not registered as a bill of sale.

On the 19th of December, 1900, Mellor was adjudicated bankrupt. Maas seized the furniture the day before the receiving order, and gave notice to the trustee. The furniture was claimed by the appellant Maas under the hire-purchase agreement, and also claimed by the trustee in bankruptcy. By agreement the value of the furniture was paid into a bank to abide the result of the trial.

Wright, J., found that the hire-purchase agreement was a security for a loan, and gave judgment for the trustee in bankruptcy, and this judgment was affirmed by the Court of Appeal.

Maas appealed.

Herbert Reed, K.C., and *Frank Mellor* (*G. A. Layton* with them), for the appellant.

Shearman, K.C., and *Horace J. Rowlands*, for the respondent.

Earl of HALSBURY, L.C.—I do not think it is necessary to go through all the facts of this case. I think Wright, J., came to the right conclusion as a matter of fact. It seems to me that the whole of the evidence points in one direction. I do not think that the sale to Mr. Maas was a reality. I think the obvious purpose was that Mr. Maas was to lend £2,000 to get the security of the furniture and yet not to be within the Bills of Sale Act; that was the whole object so far as this transaction was concerned. Everything raises a very strong presumption that this was a colourable sale. The only thing that would have brought me to a different conclusion would have been if Mr. Maas himself had been called and had given a perfectly clear and credible account of how it was that the original arrangement was completely altered by all the parties, and that he was to become the vendee of these goods. I do not think he ever was that. It was for those who insisted upon the sale of the furniture being a real and *bonâ fide* sale, to have proved it. In my view the judgments of Wright, J., and the Court of Appeal were right, and I move your lordships that the appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion, but with some hesitation. The learned judge has found that this was not a real sale to Maas, but a sale to Maas on behalf of Mellor; and, having regard to the fact that Maas was not called, and consequently not subjected to cross-examination, I am not prepared to differ from the learned judge.

Lord JAMES OF HEREFORD.—I am disposed to agree with the judgment of your lordships, but I am in much the same position as my noble and learned friend Lord Macnaghten. The case comes before us upon an allegation that a wrong inference has been drawn from facts which are not in dispute. If that is so, I think this House ought to deal with great consideration with the inference which has been drawn, first by the learned judge who heard the case in the first instance, and secondly by the Court of Appeal. For my own part, I am not quite certain that I should have drawn the same inference from the facts; but I am of opinion that there has not been enough established here to show that the inference, which was drawn by Wright, J., a judge of very great experience in matters of bankruptcy, and by the learned judges in the Court of Appeal, was certainly wrong.

Lord LINDLEY.—I think the decision of Wright, J., was perfectly correct. I should have come to the same conclusion myself. I have not the slightest hesitation in saying that this was a loan on security, and that there was no sale at all.

Appeal dismissed.

Solicitor for the appellant, *Edward Betteley*.

Solicitor for the respondent, *Wellington Taylor*, for *Rowlands & Co.*, Birmingham.

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — May 12.

CASE v. COLONIAL WHARVES (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Earnings—Average weekly earnings—Costs of appeal—Workmen's Compensation Act, 1897, *Schedule I.* (1) (b).

There is no presumption for the purposes of the Workmen's Compensation Act, 1897, *that a casual labourer employed by the hour will continue in his employment for more than one hour.*

Where an applicant under the Workmen's Compensation Act appeals unsuccessfully against the amount of compensation awarded him, the costs of appeal will be set off against his costs in the court below.

Appeal of applicant from award of the judge of Whitechapel County Court.

A workman employed by the respondents as a casual labourer at 6d. an hour worked for eleven hours on the first day of his employment and was then accidentally injured. The county court judge held that his average weekly earnings were no more than 5s. 6d., and accorded him a weekly payment of 2s. 9d.

The workman appealed.

Dodd, K.C., and *George Philips*, for the appellant.—The county court judge ought to have taken into account the probability of the workman continuing in his employment, and to have inquired whether there was any evidence that the applicant would have worked for more than one day but for the accident, and for how many days, and for how much *in toto* for the week: *Ayres* v. *Buckeridge*, 50 W. R. 115, [1902] 1 K. B. 57.

J. A. Simon, for the respondents, was not called on.

COLLINS, M.R., said that in *Ayres* v. *Buckeridge* the workman was not a mere casual labourer, and that the present case fell within the decision of the House of Lords in *Lysons* v. *Knowles*, 49 W. R. 696, [1901] A. C. 79, as explained by the Court of Appeal in *Bartlett* v. *Sutton*, 50 W. R. 149, [1902] 1 K. B. 72. The costs of the appeal should be set off against the costs of the applicant in the court below.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Noon & Clarke; Hicklin, Washington, & Co.*

(a.) Reported by D. R. CHALMERS-HUNT, Esq., Barrister-at-Law.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) May 6.

WILKES v. DOWELL & Co. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Accident arising out of the employment—Fall owing to epileptic fit—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

The applicant was employed by the respondents in unloading coal from a steamer at their wharf. The coal was put into a bucket, which was raised from the hold by a hydraulic crane, and the bucket when emptied was lowered into the hold again. The applicant's duty was to stand upon a stage next to the opening into the hold and to guide the bucket when it was being lowered into the hold by the crane, and to give signals to the man who was working the crane. While so employed he was seized with an epileptic fit and fell into the hold and was injured. In proceedings for the assessment of compensation under the Workmen's Compensation Act, 1897,

Held, that the injury to the applicant was caused by an "accident" which arose "out of" his employment within section 1, *sub-section* 1, *of the Act.*

Appeal from an award made by his Honour Judge Addison, K.C., at the Greenwich County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was employed at the respondents' wharf in unloading coal from a steamer. The coal was put into a bucket which was raised from the hold by a hydraulic crane, and the bucket was then lowered into the hold again. The applicant's duty was to stand upon a stage, which was made so that he could look down the hold, and to guide the bucket by means of a long pole while it was being lowered into the hold by the crane, and to give signals to the man who was working the crane. While he was standing on the stage engaged in his work, he was seized with an epileptic fit and fell into the hold and was severely injured, breaking his thigh and fracturing his hip. The applicant had had three epileptic fits before the day in question. The county court judge was of opinion that he was bound by the authorities to hold that the injuries sustained by the applicant were not caused by an accident arising out of his employment so as to entitle him to compensation under the Workmen's Compensation Act, 1897. He therefore decided in favour of the respondents.

The applicant appealed.

Overend and *John Duncan*, for the applicant.—The injuries here were caused by the fall, which was an accident, and none the less because the fall was caused by the epileptic fit: *Reynolds* v. *Accidental Insurance Co.*, 18 W. R. 1141; *Winspear* v. *Accident Insurance Co.*, 29 W. R. 116, 6 Q. B. D. 42; *Lawrence* v. *Accident Insurance Co.*, 29 W. R. 802, 7 Q. B. D. 216. The word "accident" has a wider meaning in the Workmen's Compensation Act, 1897, than in a policy of insurance against accidents: *Fenton* v. *Thorley & Co.*, 52 W. R. 81, [1903] A. C. 443, *Turvey* v. *Brintons (Limited)*, 52 W. R. 195, [1904] 1 K. B. 328, in H. L., 21 T. L. R. Secondly, the accident arose out of the applicant's employment. He was employed to stand upon a stage close to the opening into the hold, and if he fell he must almost necessarily fall down the hold. The fall, therefore, was an accident arising out of his employment. The Act therefore applied.

Ruegg, K.C., and *W. Shakespeare*, for the employers.—The injuries were not caused by "accident" within section 1, sub-section 1, of the Workmen's Compensation Act, 1897. The epileptic fit was the cause of the injury. The accident insurance cases, as was pointed out by the House of Lords in *Fenton* v. *Thorley & Co.*, have no real bearing upon the meaning of "accident" in this Act. Next, if the injuries were caused by "accident," the accident did not arise "out of" the employment. In *Fenton* v. *Thorley & Co.* and *Turvey* v. *Brintons (Limited)* the only question was as to the meaning of the word "accident," and no question arose as to whether the accident arose "out of" the employment. The disease here caused the fall, and the fact that the workman was at the time standing near a hole and fell into it could not make the employers liable. The employment did not in any way cause the accident. The real effective cause was the disease—namely, the epileptic fit, and not any risk arising from the applicant's employment. The applicant carried with him to his work a disability arising from his predisposition to epileptic fits, and he cannot throw upon his employers liability for any injury caused by that predisposition. The county court judge found that the cause of the injury was the fit, and this court will not interfere with that finding.

COLLINS, M.R.—This is an appeal from the decision of Judge Addison, sitting at the Greenwich County Court, by a workman who met with an injury under circumstances which, it is contended, brings the case within the Workmen's Compensation Act, 1897, as being an injury caused by accident arising out of and in the course of the employment. The judge came to the conclusion, as it seems to me, rather as a matter of law than as a matter of fact, that the injury was not caused by an accident arising out of and in the course of the employment. The circumstances were that the workman was employed close to the opening into the hold of a ship, his duty being to stand upon a stage, and to guide a bucket which was lowered into and raised from the hold by means of a crane. The man was subject to epileptic fits, and he had a seizure while he was standing on the stage and fell into the hold and was injured. The question is whether the injury was caused by accident arising out of and in the course of the employment.

It is contended that, inasmuch as the original cause of the fall was the epileptic fit, which was a cause carried by the workman to his place of employment, the injury which he sustained was not caused by accident arising out of the employment, but that it arose from what Mr. Ruegg called the idiopathic condition of the man. It seems to me that that argument is excluded by authority. The cases of insurance against accident which have been referred to have always been followed and have never been doubted, and, as was pointed out by the House of Lords in *Fenton* v. *Thorley & Co.*, the policies in those cases were carefully framed in the interest of the insurers, with the object of excluding liability by reason of what is called the idiopathic condition of the assured bringing on an injury by accident. In *Reynolds* v. *Accidental Insurance Co.* the assured, while bathing in shallow water, was seized with sudden insensibility and fell down and was drowned; in *Winspear* v. *Accident Insurance Co.* the assured, while crossing a stream, was seized with an epileptic fit and fell into the water and was drowned; and in *Lawrence* v. *Accident Insurance Co.* the assured, while on a railway platform, was seized with a fit and fell on to the line and was run over by an engine. In all those cases it was held that, notwithstanding the special stipulations in the policies, the injury was caused by an accident. In other

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

words, that the *causa proxima* must be looked at, the accident being the falling into the water, or the falling on to the railway line, though the original cause of the fall in each case, and therefore the more remote cause of the injury, was the sudden seizure at a particular place. It is said that those cases have no application to the Workmen's Compensation Act, 1897, and reliance is placed upon some observations in *Fenton* v. *Thorley & Co.* in the House of Lords. When looked at those observations do not affect the authority of the cases upon the point before us. The point of those observations is that the remedy of the workman is not to be limited by the qualifications put upon the meaning of the word "accident" by the special contract in those cases. They are directed towards showing that the words "injury by accident" in the Act are wider in their scope than similar words in the special contract of insurance. If what happened would be an accident within a policy of insurance where there are such special stipulations, *à fortiori* it would be an accident within the meaning of the Act. Moreover, it is clear, in accordance with the principle which lies behind those decisions, that the injury in the present case was an injury by accident. The man was found lying in the hold. The cause of his injuries was the fall. That fall was caused by the idiopathic condition of the man himself, and on that ground it is said that the injury was not caused by an accident. It is precisely there that the principle upon which the insurance cases are founded comes in. Though the original cause of the fall was the fit, the fall itself was an accident, and the injury was caused by that accident.

The only remaining question is, Did the accident arise out of and in the course of the employment? When once one gets rid of the confusion arising from the fact that the original cause of the fall was the fit, and the confusion that is involved in not dissevering the actual injury and the cause thereof from the more remote cause—namely, the fit—the difficulty arising from the words "arising out of" the employment is removed. How did the accident come about? Because by the conditions of his employment the man was bound to stand upon a stage close to the opening into the hold. It was part of his duty to stand on the edge of a precipice, and when he was seized with a fit he almost necessarily fell over that precipice. The injury resulted from the fall, which was brought about by the necessity imposed upon him of working next to the opening into the hold. It did not cease to be an accident arising out of the employment because the more remote cause of it was the idiopathic condition of the man himself. The accident, therefore, arose out of and in the course of the employment. The Act accordingly applies, and the workman is entitled to compensation.

MATHEW, L.J.—I am of the same opinion. The true cause of the injuries to this workman was the fall. We have the high authority of the House of Lords for saying that a case like this comes within the Act. In *Fenton* v. *Thorley & Co.* Lord Macnaghten said: "It does seem to me extraordinary that anybody should suppose that when the advantages of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as 'accidents' which beyond all others merit favourable consideration in the interest of workmen and employers alike." Applying the view there expressed, the Act operates as a statutory policy of insurance against accidents in certain employments. According to the cases referred to by the Master of the Rolls this statutory policy covers the injury in the present case. We should be going contrary to those cases if we went back to the remote condition of the man himself, which brought about the fall. He was injured by the accident of falling from the place where he was bound to work, and therefore the Act applies.

COZENS-HARDY, L.J.—I agree. It is plain from the authorities referred to that there was here an "accident." It is also clear that the accident arose in the course of the employment. The only question is whether it arose "out of" the employment. Upon the whole I think that it did. If we were to adopt the contention that the employers are not liable for the remote consequences arising from a disability which a workman brings with him to his work, our decision would have a far-reaching effect. A workman brings with him to his work a particular disability. In the course of his employment he is placed in a dangerous position where he is more liable, by reason of his disability, to meet with an accident than a man who is not subject to that disability. For instance, an old man is more liable to an accident when placed in a dangerous position than a young man. The same rule must apply to an infirmity or disability other than that of old age—namely, as in the present case, a predisposition to epileptic fits. If in the discharge of his duty the workman meets with an accident, it will be an accident arising out of his employment, and none the less so because the remote cause was his physical disability.

Appeal allowed, and an order made by consent for payment of 13*s.* 9*d. a week during incapacity.*

Solicitor for the applicant, *Roland H. Ward.*

Solicitor for the employers, *William Hurd & Son.*

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — May 2, 3, 4.

FLETCHER v. COLLIS. (a.)

Trustee—Breach of trust—Consent of beneficiary—Replacement of lost fund by trustee—Impounding interest of consenting beneficiary.

Mere acquiescence in a breach of trust on the part of a beneficiary, who derives no personal benefit from the breach of trust, does not render such beneficiary's interest in the trust estate liable to be impounded in order to indemnify the trustee liable to make good the loss occasioned by the breach. But in the absence of special circumstances, such as the existence of a peculiarly confidential relation between the trustee and the beneficiary, a beneficiary who has consented to a breach of trust cannot make the trustee liable to him for any damage suffered in respect of his interest in the trust estate. Nor if the loss be made good by the trustee at the instance of other beneficiaries, is the beneficiary, who has consented to the breach of trust which gave rise to the loss, entitled as against the trustee to any benefit from the fund so made good.

This was an appeal from Warrington, J.

On the marriage in November, 1881, of a Mr. and Mrs. Fletcher a settlement was made of a personalty fund amounting to £3,100, which was vested in trustees upon trust for the husband for life, with remainder to the wife for life, with remainder to the children of the marriage in the usual way.

In the year 1885 the whole fund vested in the trustees was sold by them with the written assent of

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the husband, and the whole proceeds of the sale were, in the presence of the husband, paid over by the trustees to his wife, Mrs. Fletcher, who misspent the whole fund.

In 1891 the husband was adjudicated bankrupt, and in the August following the present action was commenced by the infant children of the marriage by their next friend in order to make the trustees liable for the breach of trust which they had committed.

It was admitted by Mr. Fletcher, the husband, that he saw the whole proceeds paid over to his wife, and that he knew that it was intended that she should have £1,000 for her own use, but as regards the balance he said that he understood that that was not to be so used but re-invested at some time or other.

By order of the 22nd of February, 1893, which was made by consent of all parties other than the trustee in bankruptcy of Mr. Fletcher, one of the trustees, the defendant Collis, who had taken the active part in committing the breach of trust, undertook, out of a pension to which he was entitled, and by means of certain policies of assurance over which he gave a mortgage, to pay into court the whole of the sum which had been paid over to the wife with interest at 4 per cent. from the 5th of August, 1891, to the commencement of the action. This order was expressed to be without prejudice to any claim which the trustee in bankruptcy of Mr. Fletcher might have against the trustees of the settlement or either of them.

The defendant Collis had died since the date of this order, and by means of payments from time to time made during his lifetime and by the proceeds of certain policies of assurance after his death, the whole *corpus* of the trust fund had been replaced, together with interest from the date mentioned in the order. On the 31st of July, 1902, a summons was taken out in the action by the present trustees of the marriage settlement to have it determined (among other things) whether the portion of the said trust funds representing income or any part thereof was payable to the defendant Margaret Agnes Collis as legal personal representative of the defendant William Collis, deceased. This summons was adjourned into court and came on for hearing before Byrne, J., on the 15th and 16th of July and the 8th of August 1903. On the 10th of May, 1904, it came on for further hearing before Warrington, J., and the order was then made which was the subject of the present appeal. By this order it was declared that Margaret Agnes Collis, as such legal personal representative as aforesaid, was entitled to have the life interest of the defendant William Fletcher in the sum of £3,100, being the said settlement trust funds and the investments for the time being representing the same, impounded by way of indemnity in respect of the sum of £1,000, part of the said sum of £3,100.

The legal personal representative appealed from this order in order to have it declared that William Fletcher's interest in the whole sum of £3,100 was liable to be impounded. The trustee in bankruptcy of William Fletcher served a cross-notice of appeal against the declaration that his interest in respect of the £1,000 was liable to be impounded.

Levett, K.C., and *A. & B. Terrell*, for the legal personal representative of the trustee William Collis.—There is no reason for making any distinction between the £1,000 and the balance of the £3,100. The whole sum was paid away to the wife with the knowledge and consent of the husband. A party who consents to a breach of trust cannot have any claim against the trustee who committed the breach with his concurrence.

They cited *Trafford* v. *Boehm*, 3 Atk. 440; *Walker* v. *Symonds*, 3 Swanst., at p. 64; *Bolton* v. *Curre*, 43 W. R. 521, [1895] 1 Ch. 544.

Alexander, K.C., and *Jessel*, for the trustee in bankruptcy.—This is really a claim on behalf of a trustee who has committed a breach of trust to impound the interest of a beneficiary. In all the cases before the Trustee Act, 1888, it will be found that for a beneficiary's interest to be impounded he must either have instigated the breach of trust or received a benefit from the breach of trust. In no case has a beneficiary's interest been impounded where there has been mere passive acquiescence on his part. Consent was never a ground for impounding the interest till the passing of section 6 of the Trustee Act, 1888, now replaced by section 45 of the Trustee Act, 1893. But the Legislature in those Acts extended the previously existing law in the interests of the trustee. The Acts do not apply here because the consent must be in writing, and therefore the case depends on the law prior to the passing of the Acts. The husband did not instigate this breach of trust, and he received no benefit from it. The representatives of the trustee are not, therefore, entitled to impound his interest.

In addition to the cases above the following authorities were cited: *Lincoln* v. *Wright*, 4 Beav. 427; *Sawyer* v. *Sawyer*, 33 W. R. 403, 28 Ch. D. 595; *In re Somerset, Somerset* v. *Paulett*, 42 W. R. 145, [1894] 1 Ch. 231; *Chillingworth* v. *Chambers*, 44 W. R. 388, [1896] 1 Ch. 685.

Hewitt, for the trustee of the settlement.

Levett, K.C., replied.

VAUGHAN WILLIAMS, L.J., stated the facts and continued: Under those circumstances the substantial result of this case is, that the trustee in bankruptcy representing Mr. Fletcher the *cestui que trust* who concurred in the breach of trust has really come into court to say: "I am entitled to complain of this breach of trust and I am entitled to have paid over to me the income which is now embodied in the surplus beyond what is necessary for the replacement of the trust fund.

Now, the question is whether, having regard to the facts which I have mentioned as constituting this concurrence by the *cestui que trust* in the breach of trust he can come here and be heard to complain at all against the trustee of the breach of trust by the trustee. Can he be heard as against that trustee? I am not speaking of his rights as against other parties, but as against the trustee—to say that that which he concurred in the trustee doing, was wrong? He concurred in it, and in my judgment he ought not to be allowed to say anything of the sort. Now, the way in which Mr. Alexander in his argument—which was very clear, if I may say so—put the case was this. He quite accepted for the purpose of this argument that there was a concurrence by the *cestui que trust* of the character which I have described, but he said: "If you take the cases beginning with *Trafford* v. *Boehm*, the case before Lord Hardwicke, which is reported in 3 Atk. 440, and go all through the cases you will not find any case in which a *cestui que trust* has been held liable to have the interest either impounded or retained or withheld from him unless the *cestui que trust* has derived a benefit from the breach of trust, and then only to the extent of the benefit which he derived;" and Mr. Alexander said further that Mr. Levett, appearing for the representatives of the trustee, admitted that he could not say that this was a case in which the *cestui que trust* received a benefit in the sense in which the word had been used with regard to these cases of breach of trust and impounding of interest.

With regard to that I wish to say that I do not agree with this view of the cases. I will call attention in a moment to the cases in which it seems to me that, although the *cestui que trust* received no benefit personally, yet he was held to be debarred from complaining of the breach of trust. I propose before I call attention to those cases to go a step further and say that quite independently of any authority, and if there had been no authority to that effect I should have been prepared to say that on general principles it is impossible to hold that a *cestui que trust* who had so concurred should be allowed to take proceedings against the trustee based upon a complaint of the impropriety or wrong dealing with the trust property in which dealing he had himself concurred. The case which I prefer to take as an instance where this principle has been recognized (there are others, but I do not propose to refer to those at length) is the case of *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, and I propose to read a passage in the judgment of Lord Lindley at p. 700. In that case Lord Lindley says this: "Suppose a *cestui que trust* in remainder to induce his trustee to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in if some other *cestui que trust* compels them to make the loss good? I apprehend not; and yet in the case supposed the *cestui que trust* in remainder might not himself have derived any benefit at all from the breach of trust." I do not say that that passage is exactly upon all fours with the present case, because the word which Lord Lindley uses, "induce," is consistent with instigation as distinguished from mere concurrence; but what he does plainly negative is that a receipt of a benefit is essential if the *cestui que trust* is to be debarred from recovering against the trustee that which he is entitled to under the settlement. I am not going to call attention at any length to the case of *In re Somerset*, but if the words at the conclusion of the judgments of Lindley, and Davey, L.JJ., are read, the same negation of the benefit being essential will be found involved in those judgments. Under those circumstances, in my judgment, the trustee in bankruptcy being here in the same position for this purpose that Mr. Fletcher, the concurring *cestui que trust*, would have been, is not entitled to complain against those who represent the trustee of the loss which was brought about by what the trustee did with his concurrence, nor is he entitled to make any claim against this fund which has been placed in court really at the expense and out of the pocket of the trustee. To hold that Mr. Fletcher, the husband, could enforce a claim against the trustee in this respect would really be to say that the husband was entitled to complain of that which he, the husband, concurred in doing as being a wrong against himself.

Under those circumstances I think that the substantial claim made by Mr. Alexander's client fails altogether. In order to prevent any mistake as to how far I mean to go in respect of my negation of the right of a party to a breach of trust to complain of a breach of trust and make a claim against the trustee in respect of a matter to which he has been a party, I wish to say that I can quite conceive circumstances in which it might be right to allow such a claim to be made even by a person concurring. In the first place, one may take the case where the trustee owed a particular duty to the *cestui que trust*—for example, the case in which such a duty existed in the trustee towards a married woman who under the trust deed had property settled upon her for her separate use without power of anticipation. That is not the only case. I can quite conceive other cases. But in the present case I see no circumstances whatsoever which should induce this court to assist the *cestui que trust* who has concurred in the breach of trust in recovering as against the trustee any loss which he sustains by the breach of trust. This deals with the whole case. There is the money in court—money which undoubtedly has been provided by the deceased trustee—which money in court, in my judgment, having regard to the order which was made, is his money unless and until the trustee in bankruptcy can establish a claim to it.

ROMER, L.J.—There was one proposition of law urged by counsel on behalf of the respondents before us to which I accede. It is this: If a beneficiary claiming under a trust does not instigate or request a breach of trust, is not the active moving party towards it, but merely consents to it, and he obtains no personal benefit from it, then his interest in the trust estate would not be impoundable in order to indemnify the trustee liable to make good loss occasioned by the breach, even though the trustee derived no benefit himself from the breach. I think this is what was meant and referred to by Chitty, J., in his judgment in *Sawyer* v. *Sawyer*, 28 Ch. D., where he says, at p. 598: "It strikes me as a novelty in law, and a proposition not founded on principle, to say that the person who merely consents is bound to to do more than what he says he consents to do. It does not mean that he makes himself personally liable, nor does he render any property liable to make it good." But that proposition of law must be taken to be subject to the following right of the trustee as between him and the beneficiaries. In the case I have before referred to, in respect to the general proposition, the beneficiary who knowingly consented to the breach could not, if of full contracting age and capacity, and in the absence of special circumstances, afterwards be heard to say that the conduct of the trustee in committing the breach of trust was against him, the particular beneficiary, improper, so as to make the trustee liable to the beneficiary for any damage suffered in respect of that beneficiary's interest in the trust estate by reason of the loss occasioned by the breach, and, of course, if satisfactorily proved, the consent of the beneficiary to the breach need not be in writing.

I will illustrate what I have said by a concrete case, not only to make my meaning perfectly plain, but also because the illustration will have a bearing upon the case before us. Take a simple case of a trust under a settlement, say, of £3,000 for a tenant for life and after the death of the tenant for life for certain remaindermen. Suppose a trustee commits a breach of trust and sells out £1,000 and pays it over to some third person, so that the trustee does not benefit by it himself, and suppose that the tenant for life, being, as I have said, of full age and so forth, knows of that act of the trustee and consents to it, what would be the position in reference to that breach of trust if the trustee were at the instance of the remaindermen attacked and made liable for the loss accruing by the breach of trust? Assuming the £1,000 to have been lost, the remaindermen would have the right of saying, so far as their interest in remainder is concerned the capital must be made good by the trustee, but the tenant for life who consented could not himself have brought an action against the trustee to make him liable for the loss of income suffered by the tenant for life by reason of the breach of trust as to the £1,000. On the other hand, the trustee would not have a right, to my mind, as against the *cestui que trust*—the tenant for life—to have impounded the tenant for life's interest on the £2,000 remaining of

the trust fund in order to indemnify the trustee. Now, suppose the remaindermen having brought an action to make good the breach of trust against the trustee, the tenant for life is co-plaintiff; defence by the trustee raising his right as against the tenant for life seeking relief in respect of the loss of the income, but admitting the right of the remainderman. What would the court in such a case do if the question between the tenant for life and the trustee had been tried out, as it might have been, and the tenant for life was found to have consented knowingly to the breach of trust. To my mind the right of the court would have been clear. It might have ordered the £1,000 to be paid into court by the trustee, but pending the life of the tenant for life have ordered the income to be paid to the trustee because the income of the £1,000 would have been out of the pocket of the trustee just as much as the *corpus* from which it proceeded, and not to have given that relief to the trustee would have been to ignore his right and to have acceded to the claim of the tenant for life in the action by him that I have indicated. Now, suppose that the tenant for life is not a plaintiff, but co-defendant with the trustee, so that the question cannot be tried out at the trial as between the tenant for life and the trustee, what might the court do if so advised in that case? It might order the £1,000 to be paid into court by the trustee, and it might reserve the question of the right as between the tenant for life and the trustee to the income, to be determined at some later period. It will be found that the illustration is pertinent to the case that is now before us. In such a case, when the question as to income arose, the trustees would be able to say, "The remaindermen are not entitled clearly to the income on the trust fund I have found, and if the tenant for life is not entitled to it as against me, I find it, it is my money, and I am entitled to it," and therefore when the question came to be tried out ultimately as between the tenant for life and the trustee, if that income was still under the control of the court, the court would again have the right to say to the trustee who found the *corpus*: The income is yours in the absence of the right of the beneficiary, the tenant for life, to claim as against you to make you liable for that income. Now, the right of a trustee which I have been dealing with, the right to resist the claim by the beneficiary as against the trustee to make good the income, has, to my mind, clearly not been affected either by section 6 of the Trustee Act, 1888, or by section 45 of the Trustee Act, 1893. As I have elsewhere pointed out, those sections were intended to and did extend the powers of the court for the benefit of the trustee. They clearly extended the powers of the court so far as concerns the case of a married woman entitled to income for her separate use and restrained from anticipation, but they also extended them in another respect, by giving power to the court to impound any part of the interest in the trust property of any beneficiary who consented to a breach of trust provided that consent was in writing. But clearly there was nothing in those sections which was intended to, and nothing in my opinion which operated so as to deprive the trustee of such a right as I indicated previously—the right of saying as against a beneficiary who has consented to a breach of trust that that beneficiary cannot make him, the trustee, personally liable to recoup to the beneficiary who consented, the loss accruing to that beneficiary by the breach of trust committed with his consent. The beneficiary, if he consented to the breach of trust, could not be heard to make that a ground of complaint and a ground of action as against the trustee. Of course the right I have indicated of a trustee as against the consenting beneficiary might possibly be lost if not raised by the trustee before it was too late. Probably—I say probably, for I have not to decide the question—if the trustee in such a case were to hand over the funds out of his own pockets to new trustees without preserving his right in any way as against the tenant for life, it might be—I will say no more—that he might be held to have lost his right to claim the income after he had parted with the fund. It might be so, and other cases might be given, but so long as his right can be claimed by him it is a right which must be recognized by the court and given full effect to when it is insisted upon at the proper time.

Now, that being to my mind the law so far as it is necessary to deal with it for the purpose of the present case, I will say a few words about the facts of this case, and I ask myself, looking at those facts, this question: Is this matter that we have to deal with on this appeal in substance not one where a beneficiary who has consented to a breach of trust is now for his own benefit calling upon the trustee to make good the loss accruing to the beneficiary by reason of the breach? I think it is. In this case the tenant for life—the husband—knew of and consented to the breach. He authorized the selling out of the trust funds, and it appeared from his evidence (he was not, to my mind, a truthful witness in many respects as far I can see, but he was driven to admit it at last) that he was actually present when the trustee handed over the proceeds of the sale of the funds to the wife. The judge in the court below has made a difference with regard to those proceeds, a difference, I am bound to say, that I cannot follow. Mr. Fletcher, the tenant for life—the husband—tried to make a difference with regard to the funds in this way. He said: "I knew the funds were going to her," at least he could not help saying that seeing that he saw them absolutely handed over to her, but he said: "I thought she was going to use only about £1,000, about one third part, for her own benefit, and I thought she was going to hand back the balance, the two-thirds, or in some form it was to come back to the trustee to be re-invested." To use a homely phrase, that story as to the re-investment of about £2,000 so deposed, was what is called a cock and bull story. But, even if anyone would attribute any substance to such a statement at all, how does it avail this husband who allowed the whole funds to go to his wife? He knew they were to go to her; he knew she was to have the control of them; and in fact it was by reason of that that the funds were lost and they never came back, nor did the husband ever take any proceedings for their restoration. I can draw no distinction for the purposes of such a case as this as between the husband and the trustee, between the £1,000 or the third and the remaining two-thirds. It appears to me he consented to the whole of the funds being handed over in breach of trust to the wife, and he cannot afterwards say as against the trustee that the trustee is bound to make good to him any loss accruing to him—the husband—by reason of the trust funds having been lost and dealt with by the wife.

I need scarcely say that the fact that the husband has become bankrupt makes no difference. The trustee in bankruptcy can only take such right as the husband would have had if he had not been bankrupt.

Now, there was the breach of trust and there was the consent of the husband. What happened when the action was brought in this case? The sole plaintiffs were the remaindermen. As against them in respect of their interest in remainder there was no defence. The trustee in bankruptcy of the tenant for life was a defendent. A compromise was made, by which the trustee, out of

his own funds, made up by instalments the trust fund. He was ordered to pay in these instalments even though they exceeded the capital, the reason being that at that time the question as between the trustee in bankruptcy and the trustee of the settlement with regard to the life income and with regard to the consent given by the tenant for life had not been determined. That order was one made entirely without prejudice to the right of the trustee in bankruptcy. So far as the order directed these instalments to come in beyond what was necessary to recoup the capital to make good the interests of the remaindermen, all rights were reserved. I notice that on p. 3 of the order by which those instalments were directed to be paid there is this order, namely, "That all moneys paid into court by the said defendant (the trustee) pursuant to his undertaking be applied first in satisfaction of the said proposed sum of £3,100, and then on the interest thereof, or upon an application for that purpose." To my mind the order is reasonably clear. The trustee of the settlement had not so dealt with these instalments that he could be said to have lost the right that he had as against the consenting tenant for life. He still had the right to say: "No income shall come out of my pocket to benefit you, the tenant for life." A hold was kept upon the funds, and the trustee of the settlement is now entitled, in my opinion, to say: "Subject to the interests of the remaindermen, unless the tenant for life by his trustee in bankruptcy can claim the income, that income is mine; it certainly is not the remaindermen's—that income is mine unless the tenant for life is entitled to it as against me; and the court having the hold it has upon this fund is bound to decide that question, to my mind, as if the trustee in bankruptcy were now actively claiming as against that income, as if it was still in the pockets of the trustee, to make him hand over that income to him. The right which I have indicated, that the trustee, to my mind, can still enforce, is still existing, can be enforced, and ought to be enforced. I think it ought to be enforced, as I have pointed out, to the whole income. It is not belonging to the tenant for life as against the trustee.

That being so, I think the appeal of the trustee of the settlement should be allowed, and the cross-appeal of the trustee in bankruptcy should be dismissed.

STIRLING, L.J., stated the facts, and continued: It seems to me that as a conclusion of fact it is perfectly clear that the husband concurred in the breach of trust which was committed by the trustees.

Now what is the effect in point of law of concurrence in a breach of trust? It seems to me that the law is clear. In *Walker* v. *Symonds*, in 3 Swanst. 64, Lord Eldon said: "It is established by all the cases that if the *cestui que trust* joins with the trustees in that which is a breach of trust knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further and agree that either concurrence in the act or acquiescence without original concurrence will release the trustees, but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence." I will pause there to remark that in the present case there are no special circumstances which would in any way modify the application of the general rule stated by Lord Eldon. In the case of *Chillingworth* v. *Chambers*, which has already been referred to, in [1896] 1 Ch., Lord Lindley says: "If I request a person to deal with my property in a particular way, and loss ensues, I cannot justly throw that loss on him," and Kay, L.J., in the same case, after referring to the passage which I have read from *Walker* v. *Symonds*, says this: "This refers only to an attempt by the *cestui que trust* to make the trustee liable for any loss which the *cestui que trust* may suffer by reason of a breach of trust which he instigated or concurred in. Such a claimant is estopped by his concurrence in the breach of trust." In the case of *In re Somerset* a remarkable illustration, as it seems to me, was given of the application of the rule. In that case there was, as here, a settlement. The tenant for life under the settlement was very anxious that the trust fund should be invested in a particular mortgage, and he requested the trustees to make that investment. The trustees did so, and it turned out that the property the subject of the mortgage was an insufficient security, and the trustees had to make good the loss at the instance of the remainderman. They then made an application to the court seeking to put in force the provisions of clause 6 of the Trustee Act of 1888, which are substantially the same as those of the 45th section of the Trustee Act of 1893. Now, that provides that any person who instigates or requests or consents in writing to a breach of trust is liable to have his interest impounded for the purpose of indemnifying the trustee. It was held by the Court of Appeal that the tenant for life did not know that the trustees were committing a breach of trust. He simply asked them to invest in a particular security, but he left it to them to make the proper inquiries as to the nature of the property which was offered as security. Consequently the trustees were held liable for neglect in the discharge of their duties, to which the tenant for life was no party; and it was pointed out by the Court of Appeal that he was not seeking in any way to get an advantage or benefit to himself at the expense of the remainderman, but was simply, as it is put by, I think, Lord Davey, seeking to get a good security for the fund. What happened there? It was held that the application to impound any interest in the remaining property failed, but the trustees having replaced the fund, it was held that they were entitled to interest upon the fund which they had themselves found and replaced, and that the tenant for life had no claim to that, but must in accordance with the rule be bound by the result of his own concurrence in the act which the trustees had done.

That being so, we have to apply the law in the present case. In the first place, if the tenant for life had not become bankrupt, if the application had been made by him, it is quite clear upon these authorities to which I have referred that he could not in any way attempt to make the trustees liable for a loss which had been occasioned by his concurrence in the payment of the trust fund to his wife, and the trustee in bankruptcy cannot stand in any better position unless indeed he has in some way acquired some new and better right than he would have had simply as trustee in bankruptcy succeeding to the position of a *cestui que trust* who had concurred in a breach of trust.

It is suggested, or rather contended, that the trustee in bankruptcy is in such a better position by reason of the order to which I have referred of the 22nd of February, 1893. In my judgment he is not. It seems to me the effect of that order was simply to preserve to the trustee in bankruptcy who declined to assent to that order, or consent to it in any way, his rights, but not to give him any new or better rights; I think, therefore, that he simply stands in the same position as the bankrupt's husband would have been in if no bankruptcy had occurred.

Then what is the present position? A fund is in court of capital and interest, and no decision has been given by the court. Nothing is decided by the form of the order as to who is entitled to the interest for the period which I have mentioned. The order

directs that in the first instance the payments into court shall be applied in satisfaction of the capital; and secondly, of the interest upon an application for that purpose. There has been no application made to the court as yet, but there the fund is, and it seems to me in that state of things the right of the legal personal representative of the deceased trustee who has paid the fund in ought to be given effect to. It seems to me that in reality the trustee in bankruptcy is setting up a claim to this interest. It is true that in form the application must be taken to have been made by the legal personal representative of the deceased trustee, and the trustee in bankruptcy is served. But what course does the trustee in bankruptcy take? He appears and resists, and insists on an order being made in his favour, and he has succeeded before the learned judge in the court below as to part.

In my judgment the legal personal representative is entitled to the fund. The income has not arisen from the original trust fund at all. That trust fund has disappeared by reason of its having been paid over to the wife, who lost it, and that payment was made with the concurrence of the husband. He therefore is precluded from claiming anything from the trustee, and the trustee in bankruptcy is in no better position.

For these reasons I think that the decision of the learned judge as regards that portion of the fund which was to the knowledge of the husband applied for the benefit of the wife was right; but that he ought to have gone on and applied the same rule as regards the balance which the husband stated that he believed was to be reserved for reinvestment.

I therefore agree that the appeal of Mr. Levett's client should be allowed, and that the cross-appeal of Mr. Alexander's client should be dismissed.

Solicitors, *Allingham & Heys-Jones; Emmanuel & Simmonds; Brooks, Jenkins, & Co.*

From P. D. & Ad. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) April 6.

"THE MINNETONKA." (*a.*)

Ship — Collision — Substituted expense — Compromise — Reasonableness of compromise — Loss arising out of collision.

A collier steamship chartered by the plaintiffs to carry a cargo of coal from the Tyne to Cape Town came into collision with a steamship of the defendants and put into the Thames for repairs. An agreement was entered into between the plaintiffs and the owners of the collier by which the voyage was to be abandoned, the cargo was to be sold, and a sum of money was to be paid by the plaintiffs to the owners of the collier as a "substituted expense" in lieu of the estimated greater expense of storing the cargo during the repairs and reshipping it after the repairs had been effected. Both vessels were held to blame for the collision, and the defendants paid the owners of the collier a half of the damage sustained by them. The plaintiffs then issued a writ against the defendants and claimed a half of the sum paid by them as a substituted expense. No part of this claim had been dealt with in the proceedings between the two vessels.

Held, that the plaintiffs were entitled to recover the sum claimed.

Judgment of Bucknill, J. (52 *W. R.* 672, [1904] *P.* 202), *reversed.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal from a decision of Bucknill, J., sitting in Admiralty, on a motion in objection to a report of the assistant registrar (52 W. R. 672, [1904] P. 202).

The plaintiffs, the commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, as the owners of a cargo of coal laden on board the steam collier *Uskmoor*, claimed to recover from the owners of the steamship *Minnetonka* a half of the sum of £276 18s. 4d., as damages arising out of a collision between *The Uskmoor* and *The Minnetonka*. The circumstances of the case were as follows:

On the 15th of May, 1902, the Admiralty chartered the steamship *Uskmoor* to carry a cargo of coal from the Tyne to Cape Town, the owners of the vessel to receive one-third of the freight by draft at three days' sight on signing bills of lading. On the 9th of June *The Uskmoor* was proceeding down the English Channel in pursuance of the charter-party when she came into collision, off Beachy Head, with the steamship *Minnetonka*, and was so seriously damaged that she was obliged to jettison part of her cargo and put back to the Thames. She arrived in the Thames on the 11th of June, when the surveyor for the owners reported that it would be necessary for the whole of the cargo to be discharged and for the vessel to undergo repairs, which it was calculated would take six weeks. Correspondence passed between the owners of *The Uskmoor* and the Director of Navy Contracts, and in the result an agreement was arrived at that the voyage should be treated as abandoned, and that the Admiralty should sell the cargo and should pay the owners of *The Uskmoor* the sum of £1,000 as a substituted expense in lieu of the larger sum which, it was estimated, would have been incurred for storage and reshipment if *The Uskmoor* had carried on the coal at the end of the six weeks required for repairs. Cross-actions of damage by collision were commenced by the owners of *The Minnetonka* and the owners of *The Uskmoor*. These actions were consolidated, and at the trial both vessels were found to blame. At the usual ships' reference the owners of *The Uskmoor* claimed £2,426 in respect of discharging cargo, expenses before collision, and demurrage. This claim was allowed by the registrar, and the owners of *The Minnetonka* paid a moiety of the sum to the owners of *The Uskmoor*. Subsequently the Admiralty issued a writ against the owners of *The Minnetonka*, claiming, as owners of the cargo laden on board *The Uskmoor*, damages in respect of the collision, and a settlement was arrived at on the terms of the defendants paying 50 per cent. of the plaintiffs' damages to be assessed by the registrar and merchants. The claim filed in the registry by the Admiralty, as owners of cargo ex *Uskmoor*, against the owners of *The Minnetonka*, consisted of two items—viz. (1) £447, the difference between the cost price and the selling price of the coal, and (2) £276, the proportion attributable to the cargo of the sum of £1,000 agreed to be paid by the Admiralty to the owners of *The Uskmoor* in view of the voyage being abandoned in London. At the reference the registrar disallowed both items of the claim. The ground for the disallowance of the item of £276 was that the payment of that sum by the Admiralty as a substituted expense was not such a consequence of the collision as to render the owners of *The Minnetonka* liable for their proportion as wrongdoers. The registrar stated in his report that no part of the claim for £276 had been dealt with in the ships' reference. On a motion by the Admiralty to vary the report, so far as the claim for £276 was concerned, Bucknill, J., affirmed the report of the registrar.

The Admiralty appealed.

R. B. D. Acland, K.C., and *William Wills*, for the Admiralty.

Aspinall, K.C., and *Arthur Pritchard*, for the respondents, the owners of *The Minnetonka*.

COLLINS, M.R.—This is an appeal from a decision by Bucknill, J., who was asked to review a finding of the registrar and merchants on a matter referred to them. The question arises in an Admiralty action between the Lords of the Admiralty and the owners of the steamship *Minnetonka*. The Admiralty had chartered the steamship *Uskmoor* to carry a cargo of coals from the Tyne to South Africa. While *The Uskmoor* was proceeding down the Channel near Beachy Head she came into collision with *The Minnetonka*, and was so seriously damaged that she had to put back to London. It was found that the necessary repairs would require considerable time and expense; but still she was capable of being repaired, and therefore the shipowners had the right to insist on carrying the cargo to its destination and thereby earning the balance of their freight, one-third of which had been paid in advance. An action was pending in respect of the collision, but *The Uskmoor* naturally considered, and no doubt told the cargo-owners, the Admiralty, that she was not to blame, and that *The Minnetonka* was alone to blame. The rights between *The Minnetonka* and *The Uskmoor* had not then been ascertained, and the only existing facts were that *The Uskmoor* had been disabled, but was capable of being repaired, and that her owners were insisting on their right to carry the cargo to its destination when the repairs should have been completed. In these circumstances a compromise was arranged between the Admiralty and the owners of *The Uskmoor*. A calculation was made of the length of time which would be required for the repairs and of the cost of discharging, warehousing, and reshipping the cargo, and an estimate was made of what contribution would have been due from the cargo-owners in general average if the voyage had been continued. This was assessed at the conjectural sum of £332. The compromise involved the abandonment of the voyage and the sale of the cargo, and provided for the payment by the Admiralty to the owners of *The Uskmoor* of the sum of £276. In this way the Admiralty reduced the payment which they would have had to make if the voyage had been continued, and they were also saved the loss which they would have incurred through deterioration of the cargo; and at the same time the shipowners gained the advantage of being at liberty to obtain another charter-party as soon as the repairs should be done. If that was a reasonable compromise to make, it seems to me that the amount paid by the Admiralty under the compromise is a fair measure of the damages which the Admiralty would be entitled to claim from the wrongdoer, *The Minnetonka*. An important point in the case was brought out in an answer given by Mr. Acland to a question put by Mathew, L.J.—viz., that as between the Admiralty and the owners of *The Uskmoor*, by the terms of the charter-party the owners of *The Uskmoor* were relieved from all liability for negligence. Therefore, although in the action between the two ships both were held to blame, yet, in the arrangement of the compromise between the Admiralty and *The Uskmoor*, the Admiralty had to regard *The Uskmoor* as being free from blame; and the Admiralty were not in a position so say that the owners of *The Uskmoor* were not entitled to receive anything at all. The Admiralty could only recover damages from the owners of *The Minnetonka*, and they brought this action against them, claiming, in accordance with the rule in Admiralty, one-half of the sum of £276. The report of the registrar and merchants on this claim was the basis of the argument which has been addressed to the court. Although the claim was not allowed by the registrar, and although the learned judge has affirmed his decision, the report found as a fact that no part of that claim had been dealt with in the ship's reference on the claim of *The Uskmoor*. In my opinion that fact, that no part of this sum has been recovered by *The Uskmoor* as against *The Minnetonka*, disposes of the argument of the respondents. For some time I was under the impression that, if the owners of *The Minnetonka* were ordered to pay this sum, they would be paying over again a sum which they had already paid in the proceedings taken against them by the owners of *The Uskmoor*. The findings, however, negative that, and we are disembarrassed of the consideration that we shall be ordering the same sum to be paid a second time. Therefore the question comes back to this—Was the compromise a reasonable one? For the reason which I have already given I think that it was reasonable. It was contended on the part of the respondents that, however reasonable the compromise itself might be, the sum to be paid under the compromise ought to have been adjusted in view of the litigation between *The Uskmoor* and *The Minnetonka*. It was suggested that there ought to have been some arrangement by which the amount might be modified in accordance with the result of that litigation. But the answer is that this sum of £276 did not come into discussion between *The Uskmoor* and *The Minnetonka*. That disposes of the suggestion that it was not reasonable to settle the compromise without regard to the litigation between the two ships. When the case is disengaged from a certain confusion in which it has been involved, it seems to me to be clear that the plaintiffs are entitled to recover the sum claimed from the owners of *The Minnetonka*. The learned judge had not all the facts before him which have been brought to the consideration of this court. His judgment seems to have been based on a proposition of law which he extracted from the case of *The Marpesia*, 42 W. R. 239, [1891] P. 403. The suggestion appears to be that a wrongdoer against whom a claim is made for a sum of money in respect of damage caused to the plaintiff is relieved from all liability if that sum of money has been arrived at by some compromise, whether reasonable or not, on the ground that the sum in respect of which the claim is made against the wrongdoer is a sum which became payable under a compromise, and is, therefore, not the direct consequence of the wrongdoing. But the assessment of the sum by a compromise does not break the chain of causality between the loss sustained and the wrong done out of which it was sustained; it is merely a mode of adjusting the loss, and not an intermediate fact cutting off the liability of the wrongdoer. The real point was not argued before the learned judge, and I do not think I am really differing from the learned judge's view in holding that this sum can be recovered. The appeal must be allowed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiffs, *The Treasury Solicitor*.

Solicitors for the defendants, *Pritchard & Sons*.

High Court of Justice.

Chan. Div. Kekewich, J. March 1, 2.

TAYLOR v. ALLHUSEN. (a.)

Settlement—Power—Limited power—Appointment to a class—Donee of power one of class—Right of donee of power to appoint to herself.

Where the donee of a power of appointment limited to members of a certain class is a member of that class herself it is competent to her to appoint to herself.

In May, 1890, the plaintiff Isabel Taylor, then Isabel Allhusen, was entitled to certain securities of the value of £3,500, standing in the name of her uncle, the defendant Wilton Allhusen as trustee for her.

By a settlement dated the 31st of May, 1890, and made between the plaintiff of the one part and the defendant W. Allhusen of the other part, it was declared that the income of the trust funds should be paid to the plaintiff for her life, and after her death, in case she should by deed or will so appoint, to any husband who might survive her for his life; and subject to any such appointment, the defendant W. Allhusen was to stand possessed of the trust funds and the income thereof in trust for the children of the plaintiff as she should by deed or will appoint, and in default of appointment for all the children of the plaintiff who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if there should be no child of the plaintiff who should attain that age or marry then the trust fund and the income thereof should be held "in trust for such persons and purposes and in such manner as the said Isabel Allhusen shall by deed or will appoint so only that every such appointment be made to or in favour of a grandchild or grandchildren of the late Christian Allhusen, the paternal grandfather of the said Isabel Allhusen, who shall have attained or shall attain the age of twenty-one years, or being female shall have previously married, and in default and subject to any such appointment upon trust for all such grandchildren of the said Christian Allhusen equally share and share alike."

At the time this settlement was made the plaintiff was engaged to and shortly afterwards married her cousin, Charles Percy Hale, who was one of the grandchildren of Christian Allhusen.

The settlement was not expressed to be made in consideration of the marriage, and was in fact a voluntary settlement. There was no issue of the marriage.

C. P. Hale died in 1896.

In 1903 the plaintiff married Francis Pitt Stewart Taylor. There was one child the issue of this marriage, the defendant Reginald Pitt Stewart Taylor, who was born in July, 1904.

The plaintiff now claimed (1) cancellation of the settlement, or (2) rectification in manner therein stated, or (3) alternatively, that the construction of the settlement might be declared, and the trusts thereof executed, and that a new trustee or trustees might be appointed.

At the trial the questions of cancellation and rectification were not pressed, the only question argued being on the construction of the settlement, and whether, on the true construction of the settlement, the plaintiff could appoint the trust funds to herself under the power.

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

The defendant W. Allhusen was willing to continue to act as trustee with a Mr. Cotton Cooke, who was willing to act with him.

P. O. Lawrence, K.C., and *Percy F. Wheeler*, for the plaintiff.—The plaintiff, as one of the grandchildren of Christian Allhusen, is one of the objects of the power; she may therefore appoint to herself. She is a member of the class to which the power is limited, and there is nothing in the instrument to exclude her from the class, or to prevent her appointing to herself; in default of appointment, she would undoubtedly take a share as a member of the class, and there is no reason why she should not take under an appointment. There is no decided case directly in point, but Farwell, J., in Farwell on Powers (2nd ed.), p. 492, states that an appointment may be made to himself by the donee of a power if an exclusive appointment is authorized, and refers to *In re Sinclaire's Estate*, 2 Ir. Eq. 45.

Stewart Smith, K.C., and *Dighton Pollock*, for the trustee of the settlement.—*In re Sinclaire's Estate* had reference to the construction of a particular will, and is not relevant here. The only other passage in any text-book which bears on the subject is one in Sugden on Powers, c. 11, s. 6, p. 145.

Wace, for the infant defendant R. P. S. Taylor.

KEKEWICH, J.—This point seems to me to be one of some importance apart from its novelty, and having considered it since the court rose yesterday, I have come to the conclusion that the plaintiff's contention ought to be upheld. The question is whether, assuming the settlement to stand, this lady, the plaintiff, can appoint to herself, and that depends entirely upon the construction of the particular instrument. There seems to be no authority directly bearing upon the point, and the books which have been cited, although useful, do not give a conclusive guide. Farwell, J., at p. 492 of his book, says: "If the intention is clearly expressed there is no reason why the donee should not appoint the whole to himself if the power authorized an exclusive appointment." That is a clear summing-up of the law, and no doubt a correct summing-up, although it comes as a comment on the case of *In re Sinclaire's Estate*, which turned entirely upon the construction of the particular instrument then before the court, and is not, I think, valuable for the present purpose. The only other authority which was cited was Lord St. Leonards' book on Powers, c. 11, s. 6, p. 145. There Lord St. Leonards does not touch this particular point, and he does not lay down any general rule, but what he does say is certainly not inimical to the conclusions contended for by the plaintiff here. This settlement was made on marriage, but was a settlement on the lady for life, and then on any husband who might survive her for life, and then to the children in the ordinary way, with a power of appointment and a gift over in default of appointment among the children. No question arises about that now. The only question is under the clause by which in default of children taking a vested interest the property is limited as the lady should appoint by deed or will, the class being narrowed by the limitation that they are to be the grandchildren of the late Christian Allhusen. It so happens that the lady herself was one of such grandchildren and that her first husband was one also. In default of the exercise of that power of appointment there is a trust for all "such grandchildren of the said Christian Allhusen equally share and share alike." It could not be argued that if the lady does not exercise the power of appointment she will not herself be able to take a share under that gift in default of appointment. It occurred to me to refer to the case of *Lees v. Massey*,

9 W. R. 425, 3 De G. F. & J. 113. The point upon which the case is reported is from what time and at what date the next-of-kin were to be ascertained; but there was a very able argument on the question whether the lady herself in that case could take as one of the next-of-kin. There was a gift by will of all the testator's real estate to a daughter in fee simple, subject to intervening limitations, and the will contained a proviso that if the daughter should die without lawful issue, the testator's wife surviving, then the said estates should go to his wife for life and after her decease to his relations, share and share alike. The word "relations" is, of course, equivalent to next-of-kin. Now it turned out that when the estate came to be disposed of under the ultimate gift it went to the daughter, and the daughter only, as the testator's next-of-kin, and the argument was that it was really inconsistent with the whole gift that she should take under the gift to the testator's "relations"; that it could not be that the daughter was to take that which was only to go to the next-of-kin in the event of her not being able to take—that is to say, the preceeding limitations failing. However, that view found no favour with the Mas'er of the Rolls or the Court of Appeal; and the decision, although it turned upon an entirely different point, resulted in giving the daughter, who was said to be excluded, the whole estate. Therefore I may fairly say that there is nothing inconsistent with or contrary to the ordinary rules of construction in holding in the present case that this lady would herself take a share in default of appointment, and that view is valuable for the purpose of the construction of this settlement. The trust is "for such persons and purposes and in such manner as the said Isabel Allhusen shall by deed or will appoint, so only that any such appointment be made to or in favour of a grandchild or grandchildren of the late Christian Allhusen," and then there is a gift over in default of and subject to any such appointment upon trust for those grandchildren of whom she was one; and if, remembering what I have just said, there is a gift in default of appointment to her as regards part of the property, that seems to me to be an extremely strong argument in support of the view that she was not to be excluded from the objects of the general power of appointment which preceded. As she was to take in default of appointment, it is difficult to say that she ought to be excluded from taking under the appointment.

But that is not the only way of looking at the case. I was very much struck by the argument of the plaintiff's counsel, that if the clause in the settlement had stopped at the word "appoint," that is to say, if it read simply "in trust for such persons and purposes and in such manner as the plaintiff shall by deed or will appoint," she might certainly have appointed to herself, and not only so, but it is the common form of general power of appointment. Why should you cut that down? You would cut it down, of course, if the language so provided; but to cut it down so as to exclude herself from the general power of appointment when there are no clear words to do it, and when that general power would certainly have enabled her to make an appointment in her own favour, seems to me to be a straining of language which would be entirely wrong. Therefore I hold that upon the true construction of the instrument the lady is entitled to appoint by deed or will to any of the grandchildren of Christian Allhusen, including herself. There will be a declaration to that effect, and the defendant W. Allhusen being willing to continue trustee of the settlement, another trustee will be appointed to act with him, and there will be consequential directions as to the transfer of the trust funds to the two trustees.

Solicitors, *Badham & Comins; Johnson, Long, & Co.*

Chan. Div.
Swinfen Eady, J. } May 3.

In re LEVESON-GOWER (*a.*)

Settled land—Improvements—Application of capital moneys—Additions to or alterations in buildings—Rebuilding vinery, peach-house, and greenhouse with a view to letting—Scheme submitted to trustees after long interval—House agent's commission—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 25, *sub-section* 11—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *ss.* 13 (*ii.*), 15.

The rebuilding of an entirely new vinery and peach-house in place of two old glasshouses pulled down, in order to let the principal mansion-house, does not fall within sub-section 2 *of section* 13 *of the Act of* 1890, *as "any additions or alterations in buildings reasonably necessary or proper to enable the same to be let," on which capital moneys in the hands of trustees can be expended, and the rebuilding of a new greenhouse in place of an old one in a dilapidated condition is in the same position. But the building of loose boxes and the making of a sunk fence in the park to keep out cattle is within the meaning of "repairs" on which capital money can be spent. The commission chargeable by an agent for obtaining a tenant of the mansion-house on a short tenancy is an ordinary income charge, and neither the whole nor any part is properly payable out of capital.*

Adjourned summons.

By an indenture dated the 24th of June, 1889, Mr. Granville C. Gresham Leveson-Gower, the applicant in the summons, became, in certain events which had already taken place, tenant for life in possession of certain settled estates situate in Surrey and Kent, settled by the said indenture subject to certain rent-charges therein mentioned of £300 and £800. His eldest son, one of the defendants to the summons, was tenant in tail of the said estates, the other defendants being the present trustees of the said indenture for the purposes of the Settled Land Acts.

The settled estates, subject to the uses of the said indenture, comprised a mansion-house with the gardens and park known as Titsey Place, another house and grounds known as Hookwood, and several farms in various other parishes.

In 1902 the tenant for life placed Titsey Place and grounds in the hands of an agent, and by an agreement dated the 15th of November, 1902, it was let to Lord Burghclere on a short tenancy of a few months.

By an indenture dated the 2nd of June, 1903, Lord Burghclere took it for a term of years (determinable as therein mentioned). The applicant stated in an affidavit that Lord Burghclere had made it a condition of his taking Titsey Place that a vinery and peach-house, which were at the time in a dilapidated state, should be rebuilt; also that a new fence should be constructed between the park and the gardens in order to keep out the cattle, the then existing fence being also in a state of bad repair and quite unfit for its purpose. As it was necessary to let the house, these improvements were carried out and paid for by the tenant for life out of his own pocket.

It was shown that rebuilding these houses and fence was absolutely essential, as they were quite past repair.

Further improvements were carried out by the tenant for life as follows: In 1896 he erected a new cattle-shed in the park, and the following year built four loose-boxes and saddle-room, with mens' rooms above, and also rebuilt a greenhouse, which was very old and falling into decay.

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

The tenant for life had only recently submitted a scheme to the trustees, one of his reasons for the delay being that there were no capital moneys subsisting in the hands of the trustees which they could apply.

All the above expenses so incurred were paid for personally by the tenant for life.

Owing to the heavy outgoings on the estate, due to its being put in repair for letting, death duties, &c., the tenant for life took out the present summons, asking for a declaration that the respondents, as trustees for the purposes of the Settled Land Acts, 1882 to 1890, might be directed to repay and recoup to the applicant out of capital moneys that had since arisen under the said Acts, and were then in their hands, the following sums, which represented the amounts expended by him on the before-mentioned improvements—viz.: £294 17s. 7d. for rebuilding the vinery and peach-house, £48 10s. for a new cattle-shed, £258 for new loose-boxes, &c., £194 5s. 6d. for the park fence, and £249 16s. 6d. for rebuilding the greenhouse. And also whether a sum of £60 which was paid by way of commission to the agents for the letting of Titsey Place to Lord Burghclere was properly payable out of such capital moneys as aforesaid.

Austen-Cartmell, for the applicant.—These various rebuildings would not have been done unless the lessee who took the house had made it a condition they should be. On the question of no scheme having been submitted to the trustees for so long a period, it falls within section 15 of the Settled Land Act, 1890. "The court may in any case where it appears proper make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the court." These expenditures are substantial improvements. This is a proper case where a tenant for life has, out of his own pocket, incurred heavy expenditure which the court is asked may be thrown on the capital. These additions are "reasonably necessary and proper" within section 13, sub-section 2, of the Settled Land Act, 1890, to enable Titsey Place to be let to Lord Burghclere: see *In re Gaskell's Settled Estates*, 42 W. R. 219, [1894] 1 Ch. 485; *In re Clarke*, 50 W. R. 585, [1902] 2 Ch. 327. It has been also held a tenant for life need not actually have in contemplation a tenant, but it must not be a mere vague idea he will obtain one. Here there is a definite letting. If as here you have a building to be let, and it must be rebuilt in order to let it, then it falls within the sub-section. [SWINFEN EADY, J.—Therefore you can only justify this expenditure under sub-section 2.] It is all part of the subject-matter of the letting. The expenditure on the loose-boxes comes within section 25, sub-section 11, of the Act of 1882. Treating the question of a new vinery and peach-house as an addition, it is to an entirely new structure, and it is for the court to say whether it is so or not: see *In re Gerard*, [1893] 3 Ch. 252, where "stables" came within sub-section 4. On the question of the agents' commission. This lease owes its existence solely to the powers of the applicant as tenant for life under the Settled Land Acts. If he were to die soon, the estate would be subject to a beneficial lease. There is no difference in principle between a letting on a building lease and a letting on an occupation lease: see *In re Maryon-Wilson's Settled Estates*, [1901] 1 Ch. 934, 49 W. R. Dig. 157. The *ratio decidendi* was only an exercise of the powers of the Settled Land Acts.

He referred to Hood and Challis on the Settled Land Acts (6th ed.), at p. 336.

P. Wheeler, for the tenant in tail.—The two questions are whether this application falls within sub-section 2 of section 13 of the Act of 1890, and if so whether the court can exercise its jurisdiction. In the present case what the tenant for life means to do is to substitute a new building for an old one; that is not an addition, nor was the request of the lessee "reasonable and proper" to bring it within the sub-section. The court cannot exercise its discretion under section 15, on account of the weak case of the applicant and his not submitting his scheme to the trustees for such a long time.

Austen-Cartmell mentioned on the meaning of the word "additions" *In re Calverley's Settled Estates*, 52 W. R. 206, [1904] 1 Ch. 150.

Wheeler referred to *In re Verney's Settled Estates*, 46 W. R. 348, [1898] 1 Ch. 508. *Maryon-Wilson's case* wholly different from the present application. [SWINFEN EADY, J., referred to *Stanford* v. *Roberts*, 49 W. R. 315, [1901] 1 Ch. 440.]

Austen-Cartmell replied.

R. Burleigh Muir, for the trustees.

SWINFEN EADY, J.—This is an application by the tenant for life of certain estates situated partly in the counties of Surrey and Kent. He claims under a settlement made in 1889. The previous tenant for life died on the 30th of May, 1895, and on his death the present applicant became the tenant for life in possession. I am told that he is between thirty and forty years of age. There are two rent-charges still subsisting on the property and the interest on certain mortgages amount to between £3,000 and £4,000. Both the mansion-houses on the estate have been let, and it appears that with respect to the house and grounds now in question a sum of £294 17s. 7d. was expended on rebuilding a vinery and peach-house, and this sum is amongst other items claimed to be allowed out of the capital moneys. It appears that these glasshouses were in a state of dilapidation seven years ago. In the autumn of 1902 Lord Burghclere took Titsey Place, the house in question, on a short tenancy for three or four months, and in the following year entered into an agreement to take it for a term of years. The applicant states that it was a term of the agreement that the vinery and peach-house should be rebuilt in order to secure Lord Burghclere as a tenant. Though evidence is wanting on this point, nevertheless I think it was probably the fact that such was the case, and I will accept the statement of the applicant. The peach-house was not rebuilt until some months after the vinery had been. The first question before the court is whether the erection of a vinery and peach-house fall within sub-section 2 of section 13 of the Settled Land Act of 1890. The glasshouses are some distance from the house, and were pulled down completely before they were rebuilt. Under the circumstances I am of opinion that where a building is entirely removed, and an entirely new building is erected, it does not fall within the sub-section, which runs: "Making any additions or alterations in buildings reasonably necessary or proper to enable the same to be let." Even if the cost of erecting these glasshouses were to come within the sub-section, and the court could exercise its discretion, I should hesitate, because the cost of these glasshouses is something like a half-year's rental, and having regard to the state of the rent and general rental of the estate, and the cost of the glasshouses, and the fact that no scheme was submitted to the trustees for so long a time, I should hesitate rather before I sanctioned it. With regard to the greenhouse, the old one was built many years before the other buildings, and it was apparently quite past repair.

The new one is much smaller than the old one, but, in my opinion, a new greenhouse is in no better position than the vinery or peach-house. With respect to the items for loose-boxes and the sunk fence in the park, I am of opinion that both fall within the meaning of repairs on which capital money can be expended. I think the sum of £400 will meet the justice of that case. With regard to the remaining question of the commission which was charged for the letting to Lord Burghclere, it is a short tenancy under an occupation lease, and the agents have charged a commission of £60, at the rate of 5 per cent. for the first year and 2½ per cent. for the second and third years. The application is made after the first two years have practically expired. I think it is an ordinary income charge. I am therefore of opinion that commission payable to an agent on securing a short tenancy is not an expense that ought to be thrown on the capital, and I decline to order the trustees to pay that commission, or any part of it, out of the capital.

Solicitors, *Cooper, Turner, & Evans*, for *Morrisons & Nightingale*, Reigate.

Chan. Div. } May 17, 24.
Warrington, J. }

In re CHANT.
BIRD *v.* GODFREY. (*a.*)

Administration — Simple contract debt — Real estate devised—Tenant for life and remaindermen—Part payment by tenant for life—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

The part payment by a devisee for life of a simple contract debt of his testator and of interest thereon is sufficient to keep the debt alive, notwithstanding the lapse of time, not only as against the devisees in remainder after the life estate, but also as against devisees of other real estate of the testator.

In re Hollingshead, Hollingshead *v.* Webster, 36 *W. R.* 660, 37 *Ch. D.* 651, *followed.*

The principles of Roddam *v.* Morley, 5 *W. R.* 510, 1 *D. G. & J.* 1, *and* Dibb *v.* Walker, 41 *W. R.* 427, [1893] 2 *Ch.* 429, *applied.*

Originating summons.

This summons raised a question as to the effect of part payment of a debt of a testator by a tenant for life of part of the devised real estate in preventing the debt becoming barred by the lapse of time as against the remaindermen and the devisees of other part of the real estate.

By his will made in 1894 Thomas Chant, after bequeathing his personal estate to his wife, Emma Chant, subject to his debts, devised certain houses to his brother, E. J. Chant, and other houses to his sister, Elizabeth Brake, and he devised the residue of his real estate to his wife for her life and after her death as to part thereof to Elizabeth Brake, and as to the rest to E. J. Chant. And he appointed certain persons executors and trustees of his will.

The testator died in October, 1894. He was at the time of his death indebted to the plaintiffs in the sum of £298 for work and materials in building houses upon simple contract.

In 1895 the plaintiffs had entered into an arrangement with the executors and the tenant for life under which they had from time to time received payments on account of the principal and interest of the debt. It was admitted that some at least of these payments—at all events of the more recent ones—were made out of the parts of the real estate of which Mrs. Chant was tenant for life. These payments continued until 1903.

In February, 1905, the creditors took out this summons on behalf of themselves and the other creditors against the executors, the tenant for life, and against Elizabeth Brake and E. J. Chant, the devisees in remainder and also specific devisees, asking for administration of the real and personal estate of the testator. The only question in dispute was whether the plaintiffs were entitled to have administration of the specifically devised and the residuary real estate of the testator as well as of the personal estate.

Fossett Lock, for the applicants.—The simple contract creditors are entitled to have the devised real estate as well as the personal estate administered for the payment of the debts of the testator under the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104). It is true that the testator died more than six years before the summons, but if any Statute of Limitations applies, which is not clear, the debt has been kept alive by the payments that have been made on its account by Mrs. Chant, the tenant for life. It is sufficient if the payments are made by anyone interested, and if so made they set the debt free as to all the real estate of the testator. That the debt is kept alive as against the devisees in remainder was expressly decided by *In re Hollingshead, Hollingshead* v. *Webster*, 36 W. R. 660, 37 Ch. D. 651. And the principles upon which that case and *Roddam* v. *Morley*, 5 W. R. 510, 2 K. & J. 336, 1 De G. & J. 1, and *Dibb* v. *Walker*, 41 W. R. 427, [1893] 2 Ch. 429, following *Forsyth* v. *Bristowe*, 8 Exch. 716, 1 W. R. C. L. Dig. 510, were decided apply here, and show that the debt is kept alive, not only as regards the residuary estate, but also as regards the other real estate of which Mrs. Chant was not tenant for life. I admit that payment by the executors does not have this effect. This was decided in *Putnam* v. *Bates*, 3 Russ. 188; *Fordham* v. *Wallis*, 1 W. R. 118, 10 Hare 217; and *Astbury* v. *Astbury*, 46 W. R. 536, [1898] 2 Ch. 111.

Cozens-Hardy, for the devisees of the real estate other than the tenant for life.—The case is governed by the Limitation Act, 1623. To take the case out of the operation of that statute there must be a fresh promise to pay implied on the part of the person who is sued for the debt. This can only be implied where the part payment is made by the person sued, or his agent, or someone through whom he claims. This is the effect of *Putnam* v. *Bates*, *Fordham* v. *Wallis*, *Bolding* v. *Lane*, 11 W. R. 386, 1 De G. J. & S. 122; *Dickinson* v. *Teasdale*, 1 D. J. & S. 52, 11 W. R. Dig. 55; and *Astbury* v. *Astbury*. No promise to pay can be implied on the part of the devisees in remainder of the residuary estate from the part payment by the tenant for life, and still less on the part of the devisees of the other real estate. Even if the former devisees are held bound by the payments the latter should not be. *Roddam* v. *Morley* and *Dibb* v. *Walker* were cases of specialty debts, and were decided upon the statute 3 & 4 Will. 4, c. 42, which does not apply to this case. Moreover, *Roddam* v. *Morley* was disapproved of by Lord Chelmsford in *Coope* v. *Cresswell*, 15 W. R. 242, L. R. 2 Ch. 112, and was said by Lord Westbury in *Dickinson* v. *Teasdale* not to apply to land other than that of the tenancy for life. The same principle is recognized and enacted by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, as between joint debtors.

He also referred to *In re England*, 43 W. R. 491, [1895] 2 Ch. 100, and *In re Macdonald*, 45 W. R. 628, [1897] 2 Ch. 181.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

E. S. Ford, for the executors and tenant for life, took no part in the argument.

Cur. adv. vult.

May 24.—WARRINGTON, J.—The debt is a simple contract debt, and the right of action is equitable only, arising under the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104). The suit contemplated is a suit against the real estate as a whole, not against any particular part, nor does the statute constitute the debts a charge on the estate. So far as any Statute of Limitations can be said to be applicable to a suit in equity the statute in the present case is that of 21 Jac. 1, c. 16. As regards the estate which is subject to the life interest the case is directly within the authority of *In re Hollingshead*. In that case it was decided that payment of interest by a devisee for life kept a simple contract debt alive against the devisees in remainder. The payment here is of principal as well as of interest. This cannot make any difference, and I must therefore hold that so far as this part of the case is concerned the case of the defendant fails. The question remains has the debt been kept alive against the other real estate in which there is no tenancy for life. The point has not been expressly decided, but in my opinion the principle of the authorities which I am about to mention cover the case. In *Roddam* v. *Morley* it was held by Cranworth, L.C., following the opinions of Williams and Crowder, JJ., that in the case of a specialty creditor payment of interest by a devisee for life kept the debt alive as against those in remainder. The case turned first on the question whether on the true construction of the statute 3 & 4 Will. 4, c. 42, s. 5, payment by a tenant for life was payment by a "party liable," and secondly what would be the effect of such payment. After holding that on the construction of the statute the tenant for life was a party liable, the Lord Chancellor proceeded as follows: "The question, however, still remains, if the payment is made by one only of several persons liable, as, for instance, by a person having only a life interest, who is affected by the payment? Does it operate against the party only by whom the payment is made? Or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty." In *Dibb* v. *Walker* Chitty, J., applying the principles of *Roddam* v. *Morley*, held that payment of interest by a tenant for life of an equity of redemption kept alive the right of action on the covenant so as to enable the mortgagee to recover the balance of his debt which his security was insufficient to satisfy as against the general assets of the covenantor; that is to say, as against property other than that in which the tenant was interested. I think that *In re Hollingshead* shows that as to the effect of part payment there is no material difference between the case of a simple contract debt and a specialty debt. All the devisees are liable in the sense that they may all be sued in equity, and in my opinion payment by any one of them is a payment by a person liable, and therefore, according to the decisions in *Roddam* v. *Morley* and *Dibb* v. *Walker*, sets free the action not only as against the person making the payment, but against all other parties liable. I hold, therefore, that the part payment in the present case was sufficient to keep the action alive as against all the persons interested in the real estate. It was argued that I ought not to follow *Roddam* v. *Morley*, having regard to the criticisms on it contained in *Dickinson* v. *Teasdale* and *Coope* v. *Cresswell*; but on this point it is enough to refer to the remarks of Chitty, J., in *In re Hollingshead*. *Dickinson* v. *Teasdale*, moreover, was decided on a different statute altogether—namely, the Real Property Limitation Act, 1833. None of the other cases cited by the defendants conflict with the opinion I have expressed. There must therefore be the usual judgment for administration of the real and personal estate.

Solicitors, *J. Trevor Davies; Robbins, Hay, Waters, & Hay*, for *H. S. & S. Watts*, Yeovil; *Samuel Price & Sons*.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 6.

REX v. PHILBRICK (COUNTY COURT JUDGE) AND ANOTHER.
Ex parte EDWARDS. (*a*.)

Poor law—Rating—Recovery—Distress—Costs of levy—Distress for sum not exceeding £20—Alleged overcharge—Right to sue in county court—Distress (Costs) Acts, 1817 *and* 1827—*Distress for Rates Act*, 1849 (12 & 13 *Vict. c.* 14), *s.* 1.

The plaintiff, a passive resister, sought to recover 12*s.* 6*d. in the county court, the amount which he alleged he had been overcharged in connection with a distress not exceeding* £20 *levied on his goods. The county court judge considered, following* Hill *v.* Pannifer, 52 *W. R.* 588, [1904] 1 *K. B.* 811, *that he had no jurisdiction to go into the reasonableness of the charges, and that the plaintiff's course was to apply to the justices, who were the proper tribunal to deal with the case.*

Held, following Headland *v.* Coster & Lamb, 49 *SOLICITORS' JOURNAL* 133, [1905] 1 *K. B.* 219, *in which* Hill *v.* Pannifer *was discussed and overruled, that the action would lie, and that the learned judge had jurisdiction to entertain it.*

In this case a rule *nisi* for a *mandamus* had been obtained at the instance of one Edwards, directed to his Honour Judge Philbrick, K.C., requiring him to show cause why he should not hear and determine an action brought by the applicant for the rule against the defendant Morey, a certified bailiff, in the Bridport County Court, which action the learned judge had decided he had no jurisdiction to try.

The plaintiff, a passive resister, had refused to pay 5s. 7d., a part of the poor rate levied on him, and the defendant had under a distress warrant levied a distress in respect of this unpaid balance. The articles taken were a gold watch and brooch. These were duly sold and realized £2 4s., out of which Morey retained £1 18s. 7d. made up as follows: Unpaid rate 5s. 7d., cost of warrant 3s. 6d., charges for taking, keeping, and selling of distress £1 9s. 6d. This latter sum included an item of 17s. 6d. for the "removal, storage, keeping possession, and delivery at sale-yard, including haulage, &c." It was to this charge of 17s. 6d. that Edwards took exception, and as he considered that 5s. was the utmost that could reasonably be charged for keeping the levy, and having paid the full sum demanded for costs under protest, he brought this action in the county court to recover back 12s. 6d. as money paid over and above the sum that legally could be demanded from him.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

At the time the action was brought in the county court *Hill* v. *Pannifer*, 52 W. R. 588, [1904] 1 K. B. 811, had been decided by the Divisional Court. That case was afterwards overruled by *Headland* v. *Coster & Lamb*, 49 SOLICITORS' JOURNAL 133, [1905] 1 K. B. 219. The Court of Appeal in *Headland's case* decided that the provisions of the Distress (Costs) Acts, 1817 and 1827, limiting the charges that may be made for taking, keeping, and selling goods distrained on for poor rates and certain other rates, where the amount demanded and due does not exceed £20, were not impliedly repealed as regards the poor rate by the Distress for Rates Act, 1849, but were still applicable to that rate.

On the authority of *Hill* v. *Pannifer* Judge Philbrick considered that the question of whether any particular item of charges for a levy under £20 was reasonable, was a question for the justices to determine; that the plaintiff's proper course was to have applied to the justices for them to decide whether the charge complained of was or was not reasonable, and that there being a statutory remedy given by appeal to justices, the jurisdiction of the county court was ousted, and the action was therefore one that could not be maintained. He accordingly dismissed the action with costs.

In these circumstances the rule was obtained and now came on for argument.

Randolph showed cause.

R. M. Montgomery supported the rule.

Lord ALVERSTONE, L.C.J.—We, of course, are bound by the decision in *Headland* v. *Coster & Lamb*, given in the Court of Appeal. I do not know that it is very material, but the reason I thought the charges made for distress were not limited having regard to the Act of 1849 was on the ground that the Act of 1849 applied specially to poor rates. That is a point which the Court of Appeal have not dealt with. They have impliedly considered it of none effect, therefore we must take it for the purpose of poor rates all the provisions of the Act of 1817 apply. If the Act of 1817 had created a special statutory remedy for this particular grievance, I think that Mr. Randolph's point would have been a perfectly good one; because I think there is abundant authority with regard to such a matter as this if there is a special tribunal whereby relief is given in respect of breaches of duty under a statute that that relief must be pursued. I need not go into those cases. Mr. Randolph cited two (*Barraclough* v. *Brown*, H. L. (E.) [1897] A. C. 615, 45 W. R. Dig. 152, and *Grand Junction Waterworks Co.* v. *Hampton District Council*, [1898] 46 W. R. 644, 2 Ch. D., at p. 346), and there are many others. But in the first place, if you look at the Act of 1817 itself I think it is pretty plain that it is not intended to interfere with other rights of action because section 4 provided as it then stood: "It shall be lawful for such justice, if he shall find that the complaint of the party or parties aggrieved is not well-founded, to order and adjudge costs not exceeding twenty shillings to be paid to the party or parties complained against, which order shall be carried into effect and levied and paid in such manner and with like power of commitment as is hereinbefore directed as to the order and judgment founded on such original complaint. Provided always that nothing herein contained shall empower such justice to make any order or judgment against the landlord for whose benefit any such distress shall have been made, unless such landlord shall have personally levied such distress. Provided always that no person or persons who shall be aggrieved by any distress for rent or by any proceedings had in the course thereof, or by any costs or charges levied upon them in respect of the same shall be barred from any legal or other suit or remedy which he or they might have had before the passing of this Act." Therefore, the extension of the provisions of the Act of 1817 to a number of other rates, including poor rate, by the Act of 1849 applied to all the provisions of the Act of 1817, including the provision of the right of recovery in other ways if other remedy was not barred.

That seems to have been the view taken by Lord Blackburn (then Blackburn, J.), in *Nott* v. *Round*, L. R. 1 Q. B. 405, 14 W. R. Dig. 31. That was an action which was brought against a bailiff for charging greater charges than the schedule allowed, and there the learned judge decided in favour of the bailiff on the ground that he had not committed a breach under the statute but had acted perfectly *bonâ fide*. The learned judge there said "he may be liable to be made to refund, by an action in the county court, charges which were unnecessary or not strictly lawful, but he is not liable to the treble penalty." In that judgment Shee, J., concurred. Although I do not say that it was absolutely necessary to the decision, it is a very strong point in favour of Mr. Montgomery's view, and it was at any rate upon a matter which had certainly to be considered by the learned judge because he was dealing with what the rights and remedies were against the bailiff under the section of the Act of 1817. I also think that Mr. Montgomery is entitled to rely, at any rate in this court, upon what I may call the effect of the authority in the case of *Headland* v. *Coster & Lamb*. That was an action in the county court brought in order to recover the excess amount. There the Court of Appeal overruled our decision in *Hill* v. *Pannifer* and decided that the action would lie, or, at any rate, treated the action as lying, and decided that in that action the plaintiff was entitled to recover such amounts as were in excess of the charges under the Act of 1817. It is scarcely possible to think, therefore, that they had not before them the provisions of the Act of 1817; and they either took the view that section 4, to which Mr. Montgomery has called attention, was an answer, or at any rate, that the power to proceed under the Act of 1817 was not sufficient to oust the plaintiff of his right to recover elsewhere in respect of an unreasonable amount either above the schedule or below the schedule price which he alleged had been charged against him. It is said that Mr. Danckwerts, the very learned counsel who argued the case for the respondents, and who tried to support *Hill* v. *Pannifer*, declined to take this point that the jurisdiction of the county court was ousted by the Act of 1817, or rather that the remedy must be under the Act of 1817. That, if so, rather strengthens Mr. Montgomery's view; but, in any event, it seems to us that this court, having regard to the language of Blackburn, J., and the proceedings of the Court of Appeal in *Headland's case*, ought to hold that the county court judge had jurisdiction and ought to have entertained the action in respect of which this rule has been moved. I think therefore the order must be made absolute for the county court judge to hear and determine the case.

KENNEDY, J.—I agree.

RIDLEY, J.—I agree.

Order made absolute with costs accordingly.

Solicitors, *Lloyd-George, Roberts, & Co.*, for *Bowen & Symes*, Weymouth, for the rule.

Solicitors, *Bisgood & Marshall*, for *Austen Whetham*, Bridport, against the rule.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) May 17.

Ex parte COHEN & COHEN. (*a.*)

Solicitor—Costs—Taxation—Third party—Agreement—Indemnity—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

A third party, who has agreed to pay the costs incurred in an action of another party, does not by obtaining an order for taxation under section 38 *of the Solicitors Act,* 1843, *enlarge his liability, and cannot be charged with items which could only be claimed by the solicitor as against his own client by virtue of express instructions.*

In re Longbotham & Sons (52 *W. R.* 660) *followed.*

Judgment of Swinfen Eady, J. (ante, *p.* 315, [1905] 1 *Ch.* 345) *affirmed.*

This was an appeal from a decision of Swinfen Eady, J., arising out of a former decision (reported *ante,* p. 315; 1905, 1 Ch. 345).

The facts are fully set out in the earlier report, and may be stated here more briefly:

From 1902 to 1904 certain litigation took place between Mrs. Cotton, a lady in the theatrical profession, and Mr. Edwardes, a theatrical manager. There was a common law action for a breach of an agreement to employ the lady, and a Chancery action to restrain singing a song. Both actions were stayed by an agreement dated the 12th of January, 1904, whereby Mr. Edwardes, who is herein referred to as the third party, agreed to pay the costs of the other party "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." A petition for the taxation of the costs was presented, and the master partly taxed the bill. The bill included several unusual items, which had been incurred on the express instruction of the client. The solicitors for the third party carried in objections, and, on the suggestion of the master, obtained an order to tax under the Solicitors Act, 1843, s. 38. On taxation under this order the master disallowed several items as unusual and unreasonable for the third party to pay. The solicitors carried in objections to the effect that the agreement was an indemnity agreement, and that in any case the bill must be taxed between the solicitors and their own client, and all items properly allowable against the client and within the scope of the agreement must be allowed against the third party. The master declined to entertain these objections.

The solicitors then took out a summons to review the taxation and vary the certificate.

On the case coming before him Swinfen Eady, J., expressed the opinion that the agreement was not an indemnity agreement, and that on a taxation under section 38 of the Solicitors Act, 1843, there might be a considerable number of items for which the client might be liable to the solicitor—*e.g.*, items incurred by the express instructions of the client—yet that the third party might not be liable to pay; but that when once the items for which the third party was liable were ascertained, the taxation must proceed as between the solicitor and the party chargeable, and not as between the solicitor and the third party; the master, however, having stated not that he had taxed as between the solicitor and the party chargeable, but as between the solicitor and the party liable, he thought that the proper course would be to send the matter back to the master to review his taxation, and he would amend his certificate.

This was done, and on the 17th of April the matter came before the court on a second summons to review, when it appeared that the master had taxed on the right principle—namely, that obtaining an order under section 38 had not enlarged the third party's liability, that the bill must be taxed as between the solicitors and the client and not as between the solicitors and the third party, and that the agreement was not for indemnity, but meant that reasonable and proper costs should be paid by the third party, leaving unusual costs to be borne by the client.

Swinfen Eady, J., held that the case was covered by his former judgment, and dismissed the summons with costs.

The solicitors appealed.

Hon. E. E. Macnaghten, K.C., and *Greenwood*, for the solicitors.—In the first place, on the construction of this agreement it was an indemnity agreement and covered all costs the client is liable to pay. Secondly, by electing to tax under section 38 the third party is precluded from objecting to any item allowable against the client and within the scope of the agreement. The case is really covered by the decision in *In re Holliday and Godlee*, 58 L. T. 301, 36 W. R. Dig. 56. That case was recognized in *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, which was followed by the Court of Appeal in *In re Longbotham & Sons*, 52 W. R. 630, [1904] 2 Ch. 152; *In re Blythe and Fanshawe*, 31 W. R. 283, 10 Q. B. D. 207; *In re Brown*, 15 W. R. 1030, 4 Eq. 464; *In re Morecroft*, 29 SOLICITORS' JOURNAL 471; *In re Negus*, 43 W. R. 68, [1895] 1 Ch. 73.

Cave, K.C., and *Peterson*, for the respondent, were not called upon.

VAUGHAN WILLIAMS, L.J.—In my judgment the decision of Swinfen Eady, J., was quite right and ought to be affirmed. In substance the argument of counsel for the appellants to-day was divided into two parts. The first argument is really upon the construction of this agreement. We were invited, as was Swinfen Eady, J., to construe this agreement according to its words as an indemnity agreement. Counsel pressed that view upon us to a certain extent. I do not think that he urged upon us, certainly he did not do so very strenuously, that the items disallowed by the taxing-master could come within this agreement, unless we acquiesce in the contention that this is an indemnity agreement. Something certainly was said to suggest that even if we construed this agreement otherwise than as an indemnity agreement the decision of the taxing-master would not be justified. But it does not seem to me that really that point was discussed at all before Swinfen Eady, J., and it is a matter on which the decision of the master cannot be seriously impeached as a decision on a question of fact. I look for one moment at the agreement to see whether it is an indemnity agreement. Paragraph 4 contains a passage by which Mr. Edwardes agreed to pay Mrs. Cotton's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." In my judgment that is not an indemnity agreement. I think that, construing these words naturally, according to their plain meaning, they were not intended to include any costs which Mrs. Cotton might have chosen to incur relating to the matters in dispute, but only such as were reasonable and proper and necessary in the actions. I do not propose to say anything more upon the

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

question of the construction of the agreement. That is my view. It is manifestly not an indemnity agreement.

Now, taking that to be so, the second point was, that by electing to tax under section 38 a third party is precluded from objecting to any item which the client could be called upon to pay by the section and within the scope of the agreement. We have got rid of any question of the scope of the agreement, so that leaves it that the effect of section 38 is that a third party who chooses to obtain an order for taxation under the section alters the nature and scope of his liability. In substance that is what was contended before us to-day and, so far as I can make out, before Swinfen Eady, J. The learned judge began his judgment by saying "It is quite clear from the decision in *In re Gray*, the principle of which was affirmed by the Court of Appeal in *In re Longbotham & Sons*, that where a third party obtains an order to tax it does not alter the nature or enlarge the scope of his liability." I entirely assent that that was our decision in *In re Longbotham & Sons*, and I say again, as I said in that case, that we were merely following that which had been laid down by Cozens-Hardy, J., in *In re Gray* and by Chitty, J., in *In re Negus*. What was laid down by Cozens-Hardy, J., in *In re Gray* was as follows: "With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third party order to tax." The learned judge referred to the judgment of Chitty, J., in *In re Negus* and read a long passage from that judgment beginning "The other point remains, viz., that this is a third party taxation and the general rule is that a third party stands as between himself and the solicitor whose bill he is taxing in the position of a party chargeable. But that rule does not prevent the taxing-master from considering the question of the liability of the third party." Speaking for myself, I do not think it is necessary to say any more. I agree with the judgment of Swinfen Eady, J. I think his judgment followed, as indeed he said it followed, our own decision in *In re Longbotham & Sons*, and I really regard the argument which has been addressed to us to-day as an attempt to persuade us that we were wrong in that case.

I will add a word upon *In re Gray*. It is said that in that case Cozens-Hardy, J., recognized the decision in *In re Holliday and Godlee*. I cannot agree with that suggestion. In *In re Gray*, [1901] 1 Ch., at p. 246, Cozens-Hardy, J., in dealing with the case before him, said: "In the present case it was conceded by counsel for the solicitors that certain charges inserted in the bill, though proper as between the solicitors and their client, ought to be excluded from the bill, and the master has taken this view. I refer to charges with reference to a writ for specific performance of the agreement for a lease. The master has also struck out from the bill the costs relating to the counterpart lease although such costs were clearly proper as between the solicitors and their client. How is the line to be drawn? There is great difficulty in arriving at a satisfactory answer. I think that the true view is that the third-party order does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based." The learned judge said that, just after he had been dealing with the judgment of North, J., in *In re Holliday and Godlee*—and it seems to me, therefore, quite plain that what he was doing was simply to distinguish *In re Gray* from *In re Holliday and Godlee*, upon the ground which brings in *In re Gray* and also the case now before us within our decision in *In re Longbotham & Sons*. In my judgment it does not make any difference whatsoever that in *In re Longbotham & Sons* the liability was that of a mortgagor to mortgagee, and therefore was not the result of an agreement *inter partes* but of an agreement implied by law, or whether the obligation arises from an agreement *inter partes*. In either case, if there is an obligation limited by an agreement, whether implied by law or *inter partes*, obtaining an order under section 38 does not alter or enlarge the liability. I think, therefore, that this appeal ought to be dismissed with costs.

ROMER, L.J.—I also am of opinion that this appeal fails. First, on the question of the construction of the agreement, I have come to the conclusion that Mr. Edwardes did not contract with the lady to indemnify her against all sums which she might have to pay, nor against all the liabilities which she might have incurred to her solicitors. The agreement speaks of costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed as taxed." In my opinion the proper construction of that agreement is that Mr. Edwardes made himself liable for all costs which would ordinarily be allowed between solicitor and client on taxation. In my view he did not make himself liable for items which could not be properly charged by the solicitor against his own client except by virtue of some special agreement. Test it in this way: Suppose the lady had agreed to pay £50 to the solicitor as a retaining fee, and assume that it was paid in circumstances which precluded her from getting it back again, could it be said that it was within the contemplation of the parties to this agreement that Mr. Edwards should be liable to pay such an item as that? To my mind, no. I think that he has contracted to pay solicitor and client costs to be taxed in the ordinary way without regard to any special arrangement which may have extended the original client's liability.

That being the construction of the agreement, Mr. Edwardes was a third party entitled to obtain this order under section 38. Since the full discussion of of these third party orders in *In re Longbotham & Sons*, and in the cases then cited, it is clear at the present day that a third party obtaining such an order does not make himself liable to pay such items as I have referred to, which could not be charged by the solicitors as being solicitor and client costs except by virtue of a special arrangement. To hold otherwise would be to prevent third parties from obtaining the benefit of section 38. Either he would have to forego taxation or, if he obtained it, he would find himself liable to pay sums which could not be anticipated by him, and for which as third party he was not liable. Applying the general principle of *In re Longbotham & Sons* to this case, it is clear that the items disallowed by the taxing-master were items for which Mr. Edwardes was not liable. They are items for which the lady would not have been liable to her own solicitor but for the special arrangement between them. Unless the solicitor had explained these items to Mrs. Cotton and shown her that they could not be properly charged against her, and would not be allowed on a party and party taxation, and obtained her special authority, these items could not have been charged against her by her solicitors. Therefore the third party is not liable. They are items to my mind for which a third party is not liable and which would not come within the liability which he incurred under the present agreement, and his liability is not enlarged because he obtained the advantage of

section 38. That ends the case. But I should like to say a word on the so-called hardship to solicitors which may be caused by this decision. The hardship would be the other way to my mind if we decided differently. It would be a great hardship if a person who had made himself liable to pay solicitor and client costs of the ordinary kind could by obtaining an order under section 38 find himself liable to pay sums which he knew nothing about, and which could only be chargeable against the client by virtue of some special agreement. There, to my mind, would lie the hardship; on the other hand, I see no hardship on the solicitors. They have always the liability of their own client to fall back upon. Every solicitor knows his liability to have his bill of costs taxed. His bill is always liable to be taxed under the third party section, and if he puts into his bill items which cannot be charged against a third party, it is no hardship on him if they are not allowed. Nor is it any hardship that he cannot be allowed against the third party items which can only be allowed by special agreement when his bill is taxed as between solicitor and client. On the question of hardship I am clear that our decision ought to be the same.

STIRLING, L.J.—I am of the same opinion. There are two points to be considered. First, the construction of the agreement entered into with the third party, and, secondly, whether the circumstance that the party who is liable to pay has taken advantage of section 38 makes any difference. The agreement is that the third party is to pay the client's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." To my mind that means proper and reasonable costs relating to the matters in dispute and does not extend to costs which the solicitors could only recover from their client if they showed that they had obtained proper authority from her after giving her an explanation. Then does the fact of an order having been obtained under section 38 make any difference? Prior to the decision in *In re Longbotham & Sons* there was a great deal to be said on that question, but I understand that that decision was intended to affirm the law as laid down by Cozens-Hardy, J., in *In re Gray*, where it was said, at p. 248, ". . . even on a third party taxation the court is bound to look at the nature of the items and to consider whether apart from the order the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill as against his own client a series of items some of which may go beyond the liability of the third party the third party does not by obtaining an order to tax render himself liable to the whole bill. With respect to matters falling within his liability under a contract express or implied he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third party order to tax." That being the view which I take, I think that the judgment of Swinfen Eady, J., was right and that the appeal fails.

Solicitors, *Cohen & Cohen; Slark, Edwards, & Co.*

High Court of Justice.

Chan. Div.
Swinfen Eady, J. } May 3, 4.

In re GOULDER (DECEASED).
GOULDER *v.* GOULDER. (*a.*)

Will—Absolute gift—Legacy on condition—Share of residue at time of testator's decease or at any time prior to actual payment of share—Gift over on bankruptcy—"Actual payment"—"Actual receipt"—Vesting of legacy—Notice—Assignment by trustee in bankruptcy—Effect of gift over—Authorities.

Bequest by a testator after death of a tenant for life of a share of residue to J., "but if J. should be unable at the time of his (the testator's) decease, or at any time prior to the actual payment to him of his share or any part thereof on the division of the estate, to give a receipt to his trustees for his share by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share either in whole or in part," then in such case the share, or that part which he could not receive for his own benefit, was to be divided equally between J.'s children. On the day of distribution by the trustees they received notice that two bankruptcy notices had been served on J., and accordingly refused to pay him his share of the residue.

Held, on the construction of the will, that the divesting had happened before the legacy had taken effect, and that the gift over was valid, and must be given effect to.

Johnson *v.* Crook, 28 *W. R.* 12, 12 *Ch. D.* 639; *In re* Chaston, Chaston *v.* Seago (29 *W. R.* 778, 18 *Ch. D.* 218); *In re* Wilkins, Spencer *v.* Duckworth (29 *W. R.* 911, 18 *Ch. D.* 634), *followed.*

Martin *v.* Martin (14 *W. R.* 986, *L. R.* 2 *Eq.* 404) *and* Bubb *v.* Padwick (28 *W. R.* 382, 13 *Ch. D.* 517) *disapproved.*

Adjourned summons.

This was a summons taken out by the trustees and executors of the will of James Goulder for the purpose of determining whether the gift over of a share or part of a share of residue bequeathed by the testator to his brother on his being unable at any time prior to "actual payment" of such share to give a receipt "by reason of his having committed or suffered any act whereby he had deprived himself of the benefit thereof," was valid or not. The facts were as follows:

By his will dated the 22nd of November, 1894, the above-named testator, after appointing George Goulder and Thomas Hattersley trustees and executors of his said will, and after sundry bequests, devised and bequeathed all the residue of his real and personal estate whatsoever and wheresoever unto and to the use of his trustees upon certain trusts therein mentioned until the decease of his said wife, and on her death after providing for certain payments therein mentioned, upon trust to divide the same into eleven equal parts, and to pay (*inter alia*) two eleventh parts to his brother John Goulder for his own use absolutely, and the testator further provided that if his said brother should be unable at the time of his (the testator's) decease, or at any time prior to the actual payment to him of his share or any part thereof on the division of the estate, to give a receipt to his trustees for his share by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share, either in whole or in part, then such share or that part which his said brother could not receive for his

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

own benefit was to be paid unto and equally between such of his said brother's children as should then be living.

The said James Goulder died on the 23rd of November, 1894, and his will was duly proved by the said executors and trustees.

The widow died on the 16th of August, 1904. The amount of the residue realized after the death of the widow amounted to £986 7s. 6d.

On the 31st of October, 1904, the trustees requested their solicitors to write to the various beneficiaries under the will explaining that they would be prepared to distribute the estate on the 2nd of November. On that date the trustees' solicitors received notice that two bankruptcy notices had been served on the said John Goulder and that the bankruptcy was fixed for hearing next day. The solicitors thereupon, at an interview the same day, informed John Goulder that in consequence of this information they advised the trustees not to pay to him his share in the two-elevenths, as under the trusts of the will it would pass to his children.

A receiving order was made against the said John Goulder on the 3rd of November, and on the 1st of December a Mr. J. L. Taafe was appointed trustee in bankruptcy of his estate. By an indenture dated the 20th of March, 1905, the said J. L. Taafe as trustee assigned to E. D. Mullis, G. H. Johnson, and H. H. Stones, as assignees, the two-eleventh parts or shares of the said John Goulder in the residue of the said sum of £1,200. The originating summons having been already issued, the three assignees were joined respondents. The remaining respondent, as a son of the said John Goulder, claimed to be entitled to his father's share under the gift over.

Owen Thompson, for the trustees.

W. M. Hunt, for the persons claiming under the gift over.—Under the circumstances the bankrupt's share has passsd to his children. The acts of bankruptcy were the non-compliance with a bankruptcy notice: *Ex parte Eyston, In re Throckmorton*, 26 W. R. 181, 7 Ch. D. 145. Here the testator uses the word "suffer," therefore non-compliance with a bankruptcy notice is "suffering any act," &c.: *Johnson* v. *Crook*, 28 W. R. 12, 12 Ch. D. 639; and see Malins, V.C.'s, remarks in *Bubb* v. *Padwick*, 28 W. R. 382, 13 Ch. D. 517, on p. 523.

Gatey, for the assignees, cited *Martin* v. *Martin*, 14 W. R. 986, L. R. 2 Eq. 404. This case is entirely distinct from *Johnson* v. *Crook*, and it is governed by *Martin* v. *Martin*. *Hutchin* v. *Mannington*, 1 Ves. jun. 367, is the groundwork of all these cases; in which the judge says there must be a definite time before which your gift over takes effect: *Minors* v. *Battison*, 25 W. R. 27, 1 A. C. 428, on p. 443 (Lord Hatherley) and p. 446 (Lord O'Hagan's remarks); *Collins* v. *Macpherson*, 2 Sim. 87. Fry, J.'s, approval of *Johnson* v. *Crook* is outweighed by *Martin* v. *Martin*: *Bubb* v. *Padwick*, 28 W. R. 382, 13 Ch. D. 517.

SWINFEN EADY, J.—The question is, What is the true construction of the language which the testator uses in his will? By that will a sum of £1,200 is set apart for the widow for life, and after her death the residue is divided into eleven equal parts, two-elevenths of which he leaves to his brother John Goulder absolutely. Then follows the proviso on which the question turns: "Provided always that in the event of either of my said brothers John Goulder and Alfred Goulder being unable at the time of my decease, or at any time prior to the actual payment to him of his share or any part of his share on the division of my estate, to give a receipt to my trustees for his share by reason of his having committed or suffered any act whereby he has deprived himself of the right to the benefit of such share, either in whole or in part, then I direct my trustees to stand possessed of the share of such brother, or that part of such share which my said brother is unable to receive for his own benefit, and to pay the same unto and equally between such of his children as are then living, as being sons shall attain or have attained the age of twenty-one years, or being daughters shall attain or have attained that age, or shall marry or have married under that age, and if there be only one such child, then all to such one child." Now, the estate was insufficient to provide this sum of £1,200, therefore there was no residue as to that. The widow died on the 16th of August, 1904, and thereupon so much of the estate as was set aside for this sum of £1,200 by the trustees—namely, £986 7s. 6d., became then divisible.

The notice by the trustees that they would be prepared to distribute, was made as early as the 2nd of November, when they had received notice of these acts of bankruptcy committed by John Goulder. On the 16th of November he was adjudicated a bankrupt. It has not been successfully disputed that before the actual payment he had committed this act of bankruptcy by non-compliance with a bankruptcy notice. It is said that the true construction of the will is, if John "should" commit or suffer any act, &c., before the actual date at which it shall be payable—that is, before the death of the tenant for life. I am of opinion that the will is a great deal too clear to permit of effect being given to that proposition. The testator provides that the whole or any part of his share is to go over, and he evidently contemplates the date of the actual payment as the date for giving the receipt, and also, when the son shall actually receive payment of such as is his share.

The will also contemplates that there may be successive payments, but before he actually receives any he may be disqualified, and so much as he does not receive is to go over. Counsel for the assignees referred me to *In re Sampson*, 44 W. R. 557, [1896] 1 Ch. 630. [His lordship referred to Stirling, L.J.'s (then Stirling, J.), remarks on pp. 634, 635.] I am of opinion that upon the true construction of this will the words are not susceptible of the construction placed on them in that case, they are clear and refer to the share or any part thereof. Also in the present case the language of the testator is much stronger than in *Martin* v. *Martin*, 14 W. R. 986, L. R. 2 Eq. 404, another of the cases on which counsel for the three assignees laid so much stress (see the remarks of Wood, V.C., on p. 413), and when the testator here gives these shares, he means "actual payment," and he refers to the legatee giving an actual receipt. Having arrived at that conclusion, the question remains, Is such a proviso legal? Can the law give effect to it? In *Johnson* v. *Crook*, 28 W. R. 12, 12 Ch. D. 639, Sir George Jessel examines the cases, and he points out such a proviso was lawful, and the rule of law to prevent effect being given must be one that is definite and certain. In *In re Chaston, Chaston* v. *Seago*, 29 W. R. 778, 18 Ch. D. 218, and *In re Wilkins, Spencer* v. *Duckworth*, 29 W. R. 911, 18 Ch. D. 634, Fry, J., in both cases approves *Johnson* v. *Crook*. It is clear that you may have a gift vested and liable to be divested. The cases which counsel for the assignees relied on of *Martin* v. *Martin* and *Bubb* v. *Padwick*, 28 W. R. 382, 13 Ch. D. 517, I cannot agree with, and I must give effect to the law as laid down by Jessel, M.R., and Fry, J., in the cases I have mentioned above.

It is a common provision to make a gift to A. for life with remainder to the children of A.; the children

take vested interests. Singular as is the particular evidence on which the divesting is to take effect I must give legal effect to the will. Under the circumstances I come to the conclusion that the divesting had happened before the legacy had taken effect, and the gift over must be given effect to.

Solicitors, *Peacock & Goddard*, for *Henry Vickers, Son, & Brown*, Sheffield; *T. H. Aldous*, for *J. E. Wing*, Sheffield.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 3.

In re HENRY AINSWORTH (AN UNQUALIFIED PERSON).

Ex parte THE INCORPORATED LAW SOCIETY. (*a.*)

Solicitor—Unqualified person—Carrying on proceedings—Entering appearance as agent for defendant—Motion to attach—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 2—*Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 26—*Rules of the Supreme Court, ord.* 12, *rr.* 9, 11.

Held, that giving notice of appearance as agent on behalf of the defendant in an action was "carrying on a proceeding" within the meaning of section 2 *of the Solicitors Act*, 1843; *and, therefore, when such notice was given to the plaintiffs by an unqualified person, such person was guilty of a contempt of court by virtue of section* 26 *of the Solicitors Act*, 1860.

Motion to commit an unqualified person for contempt of court under section 2 of the Solicitors Act, 1843, and section 26 of the Solicitors Act, 1860, in carrying on a proceeding by giving notice of appearance under ord. 12, r. 9, of the Rules of the Supreme Court on behalf of a defendant in an action brought in the District Registry of Manchester.

The affidavit in support of the motion stated the following facts: On the 29th of August, 1904, a writ was issued in the Manchester District Begistry in an action of *Kirker, Greer, & Co.* (*Limited*) v. *Greenhalgh* for money lent and goods supplied.

On the 5th of September the solicitors for the plaintiffs in the above action received by registered post a notice of appearance, dated the 3rd of September, in these terms: "Take notice that I have this day entered an appearance at the office of the Registrar of the Manchester District Registry for the defendant Joseph Greenhalgh to the writ of summons in this action. The said defendant requires delivery of a statement of claim. Dated the 3rd of September, 1904. (Signed) HENRY AINSWORTH, of 24, Crompton-street, Bury, agent for Joseph Greenhalgh."

Henry Ainsworth was not a solicitor.

F. W. Hollams, for the Law Society, having stated the facts, said that Henry Ainsworth, in his affidavit filed in the motion, expressed his regret for having done anything illegal, and undertook, if the court should accept his apology, to pay the costs of the motion.

THE COURT called upon

Mallinson, for Henry Ainsworth.—There was no suggestion in the letter, or in anything that Ainsworth did, to point to his representing himself to be a solicitor. He was clearly entitled to enter an appearance, which, under the Rules of the Supreme Court, may be done by a defendant personally, or by anyone duly authorized on his behalf. That very point was decided in *Oake* v. *Moorecroft*, 18 W. R. 115, L. R. 5 Q. B. 76. It was therefore not an illegal act to enter the appearance, and the mere fact that he did not accurately describe what was done could not render an act that was *per se* legal illegal. Moreover, it was clear that he intended to describe what in fact was done.

F. W. Hollams, in reply.—If instead of giving notice of appearance Ainsworth had delivered a defence the case would have been unarguable. There was no real distinction between the two cases, for each was a step in the proceedings, and therefore notice of appearance equally with delivery of defence could only be taken either by the defendant himself or by his solicitor.

Lord ALVERSTONE, L.C.J.—In this case I think I am justified in saying that a technical offence has been committed. It was urged for the respondent that he was justified in taking a document signed by the defendant to the registrar so that an appearance might be entered, and having done that, he was justified in any form in telling the plaintiff that he had taken that step. I am not prepared to say if that was all that Mr. Ainsworth had done it might not be an answer to that which is a technical breach of the rules. I think that rule 9 of order 12 means more, and I think it means that "the defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of appearance (Form No. 2 in Appendix A, Part II.) to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing. served in the ordinary way at the address for service (which, in the case of a writ issued out of a district registry, must be the address for service within the district), or by prepaid leter," and so on. The form is given; the statute contemplates that step being taken in the action. When the document is looked at it is a document in which Henry Ainsworth states that he has this day entered an appearance for the defendant Greenhalgh, and he requires delivery of a statement of claim, and it purports to be signed by Henry Ainsworth, agent for Joseph Greenhalgh. I think it was intended that the notice should be given either by the defendant himself or by his solicitor, and the intervention of a third party acting for the defendant purporting to do that which the rule states is taking a step which would properly be taken when a man does not do it himself by a solicitor was, under the circumstances, a technical breach of the rules. I agree with Mr. Hollams that, this explanation having been given, although beyond pointing out what is right and wrong in the matter it is not of great importance—we might accept Mr. Ainsworth's offer to express regret that he has broken the rule, and pay the costs. We see no reason not to hold him to that, and I think we ought to give effect to it, and make that order, notwithstanding the contention Mr. Mallinson has urged upon us.

KENNEDY, J.—I am of the same opinion. It seems to me this was carrying on a proceeding in the action. The document was one prescribed by the rules and forms, and there is common sense and meaning in insisting on the rule being followed out. This document is sent to the plaintiff or his solicitor, the complaining party; he looks at the signature, and if he has the signature of a person who says he is agent for the defendant, he has neither the assertion of the defendant nor of the only class of persons who according to the law can represent—and if he represents falsely is subject to very serious pains and penalties—namely, a responsible solicitor who says: "I have entered an appearance." What he has on the face of this document is not that contemplated by the rule, the word "agent" there being used to

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

meet the case, so to speak, of the person being not the solicitor himself, but the agent for the solicitor, and not the agent for the defendant. All the plaintiff gets in this case is the signature of a person without any proof that he had the authority of the defendant to make this entry and send this official document. Mr. Mallinson argued that it is merely a notifying to the plaintiff of the defendant's act by a third party which, according to decision and authority, was permissible. It is clearly decided that the defendant need not attend personally to enter an appearance, and the appearance is good though delivered to the officer by a third person. But it must be borne in mind that in that case it has the signature of the person who is sued upon it.

RIDLEY, J.—I agree. Although it is possible for the defendant to properly enter his appearance without doing it in person, yet when you come to deal with ord. 12, r. 9, it is necessary for either the defendant personally, or a solicitor properly authorized to represent him, to give the notice, and I cannot see how the requirements of the rule are complied with unless that is so.

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Solicitor for the respondent, *R. H. Bentley.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) } Jan. 20; April 14.

LANDAUER *v.* ASSER. (*a.*)

Arbitration—Award bad in point of law—Marine insurance—Depreciation in value of goods covered by policy—Undertaking—Covering note—Usage.

A contract of sale contains a term that A., the vendor, shall effect on account of L., the vendee, insurance for 5 per cent. over net invoice price. Subsequently to the sale A. receives an undertaking from his vendor to hold a policy of insurance for account of A. to the extent of the value of the goods sold to A.—viz., £1,280, which goods A. has by the old contract resold to L. at a depreciated price—viz., £1,107. L. having paid the contract price, A. hands over to him the shipping documents, including the said undertaking. A. alleges that the mercantile usage in such cases is not to hand over the undertaking, but a covering note for the actual value of the goods insured, and that it was owing to a mistake of a clerk that it was not the course pursued in this case. The goods were destroyed by fire after the property in them had passed to L. The underwriter paid L. £1,280 in pursuance of the undertaking. A. claims the amount represented by the difference between £1,280 and £1,107, and goes to arbitration under a clause in the contract. The award delivered pursuant to these proceedings stated that under the contract A. was entitled to the sum in dispute.

Held, that inasmuch as it was not a term of the contract that A. should be entitled to the sum in dispute, the award was bad in point of law on its face, and therefore must be set aside; that A. having no legal title to recover anything from the underwriters by reason of the fact that he had lost all interest in the property insured, he could have no better title against L. unless under an express or implied stipulation to that effect.

Held, further, that even if there were a mercantile usage supporting A.'s contention, yet the umpire had not so found in his award.

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Quere (Kennedy, J.) *whether such a usage could be supported in a court of law.*

This was a motion to set aside the award of an umpire on the grounds that it was bad in point of law on its face. The facts material to the case are fully set out in the judgment of the Lord Chief Justice.

Leck, for the appellants Landauer & Co.—I agree if the underwriters had tendered the appellants £1,107 they could have claimed no more; but, seeing that they, the underwriters, are willing to pay the full amount—viz., £1,280, the appellants are entitled to retain it for themselves. The vendors had lost all interest in the property insured, and therefore could not have maintained an action against the underwriters: see *Ralli* v. *Universal Marine Insurance Co.*, 10 W. R. 278. The award professes to construe the contract of sale, and has plainly misconstrued it, and the award must be set aside.

J. H. Hamilton, K.C. (*F. Gover* with him), for the respondents Asser & Co.—Where there is an error in law on the face of an award I agree that there are grounds for appeal, but it must appear from the documents referred to in the award that the umpire was wrong in law. Mercantile usage must be taken into consideration, and in this case the umpire must, as a matter of fact, have taken it into consideration before he could have given any legal effect at all to the insurance documents, for the actual facts show that on the first sale the seller to the respondent declared on a floating policy, which declaration was accepted by the respondents, who might have insisted upon a fresh marine policy; the underwriters, but for the mercantile usage, could not be compelled to pay on such a declaration at all. There is evidence on affidavits of a usage that in the case of a resale of a portion of goods duly insured a covering note to protect the purchaser to the value of the goods sold is handed over, and the umpire took that into consideration. He was entitled to do so, the submission to arbitration being of the usual mercantile character. In the *Ralli case* the policy was an existing policy, but in this case it was not existing at all at the time of the contract, and was to be under the terms of the contract for strictly a limited amount—viz., 5 per cent over net invoice price. *Tamvaco* v. *Lucas*, 3 B. & S. 89, shows that it is a question of fact as to what documents the buyer is entitled to have handed over to him, therefore the umpire was entitled to treat the question in this case as a question of fact.

He referred to *Ionides* v. *Harper*, 29 L. J. Exch, p. 36.

Leck, in reply.—The award does not show that the umpire took into consideration the question of usage at all. No usage could give Asser & Co. an interest so as to support a claim against the underwriters. [KENNEDY, J.—Suppose there had been a clause in the contract to some such effect as "any excess to be held by you for me." Would that have bound the appellants?] That would not have been binding, because it would have been illegal. It would have been in the nature of a gambling contract: *Lloyd* v. *Fleming*, 20 W. R. 296, L. R. 7 Q. B. 302.

Cur. adv. vult.

April 14.—Lord ALVERSTONE, L.C.J., read the following judgment: This was a motion to set aside an award made by Mr. Bibby, an umpire appointed under an arbitration clause in a contract for sale of the 3rd of November, 1903. The only ground on which it is alleged that the award should be set aside is that the arbitrator has gone wrong in point of law.

and that the error in point of law appears upon the face of the award. There is no doubt whatever that if this can be established the award ought to be set aside: see *Hodgkinson* v. *Fenice*, 3 C. B. N. S. 189. The contract of sale was dated the 3rd of November, 1903, and made between Messrs. Landauer as purchasers, and Messrs. Asser & Co. as sellers, of 250 bales of Manilla hemp at the price of £35 10s. per ton cost, freight, and usual f. p. a insurance. The shipment was to be made from the Philippine Islands, Hong Kong, or Singapore to London, between the 1st of January and 31st of March, 1904. The contract contained the following clause: "Should hemp or any portion thereof not arrive in London from loss of vessel or unavoidable cause this contract to be fulfilled for such portion by handing documents including insurance policy against payment of invoice; but should the hemp or any portion thereof be transshipped and arrive in other vessel or vessels for account of the original sellers the contract shall hold good for such portion. Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers under a f. p. a. policy, or usual Lloyds' conditions at Lloyds, or with a London insurance company, or with a company having a responsible and well-known London agent." At the time of the contract there does not appear to have been any policy in existence. The goods were paid for on the 4th of May, 1904, and on that day the purchasers, Messrs. Landauer, received from Messrs. Asser & Co. the shipping documents including an undertaking dated the 29th of April, 1904, in the following terms:

"2, East India-avenue, London, 29th of April, 1904. The Manager, Hong Kong and Shanghai Banking Corporation.—Sir,—In pursuance of directions from F. A. Coney & Co., of Mincing House, E.C., by whose order we, as their broker, effected a policy of insurance for £5,616 on hemp per steamers from Phillippines to U.K. Continent, and being dated the 29th of April, 1904, now remaining in our hands, to hold the same as far as relates to the interests declared on such policy as per declaration of £1,280 say one thousand two hundred and eighty pounds on 250 bales hemp so valued per steamship *Peleus* to London as a security for your bank to protect its interests in the subject-matter of the above declaration to the extent of £1,280, and we hereby hold such policy to the extent of the above declaration for your bank free from any lien on our part on the policy.—We are, Sir, yours, &c., G. DUNCAN & Co. (*pp.* A. DUNDAS)."

Some word is omitted in the above document, but it was treated before us as an undertaking to hold the amount of £1,280 therein mentioned. This sum, £1,280, was in excess of the net invoice amount plus 5 per cent., which it is agreed would amount to £1,107.

After the arrival in Liverpool about 160 bales of the goods were injured by fire while in the warehouses at the docks. A claim was made by Messrs. Landauer upon the insurance company, who, as I understand, made a payment on account to them of 75 per cent. and were prepared to pay over according to the terms of the undertaking the balance of the amount due upon a basis of the whole parcel being insured for the amount of £1,280. Before, however, the remaining 25 per cent. was paid over the sellers, Messrs. Asser & Co., claimed that they were entitled to receive such amount of the insurance money as represented the difference between £1,107, that is, the net invoice amount plus 5 per cent., and £1,280. The matter was referred to arbitration pursuant to the supplementary clauses of the contract. The only one of the supplementary clauses which seem to have any bearing upon the matter is clause 5: "The evidence and proceedings upon arbitration may be taken in a mercantile way without regarding legal technicalities respecting evidence."

Mr. Bibby made his award in the following terms:

"Having been asked to act as umpire in the question as to the liability and interest in the policy of insurance appertaining to 250 bales Manilla hemp per *Peleus*, I decide that as the parties to the contract dated the 3rd of November, 1903, were by the terms thereof the principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent., and that the buyers are therefore entitled to and only to said amount, the balance one way or the other being due from or to the sellers."

It is alleged on behalf of Messrs. Landauer that the award is bad because it decides that the buyers are only entitled under the contract to such amount of the insurance money as represents the net price plus 5 per cent., and that the balance is due to Messrs. Asser & Co. It is alleged on behalf of Messrs. Asser that the question to be decided by the umpire was one of mercantile usage, and that he was entitled to say, under the contract, that the interests of Messrs. Landauer was limited to the extent of the purchase-money plus 5 per cent., and that, as against Messrs. Landauer, the sellers, Messrs. Asser, were entitled to receive from the underwriters and retain the difference between the amount of the insurance and the amount of the net price plus 5 per cent. The umpire appears to have decided so far as one can gather from his award that under the contract of the 3rd of November the purchasers are, as against the sellers, not entitled to claim more than £1,107 plus 5 per cent. even though the policies handed over in pursuance of the contract were intended to be so handed over as a discharge of the sellers' obligation to deliver the policy of insurance.

This seems to me to be an error in point of law. If policies are handed over by a seller under such a contract the interest in them passes wholly to the purchaser, and, assuming the underwriters to pay on those policies the amount insured, I do not see under what right the sellers are entitled to claim that the purchasers are trustees for them of any portion of the amount so insured. The sellers, Messrs. Asser & Co. had, at the time of the loss, no interest in the subject-matter of the insurance, and could not upon the facts assumed have made any valid claim against the underwriters; and if the underwriters pay, they must be taken to have paid to the persons who were entitled to the goods at the time of the loss. The only reason stated in the award for a different conclusion is that the parties to the contract were principals and not brokers, and the award states that the buyers are therefore entitled only to the value plus 5 per cent. This seems to me immaterial except, possibly, for the purpose of excluding any question of the right of the sellers or purchasers respectively to represent the interests of third parties. I can see no other bearing that it has upon the question. Although not directly in point, the case of *Ralli* v. *Universal Marine Insurance Co.*, 31 L. J. Ch. 313, supports the contention that under such a contract policies which are in fact handed over in discharge of the sellers' obligations are to be treated as belonging to the purchasers. For these reasons I think the award should be set aside and the appeal allowed.

KENNEDY, J., read the following judgment: I concur in the judgment which my lord has just delivered but it is right, as the case is somewhat peculiar, I think, to state as shortly as may be the reasons of my coming to that conclusion. It is unnecessary to recapitulate the facts which appear

in the affidavits filed by the parties on this motion. There is not really any conflict as to those which are material.

We are called upon to decide whether the award made by Mr. Bibby, acting as umpire held under the provisions of the contract of purchase dated the 3rd of November, 1903, ought or ought not to be set aside for error of law appearing upon its face. It is clear that such error affords good ground for setting aside an award; see *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189.

It appears to be clear also that Messrs. Asser & Co. had not at the time of the loss and of the insurance any insurable interest in the goods insured. They could claim from the underwriters nothing for themselves. The underwriters have paid to Messrs. Landauer & Co., who were the owners of the insured goods at the time of the loss, 75 per cent. of the amount due in respect of the insurance, and are willing to pay to pay them the balance. That balance has not as yet been paid, only because Messrs. Asser have interfered and put forward a claim that as between themselves and Messrs. Landauer & Co. it belongs to them. The case comes before us in a somewhat awkward form because the underwriters are not parties to the arbitration or bound by the award. In these circumstances seeing that Messrs. Asser & Co. can have no valid legal claim against the underwriters, I ought, I think, to treat the case as if the underwriters had paid, as they are willing to pay, to Messrs. Landauer, the full amount covered by the policy of insurance and as if Messrs. Asser & Co. were suing Messrs. Landauer & Co. in respect of so much of the money paid by the underwriters to Messrs. Landauer & Co. as represents the difference between the amount recoverable by the assured under a policy for £1,280 and the amount recoverable under a policy which would satisfy the contract of the 3rd of November, 1903.

The umpire's award as to this difference, which for brevity's sake I will call the sum in dispute, runs as follows. [His lordship read the award as set out above.]

The reasoning of the umpire which he puts forward in the expression "as the parties to the contract dated the 3rd of November, 1903, were by the terms thereof the principals thereto" is, as the learned counsel for both parties seem to agree, far from clear. I do not understand in any case how the fact helps Messrs. Asser & Co. But whatever the expression means, it is quite clear I think, that the umpire bases his decision that Messrs. Asser, the sellers, are, and Messrs. Landauer, the buyers, are not, entitled to the sum in dispute entirely upon the terms of the contract of the 3rd of November, 1903. Therefore unless that contract, properly construed, justifies the umpire's conclusion the award is upon its face bad in point of law. Is there, then, anything in the contract of the 3rd of November, 1903, which would constitute Messrs. Landauer & Co. in respect of the sum in dispute trustees of it for Messrs. Asser & Co.; or anything which would make that sum when received by them money had and received for Messrs. Asser & Co.? It appears to me that, unless one or other of these propositions can be established, Messrs. Asser's & Co.'s claim fails and the award must be set aside.

In my judgment the contract does not afford good ground for the maintenance of either of these propositions. It is a c.i.f. contract for the purchase of 250 bales of Manilla hemp, to be shipped by steamer or steamers from the Philippine Islands, Hong Kong, or Singapore to London, insurance for 5 per cent. over net invoice amount to be effected by the sellers, Messrs. Asser & Co., for account of buyers, Messrs. Landauer & Co. Messrs. Landauer & Co. admittedly performed their duties as buyers, and at the time of the loss of a part of the goods by fire were the only parties who had any interest in the goods. I will assume that, as alleged by Mr. W. Asser in his affidavit, Messrs. Asser & Co. would have correctly and sufficiently performed their duty in regard to the provisions of the contract as to insurance if they had with the bill of lading handed over to Messrs. Landauer a covering letter as described by him in paragraphs 8 and 9 of that affidavit, and as appearing in exhibit A. The business effect of this, as I assume, would have been that Messrs. Asser & Co., retaining the original undertaking of the underwriters, which they, when buying, had received from the buyers, would, upon the loss occurring, have collected the insurance moneys for Messrs. Landauer, the only parties having any legal claim against the underwriters at the time of the loss, and that Messrs. Landauer & Co. could have claimed, as a matter of legal right from the underwriters through Messrs. Asser & Co., only an amount equal to 5 per cent. over the invoice price and no more. I will assume also, as now alleged by Mr. W. Asser in paragraph 10 of the same affidavit, it was owing to a mistake, in the sense of a deviation from the ordinary course of business on the part of their clerk, that Messrs. Asser, instead of sending the covering note, gave to Messrs Landauer, as in performance of their duty under the contract in respect of insurance, the marginal undertaking of the importers' underwriter for the larger sum of £1,280. What is there in the contract to justify in these circumstances a claim on the part of Messrs. Asser & Co., whose property in the goods and insurable interest, as I have already said, had passed to Messrs. Landauer & Co. before the time of the loss, that Messrs. Landauer & Co. are trustees for them in respect of any part of the insurance moneys, whatever be the amount which may be paid to Messrs. Landauer & Co. by the underwriters? Or because, if they had handed over to Messrs. Landauer not the original undertaking but only the covering note for the smaller amount, Messrs. Landauer & Co. would not have been able to insist on receiving from the underwriters, through Messrs. Asser & Co., so much as they are now willing to pay them, to justify a claim that the surplus is being received to their, Messrs. Assers', use? It appears to me that in regard to the claim of Messrs. Asser & Co. for the sum in dispute, the alleged mistake of their clerk does not assist them. As I understand the facts, they do not lose a penny to which otherwise they would have had a valid legal claim because that Messrs. Landauer receive from the underwriters more than Messrs. Landauer & Co. might otherwise have received. The fact that Messrs. Landauer, in consequence of the alleged mistake, receive, because for some reason the underwriters are willing to pay, a larger sum than they would have received if the Messrs. Asser had merely satisfied the contractual requirements as to the insurance in the usual way, could in my opinion clothe Messrs. Asser with a legal or an equitable right to the surplus only if there is to be found in the contract an express or an implied undertaking or obligation of Messrs. Landauer in case of an insurance claim arising to hold any sum which they might receive in respect of insurance beyond 5 per cent. on the invoice price for the use and benefit of Messrs. Asser. I am unable to find any such stipulation expressed or implied in the contract. Mr. Hamilton, in his able argument on behalf of the Messrs. Asser, insisted much upon the fact that this was a mercantile arbitration, and that the umpire might properly give effect to a mercantile usage. But the award expressly and explicitly founds its conclusion upon the terms of

the contract of the 3rd of November, 1903, and makes no reference to custom or usage; and, further, it is difficult to see how there could be a custom or usage applicable to a set of circumstances which, according to Mr. Asser's affidavit, has arisen not in accordance with the ordinary course of business in the performance of the contract, but out of a clerk's mistake, which has created a peculiar and abnormal state of affairs. The only case cited to us which appears to have any real bearing upon the point is that of *Ralli* v. *The Universal Marine Insurance Co.*, 10 W. R. 278. In that case a cargo of grain from the Black Sea had been insured with the defendants under two policies, and was sold afloat when the market was low, and, consequently, at a depreciated price, including insurance. The vendor indorsed one of the policies for its full value to the vendee, and the other for about half the amount insured in it, making together the amount of the depreciated selling price of the grain. The cargo was lost, and the vendee claimed to receive from the underwriters the whole amount covered by both policies. The vendors thereupon sued the vendee and the underwriters, claiming a declaration that as to the amount covered by the last-named policy there was as to half the amount thereby insured a trust in their favour. The underwriters paid the whole amount of the insurance into court, and the litigation proceeded. The decision is not directly in point here, because the judgment of the Lords Justices was largely influenced, at least, by the fact that in that case the policies had been effected before the time of the contract of sale, and in their view the stipulations in the contract of sale as to insurance were to be read as referring to those existing policies; whereas, in the present case, the undertaking which represents the insurance was not given until some months after the contract of sale. On the other hand, the position of the vendor was in that case stronger than that of Messrs. Asser & Co. here, because he had, as I have said, indorsed over one of the policies to the vendee only for about half the amount insured in it, and it was claimed, therefore, on his behalf, that he had in this way expressly reserved to himself as against the vendee, an interest to the extent of the half of the policy. In view of this plain reservation on the part of the vendor in respect of this policy, it is noticeable that Mr. Arnould, commenting upon the case (Marine Insurance (4th ed.), pp. 308, 309) says, "The defendants (the underwriters) had paid the full amount into court in the first instance; if they had not adopted this course, and the judgment of the learned Vice-Chancellor against the vendee's claim had been affirmed, it is difficult to understand upon what principles in law the vendor would have based his claim to the balance." My view is that, as the award decides that in point of law under the contract the Messrs. Asser had a title to the sum in dispute, it is bad in point of law and must be set aside. As we have already pointed out, the underwriters are not parties to the arbitration proceedings or to this litigation, and it is therefore neither open to us nor indeed necessary to say whether in paying Messrs. Landauer, as we are assured the underwriters are willing to do, they are doing what Messrs. Landauer would as against them have required as a legal right.

Appeal allowed.

Solicitors for appellants, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for respondents, *C. W. Dommett & Son.*

Prob. Div. & Adm. Div. Admiralty. } February 23.

"THE GLENGARIFF." (a.)

Ship—Collision—Queenstown Harbour—Regulations for Preventing Collisions at Sea, art. 25.

The entrance to Queenstown Harbour must be deemed to be a narrow channel within the meaning of article 25 of the Regulations for Preventing Collisions at Sea.

Action.

The plaintiffs were the owners of the steamship *Lough Fisher*, a vessel of 418 tons gross register. The defendants were the owners of the steamship *Glengariff*, a vessel 1,285 gross register.

About 7.35 p.m. on the 30th of June, 1904, a collision occurred between the steamship *Lough Fisher* and the steamship *Glengariff* in Queenstown Harbour.

According to the plaintiffs' case *The Lough Fisher* was on a voyage from Ellesmereport to Queenstown with a cargo of coals. At the time of the collision the weather was clear and fine and the wind from the W.S.W., the tide about high and of little force. The plaintiffs' vessel was proceeding on a course of N.N.E. magnetic, making about eight knots, proceeding up channel. In those circumstances those on board saw *The Glengariff* about one and a-half to two miles off and broad on the port bow. As the Bar Rock buoy was approached *The Lough Fisher* ported her helm a little and sounded one short blast upon her whistle. As *The Glengariff* appeared to disregard this signal *The Lough Fisher's* helm was ported a little more and her engines slowed down. Directly afterwards her engines were put full steam astern and three short blasts were sounded upon her whistle, but *The Glengariff* came on and with her starboard bow struck the stern of *The Lough Fisher* and did considerable damage.

The plaintiffs contended that *The Glengariff* had improperly attempted to cross the bows of *The Lough Fisher*, and had failed both to indicate her course and to keep her proper side of the fairway.

According to the defendants' case *The Glengariff* was at the time of the collision on a voyage from Queenstown to Liverpool with a general cargo, with cattle and passengers, and was manned by a crew of thirty-one hands. She was making about twelve to thirteen knots, and was proceeding down on the southern side of the fairway. At a distance of about two miles and bearing broad on the starboard bow, those on board *The Glengariff* observed *The Lough Fisher* coming up to the westward of the fairway, and acting under a port helm as if intending to cross the bow of *The Glengariff*, *The Lough Fisher* being on the wrong side of the fairway. *The Glengariff* at once put her engines full speed astern and sounded three short blasts upon her whistle and put her helm hard aport. *The Lough Fisher*, however, came on at a high speed, and with her stern struck the starboard bow of *The Glengariff*, doing her considerable damage.

The defendants alleged that *The Lough Fisher* was not on her proper side of the fairway and had failed to take proper steps to pass port to port; that her helm was ported at an improper time and kept to port, and that her engines were not eased, stopped, or reversed in due time.

Aspinall, K.C., and *A. D. Bateson*, for the plaintiffs.—Article 19 was infringed by reason that *The Glengariff* did not keep out of the way when she had *The Lough Fisher* on her starboard side. By attempting to cross ahead of *The Lough Fisher The Glengariff* infringed

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law

article 22, and in neglecting to keep that side of the channel which was on her starboard side she committed a breach of article 25.

They cited *The Leverington*, 11 P. D. 117, 34 W. R. Dig. 175; *The Ashton*, [1905] P. 21.

Laing, K.C., and *Dumas*, for the defendants, cited *The Gustafsberg*, *ante*, p. 350, [1905] P. 10; *The Pekin*, [1897] A. C. 532; and *The Velocity*, L. R. 3 P. C. 44.

BARGRAVE DEANE, J., in giving judgment, said: This is an action for damages caused by a collision between *The Lough Fisher*, a steamship of 418 gross and 168 tons net register, and *The Glengariff*, a steel screw steamer of 1,285 tons gross and 487 tons net register, and 450 horse-power nominal. One vessel is a great deal larger and more powerful than the other. The collision was brought about by one vessel crossing the bows of the other, and the damage done shows to us that both had way on them at the time of the collision. It is true that the master of *The Glengariff* says that he was stopped, and when I asked him the question he said he was going astern through the water, but the mate, who was called, agreed that he was stopped in the water, which would mean that he still had about two knots over the ground, with the tide. That would be fast enough to cause the undoubted damage, which consists in the stern of *The Lough Fisher* being drawn over to starboard. The damage actually done was done by the starboard bow of *The Glengariff* near the hawsepipe, the patent anchor in the hawsepipe being driven right through the bow of *The Glengariff*, and there is no doubt that was the hard substance which caused the damage done to the stem and bow of *The Lough Fisher*. This case has given the court a good deal of anxiety, because it involves a very large and very important question. The entrance to Cork Harbour is in one sense a very narrow entrance; that is to say, it is very narrow to the southward, where there seems to be only a few hundred yards where vessels must come in, and then there is a fairway which has been marked by buoys by the local authorities. It leads a little to the eastward of north until you come up further, and then it leads more to the westward, but to the westward of that long stretch of fairway there are several hundred yards—I think we have worked it out at about 400 or 500 yards—of navigable water. The question is, what is the effect of the various rules on a condition of things like that? There is article 25, which says that, "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." What is a fairway? A fairway is practically defined by this article to be mid-channel. There is no rule which says that people shall keep in the fairway, but the rule says that they shall keep to the starboard side of that fairway or mid-channel—that is to say, in narrow channels. What is a narrow channel? I do not think it has ever been laid down what is a narrow channel. There have been cases in which certain places have been held to be narrow channels, and in which definite decisions have been given on definite facts; but this is the first case, as far as I know, in which the question whether Queenstown Harbour is a narrow channel has been raised. We have discussed it at considerable length, with every possible effort to arrive at a definite conclusion, and the Trinity Masters are very strongly of opinion that this is a narrow channel, and that the channel extends from one side of the whole of this navigable channel to the other, and that article 25 requires all vessels passing up and down to keep to the starboard side. If that is right, and I so hold—and I realize that it is a very serious consideration, because it is a very important piece of water—holding that that is all a narrow channel—it is the duty of every vessel entering to pass up on the starboard side of that mid-fairway, and of every vessel coming down to keep to the starboard side of that mid-fairway. What is the result? The result is that we find *The Lough Fisher* is wrong. She was away to the port side of that fairway, and right over on the port side of that navigable narrow channel, and therefore we find that she is to blame. What was the intention of *The Lough Fisher*? I have not the smallest doubt that the intention of *The Lough Fisher* was, by hugging that port side of the narrow channel, to cheat the tide, which was ebb, and when she got up to the light on her port hand to hug round the shore on her starboard hand, and so get into the harbour; but when she got abreast of that light she saw ahead and on her port bow a steamer, which was coming down on the starboard side of the fairway. The vessel, which was *The Glengariff*, was, according to the rule I have just laid down, in her proper water. She was on her starboard side of that fairway—not necessarily in the fairway—but on her starboard side of the centre of that fairway, coming down. *The Lough Fisher*, when she found herself with her port bow open to the starboard side of *The Glengariff*, did not accept the position under article 19 and keep her course. She ported, which she had absolutely no right to do. If she was intending—it is not suggested she was—to get into her right water by crossing the bows of the other vessel, so as to get on to the starboard side of the channel, then she had no right to put *The Glengariff* in that position. *The Glengariff* assumed, according to the evidence of her master, that *The Lough Fisher* was going to starboard and carry on the course which she had been adopting in her own water, of hugging the shore and passing away to the westward. The only doubt the court has is whether the master of *The Glengariff* is altogether free from blame for not stopping his engines sooner. I do not think that he stopped his engines in the ordinary sense of the word as soon as he ought to have done, but I think that he is absolved because I think he was put into a false position by the action of *The Lough Fisher*; and that he is absolved by reason of his assuming, as he was entitled to assume, that that vessel having got out of her proper water, was intending, as she evidently did intend, to starboard her helm and go to port. It was not until he found that she was porting, so as to cross his bows, that he stopped, and we think he did it then as early as he was justified in doing it, in the circumstances. The result is that the court finds *The Lough Fisher* alone to blame.

Solicitors for the plaintiffs, *Pritchard & Sons*.

Solicitors for the defendants, *Cooper & Co.*

Prob. Div. & Adm. Div. } Admiralty. } Dec. 15, 16.

"THE SKIPSEA." (a.)

Ship — Collision — Tyne Navigation Rules, Nos. 21 and 22.

Rule 21 *requires that "every vessel when under way, and requiring to pass over a part of the channel which is not within that half reserved for its navigation, for the purpose of proceeding to or from any landing, mooring, or*

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

other place, shall be navigated so as to cause no obstruction, injury, or damage to any other vessel; and every vessel continuing its navigation, after reaching such landing, mooring, or other place, shall be navigated as soon as practicable to the side of the river specified as the proper side for its navigation, and so as to cause no obstruction, injury, or damage to any other vessel." *Rule 22 provides that "every vessel crossing the river, and every vessel turning, shall be navigated so as not to cause obstruction, injury, or damage to any other vessel."*

The Court held that what the substance of the two rules indicated was that the crossing vessel must be so navigated as not to cause obstruction to another vessel. In other words, the crossing vessel may cross if there is time and opportunity to do so without hampering another vessel, and that another vessel which sees a vessel about to cross must act reasonably with regard to that crossing vessel, and if the crossing vessel requires a little more room to assist her in crossing such more room must be given.

Action of damage by collision.

Laing, K.C., and *Balloch*, for the plaintiffs, the owners of the steamship *Vernon*.

Aspinall, K.C., and *D. Stephens*, for the owners of *The Skipsea*.

The facts of the case sufficiently appear from the judgment.

GORELL BARNES, J., in giving judgment, said: This is the case of a collision which took place between the steamship *Vernon* and the steamship *Skipsea*, about 5.45 p.m. on the 14th of September last, speaking generally, off the Northumberland Dock entrance, on the Tyne, though the spot is really a little below that. At the time in question the weather was fine and clear, the tide was flood, force of about a knot and a half, according to the evidence, and *The Vernon*, a vessel of 982 tons gross, was bound from the Tyne to Rochester with a cargo of coal, and was therefore proceeding out of the Northumberland Dock entrance with the object of going down the river. *The Skipsea*, a steam screw steamer of 2,993 tons gross, was inward bound from Rotterdam to Dunston-on-Tyne, which is above the Northumberland Dock, in water-ballast, with a pilot in charge and a tug ahead of her. She was proceeding up the river. The two vessels came into collision at a spot about which there is some considerable dispute, but which, substantially, must be not very far, I think, from the upper buoy of what is marked on the chart before me as No. 3 pier, well over to the north side of the channel. They came into collision at an angle of a very fine degree. The port bow of *The Skipsea* was touched, apparently, by the port bow and stem of the other vessel. There was evidently a very fine angle between them. Now, the rules which are applicable to this case are the Tyne Rules, Nos. 21 and 22. Probably the 22nd is more applicable, but the 21st is of a somewhat similar character. It is as follows: "Every vessel when under way, and requiring to pass over a part of the channel which is not within that half reserved for its navigation, for the purpose of proceeding to or from any landing, mooring, or other place, shall be navigated so as to cause no obstruction, injury, or damage to any other vessel; and every vessel continuing its navigation, after reaching such landing, mooring, or other place, shall be navigated as soon as practicable to the side of the river specified as the proper side for its navigation, and so as to cause no obstruction, injury, or damage to any other vessel." The 22nd rule is in these terms: "Every vessel crossing the river, and every vessel turning, shall be navigated so as not to cause obstruction, injury, or damage to any other vessel." The first rule I have read—namely, the 21st, referring to the part reserved for the vessel's navigation, must, of course, be read with reference to those rules which require a vessel proceeding inward and up the river to keep on the north side, and a vessel proceeding out to sea to go to the south side, so that each vessel shall pass the other on the port side. The rules which I have referred to have been dealt with in certain cases, one of which is *The Thetford*, 6 Asp. M. L. C. 179, but they substantially seem to me to indicate that the crossing vessel must be so navigated as not to cause obstruction to another vessel; in other words, that the crossing vessel may cross if there is time and opportunity to do so without hampering another vessel, and that another vessel which sees a vessel about to cross must act reasonably with regard to that crossing vessel, and if the crossing vessel requires a little more room to assist her in crossing such more room must be given. It is a kind of give and take, but I do not think one is going too far to say that the weight of it begins to operate upon the vessel crossing. She must see she has room to cross, and if she has she should do it. This is one of those cases in which, to my mind, it is exceedingly difficult to arrive at any decision about the matter if one binds oneself down to particular answers given by particular witnesses. In this present case there is a good deal of the evidence on both sides which one cannot possibly accept. They naturally try to make—each of them do—the best case they possibly can. The case on the part of the plaintiffs is that they were acting in such a way as to show that they were proceeding to keep away to the northward of the up-coming ship, and that the up-coming ship really had no difficulty in passing to the southward. The case presented on the other side is that the up-coming ship had the other vessel in a position in which they at first thought she would cross, and that they acted accordingly, and that the other vessel did in fact get across them (some of the defendants' witnesses say) and then came swinging back towards them. This is a gross exaggeration. It is not likely that *The Vernon* would come back after she once got across. That is not the evidence given by the pilot, and those who have given it, I think, have been led away by the fact that their own bows were swinging round under the reverse action of the engines. I think this may be decided upon what may be termed the undisputed facts. One of those undisputed facts, or perhaps two, one may say, are that the coming-out vessel is coming out at an angle across the river and moving, according to the statement of claim and the preliminary act, at about a knot and a half through the water, with engines moving slowly ahead. There is very little doubt about that. There is also very little doubt that the other vessel, which was coming up river, had received warning that a ship was coming out of dock, that she was proceeding at slow speed, and had reversed the engines slightly to take her off still more, and that she was also coming up river under a proper mode of navigation. I think the discrepancy between the two sets of witnesses about her position in the channel can be reconciled by noticing that the bouys of No. 3 pier stand out very considerably into the river. When the plaintiffs say that *The Skipsea* was coming up in mid-channel, and the defendants say she was coming up well over to the north side, they were both not very far from speaking the truth, because a vessel which appears to those on a vessel coming out to be in mid-stream may still not be very far from the buoys on the north side. and be well within what is termed her own water, It seems to me that the probabilities go rather to show that the up-coming ship was coming up in a proper position on her own side of the navigable

water. The next matter that is not in much practical controversy, and may, I think, be accepted, is that the two vessels sighted each other at about 400 yards apart; that is to say, as soon as *The Vernon* was far enough forward from the gate of the basin to see past the corner wall there, she could see the other vessel coming up, and, of course, the upcoming vessel could see her. I do not suppose that the large vessel, *The Buluwayo*, that we have heard of, was any substantial obstruction to that sight. Having regard to her length and size, and the position of the shute or place where she was loading, she would not, I think, obstruct the view from the two vessels of each other as soon as the one coming out was fairly clear of the basin entrance and could see round the corner of the point. So there is another matter not much in dispute—namely, the distance apart at which these vessels saw each other. The third matter which is not in any really substantial conflict is approximately the spot of the collision; that is to say, well to the north side, not very far from the upper buoy of No. 3 pier. I think it follows from that statement of the position of the collision that, having regard to the state of the tide and the distance at which these two vessels saw each other, both vessels must have moved very nearly the same distance through the water to the spot of the collision from the time they first saw each other; and the vessel coming up had the tide with her, and was moving in the stream of it. If it is measured off with any care, as I said yesterday, the out-coming vessel must have moved a considerable distance from the edge of the basin to get to the spot of the collision.

What is the general conclusion to draw from these facts, which are independent of smaller details mentioned by witnesses, and about which there is a great deal of discrepancy? When one takes the general features of the case I think one is brought face to face with this position, and this is the real solution—namely, whether or not when those on the defendants' vessel first saw *The Vernon* they were justified in assuming that she was about to cross the river, and they ought to take action to help her to do so, by giving room for that, or whether they ought to have assumed that she was going to remain on the side where she was and not attempt to cross. The pilot of the defendants' vessel, who gave his evidence, I think, well, said this: "I knew from the pilot or someone on board another steamer that there was a steamer coming out of dock," and, dealing with the manœuvres which he adopted, he said: "I gave orders to stop and to my tug to 'vast towing,' and I gave a long warning blast. We had then two knots speed through the water and we reversed a few revolutions, knowing there was a ship coming out." Then he said: "I saw her 400 yards off, a little on the starboard bow, and we gave one short blast, and *The Vernon* replied with two. I thought she would cross and go into her water. I ported a little when I first saw *The Vernon*, steadied again, and blew one blast again, and she replied again with two. I saw she was acting under starboard helm and I reversed and gave three short blasts." I think the effect of that is that he had committed himself, as soon as he saw this ship coming out, to the idea that she was crossing, and to acting in consequence for the purpose of keeping to the northward, so as to allow her to cross; and the question resolves itself, again, into what I have already said—namely, were those on board the defendants' vessel justified in that assumption, and what grounds had they for so acting? As I have said, I think it is clear that *The Vernon* was proceeding out of the dock entrance with engines working slow ahead and making a knot and a-half, or thereabouts; and when the other vessel saw her, and when those on board her could see the other vessel, the plaintiffs contend that she (*The Vernon*) kept in such a position and acted in such a way that the defendants' vessel ought to have kept away to the southward of her. The defendants, on the other hand, say that the action of the plaintiffs' ship was such as to indicate, in the first instance, that she was crossing the river, and that they, the defendants, acted at first as if that was the intention of the plaintiffs' ship. That the vessels were very close together, and that the opportunity of the plaintiffs' ship for crossing the river was not a good one, was certainly tolerably clear. Possibly she might have got across if she had acted at once, but still I think that the more prudent action to take was that which was partially taken by the plaintiffs, namely, not to attempt to cross after they had seen the vessel in front of them approaching at such a short distance. I do not believe all that the plaintiffs' witnesses have said about this case. I do not believe their evidence that the defendants' ship was by the action of her port helm brought as much across river as they say, or that the tug was towing on the starboard bow as they say. If that had been so the tug would have found herself in difficulties with *The Buluwayo*. On the other hand, I do not accept the view of the defendants that the plaintiffs' ship got right across the bows of *The Skipsea*, and then came back again. I cannot accept either story *in toto*. The plaintiffs' vessel had, to use an expression of her master, "just got her stern nicely clear of the lock gates," and at first sight, it seems to me, those on the defendants' vessel would say, "That ship is coming out of dock and is moving ahead." If that was the impression to be conveyed, what ought the plaintiffs to do in connection with such a position? It seems to me that they are then placed upon their election, either to cross the river or to stop where they are, or to keep such a position as not to hamper or mislead the defendants; and I think myself that those on the plaintiffs' vessel ought in such a position to have indicated unmistakably to the defendants what their action was to be; that is to say, if they were intending to cross, which might be risky in the circumstances, to act at once to do so, but if, on the other hand, it was not right to cross, and they determined to stop where they were, to indicate that in an unmistakable way. As Mr. Aspinall pointed out, if the ship in the dock entrance was stationary, then the up-coming ship could say, "I can go on and pass her"; but if she was not stationary, having regard to this narrow way, then I think she should indicate properly what she was going to do. The proper way to do it was to have given three short blasts at once, and reversed her engines, and kept in the lock or near the lock entrance. If it is said that might have tended, with the tide, to cant her head to starboard, it is not really of moment, because it could only have been for a short time, and it could have been counteracted by dropping the anchor while the other ship passed. She did neither. She neither went across, nor did she indicate with any definiteness what she was going to do. I think the defendants first blew a short blast, and then *The Vernon* blew two, but that would be indicating only that she was trying to keep to the northward, and that is a matter which, I think, would be contrary to the general spirit of the rules. It seems to me that that failure to indicate distinctly that she was going to stop where she was and not cross the river is really the cause of this trouble, because it leaves the navigator of the upcoming ship, which was being navigated carefully and properly, and on which it is extremely difficult to find any real negligence or defect of management, in

the position of thinking "Well, I am not sure whether this ship means to stop or to cross, and I think from her motion ahead she is going to cross, and she is not indicating properly that she is not going to do so." Then the vessel ports slightly and reverses her engines for a time—there is some discrepancy between her pilot and engineer about it—possibly the engines were stopped at the end because it was found that the vessel was canting so much to the northward that there was danger of her getting into difficulties with the buoys or *The Buluwayo*—and I do not think she could do anything else. The result, to my mind, is that the plaintiffs' vessel is alone to blame in this case.

Solicitor for the plaintiffs, *Charles E. Harvey.*

Solicitors for the defendants, *Botterell & Roche.*

High Court of Justice.

Chan. Div. Kekewich, J. — April 17.

ATTORNEY-GENERAL *v.* ODELL. (*a.*)

Land transfer—Right of appeal—Forged deed—Indemnity—"Act neglect or default"—Taking deed to registry—Land Transfer Acts, 1875 (38 & 39 *Vict. c.* 87), *s.* 98; 1897 (60 & 61 *Vict. c.* 65), *s.* 7; *Land Transfer Rules,* 1903, 296-8.

When the registrar has, under section 7, *sub-section* 5, *of the Land Transfer Act,* 1897, *awarded indemity to an applicant who has suffered loss by the rectification of the register, the trustees of the insurance fund and the Treasury as guarantors of the fund have a right of appeal to the court as being "aggrieved persons" within section* 96 *of the Land Transfer Act,* 1875, *and rule* 298 *of the Land Transfer Rules,* 1903. *A transferee of a forged transfer took it to the Land Registry, where it was registered; subsequently on the forgery being discovered the register was rectified on the application of the true owner, whereupon the transferee applied to be indemnified out of the insurance fund.*

Held, that the transferee was, under section 7, *sub-section* 4, *entitled to indemnity out of the insurance fund, as he had suffered loss by the rectification, and that his act in taking the deed to be registered was not an "act, neglect, or default" within the meaning of section* 7, *sub-section* 3, *so as to disentitle him to indemnity.*

This was an appeal by the Treasury from the decision of the registrar allowing indemnity out of the fund created under the Land Transfer Act, 1897, to Mr. Odell.

On the 7th of December, 1901, Mrs. Rose Connell, was registered as the proprietor of a charge upon 36, Kensington Park-road, Notting Hill, for £350, with interest at 5 per cent.; this charge was afterwards reduced to £300.

Mrs. Connell's solicitor entered into negotiations with Mr. Odell, the present claimant, that he should take over this charge. Mr. Odell agreed to do this and paid the money to Mrs. Connell's solicitor, and on the 23rd of February, 1903, a transfer of the said charge—which was alleged to have been made in consideration of £300 paid by the said E. T. Odell to Alexander Thompson, solicitor, in pursuance of a written authority purporting to be signed by the said Mrs. Rose Connell—was registered; the transfer purported to be signed by the said Mrs. Connell was dated the 21st of February, 1903, and the said charge was thereby purported to be transferred to the said E. T. Odell. Mrs. Connell's solicitor had in fact forged Mrs. Connell's name to the transfer, and she knew nothing about the transaction. Mr. Odell's solicitor produced the forged transfer at the registry, and procured the name of Mr. Odell being placed on the register in the place of Mrs. Connell.

When Mrs. Connell discovered the transaction, she at once applied to the court to rectify the register, and Mr. Odell's name was accordingly struck off the register and Mrs. Connell's name was restored to it.

Mr. Odell then claimed that he was entitled under section 7, sub-section 5, of the Land Transfer Act, 1897, to be indemnified in respect of the removal of his name from the register.

The registrar considered that the above state of facts exactly fitted the words of section 7, sub-section 4, of the Land Transfer Act, 1897. The register had been rectified in consequence of a fraud, the fraud had occurred in a registered disposition for valuable consideration, the grantee was not aware of the fraud and had in fact exercised reasonable care in the transaction, he had suffered loss by the rectification in that he had lost the security for the £300 which he had paid to the said A. Thompson, and therefore the registrar thought that he was entitled to indemnity and accordingly awarded him the sum of £369 17s. 4d. to be paid out of the Indemnity Fund established by section 21 of the Land Transfer Act, 1897.

From this award the trustees of the fund appealed.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7:

Sub-section 1: "Where any error or omission is made in the register, or where any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principal Act, any person suffering loss thereby shall be entitled to be indemnified in the manner in this Act provided."

Sub-section 2: "Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry would be to deprive a person of land of which he is in possession or in receipt of the rents and profits, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity."

Sub-section 3: A person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect, or default, and the omission to register a sufficient caution, notice, inhibition, or other restriction to protect a mortgage by deposit or other equitable interest, or any estate or interest created under section 49 of the principal Act, shall be deemed neglect within the meaning of this sub-section."

Sub-section 4: "Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section."

Sub-section 5: "The registrar may, if the applicant desires it, and subject to an appeal to the court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity. In the event of an appeal to the court, the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the court shall consider that the appeal is unreasonable."

Sub-section 6: "Where indemnity is paid for a

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect, or default."

Section 21, sub-section 1: "For the purpose of providing indemnity payable under this Act there shall be established an insurance fund to be raised by setting apart at the end of each financial year such portion of the receipts from fees taken in the Land Registry as the Lord Chancellor and the Treasury shall by order determine."

Sub-section 2: "The insurance fund shall be vested in such names and manner as the Treasury from time to time direct."

Sub-section 3: "If the insurance fund is at any time insufficient to pay indemnity for any loss chargeable thereon, the deficiency shall be charged on and paid out of the Consolidated Fund of the United Kingdom, or the growing produce thereof; but any sum so paid out of the Consolidated Fund or the growing produce thereof shall be repaid out of the money subsequently standing to the credit of the insurance fund."

By the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 95: "Subject to any estates or rights acquired by registration in pursuance of this Act, where any court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, such court may make an order directing the register to be rectified in such manner as it thinks just."

Section 96: "Subject to any estates or rights acquired by registration in pursuance of this Act, if any person is aggrieved by any entry made or by the omission of any entry from the register under this Act, or if default is made, or unnecessary delay takes place in making any entry in the register, any person aggrieved by such entry, omission, default, or delay may apply to the court in the prescribed manner for an order that the register may be rectified, and the court may either refuse such application with or without costs to be paid by the applicant, or it may if satisfied of the justice of the case make an order for the rectification of the register."

Section 97: "The registrar shall obey the order of any competent court in relation to any registered land on being served with such order or an official copy thereof."

Section 98: "Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

By rule 296 of the Land Transfer Rules, 1903: "In all mere formal matters the decision of the registrar shall be final, unless the registrar or the court gives leave to appeal therefrom."

Rule 297: "In all other cases, questions arising before the registrar upon any application as to the registration of a title, incumbrance, or charge, or as to any dealing with any registered title, incumbrance, or charge, or any matter entered or noted in or omitted from the register, or as to the amendment or withdrawal from the register, of any certificate or other document, or as to any claim for indemnity (whether such questions relate to the construction, validity, or effect of any instrument, or the persons interested, or the nature or extent of their respective interests or powers, or as to order of priority, or the mode in which any entry should be made or dealt with in the register, or otherwise) shall be determined by the registrar, subject to appeal to the court; but the registrar may, if he thinks fit, instead of deciding the question himself, refer it at once to the court for decision."

Rule 298: "Subject to the provisions of rules 296 and 297, any person aggrieved by an order or decision of the registrar may appeal to the court."

Sir R. B. Finlay, A.G., and *R. J. Parker*, for the appellants.—The trustees of the fund and the Treasury are persons aggrieved within section 96 of the Act of 1875 and rule 298 of the Land Transfer Rules, 1903, and therefore they are within their rights in appealing against the decision of the registrar. A transferee who has accepted the transfer and paid his money and registered the transfer cannot be heard to say that he acted in reliance on the deed, which he himself brought to be registered, being guaranteed by the registry, and that he is therefore entitled to be indemnified out of the insurance fund. The principle of the decision in *Simm* v. *Anglo-American Telegraph Co.*, 28 W. R. 290, 5 Q. B. D. 188, is applicable here. There is nothing in the Land Transfer Acts or rules which throws upon the registry the burden of guaranteeing the validity of every deed presented to them for registration. The insurance fund was created for the purpose of indemnifying third persons who had acted on the faith of the register, and who had suffered loss by reason of the rectification of the register. It is impossible to say that Odell did not contribute to the loss by his own act in forwarding the transfer to the registry so as to bring him within sub-section 3 of section 7. The case of *Gibbs* v. *Messer*, [1891] A. C. 248, 39 W. R. Dig. 252, shows that a person who deals with a forger does not act on the faith of the register, and cannot by registration of the forged deed obtain a valid title in his own person, although he can pass a valid title to a third person who purchases from him, and such third person could claim to be indemnified on the rectification of the register, but his position is a totally different one from Odell's. The question under sub-sections 2 and 4 of section 7 is whether Odell is a person who has suffered loss by the rectification, and under sub-section 3 whether he contributed to the loss by his own act or default. In this case Odell has not suffered loss by the rectification of the register; the loss was the direct result of the forgery; he never was the owner of the property, as the instrument was a nullity. After the forgery was discovered Odell would have been guilty of fraud if he had attempted to sell the property, and he could not have made a title to the property even if the register had not been rectified, and further if he has suffered loss by the rectification he contributed to it inasmuch as he brought the forged instrument for registration. Odell acted on the representation of Thompson that he had authority to receive the money, and this representation was quite outside anything that took place at the registry. The case of *Viney* v. *Chaplin*, 4 Drew. 237, 2 De G. & J. 468, as to the right of the purchaser to have the deed executed in his presence, and his right to insist on the payment to the vendor personally or upon his written authority, has no application now in the case of sales, by reason of section 8 of the Conveyancing Act, 1881, but that section does not apply to mortgages, as to which the doctrine of *Viney* v. *Chaplin* still holds good. Section 98 of the Land Transfer Act, 1875, is wide enough to cover the present case. The effect of putting a title on the register is not to make it a better title; if it was originally void it is not cured by being put on the register.

P. O. Lawrence, K.C., and *F. Baden Fuller*, for the respondent Odell.—There is a preliminary objection to the hearing of this appeal. The Attorney-General has no *locus standi* to appear in this appeal. Under

the rules the registrar has the entire management of the fund, and the only persons concerned in an application for indemnity are the applicant and the registrar, and if the decision is against the applicant he has the right to appeal to this court, making the registrar respondent to the appeal, but he is not required to serve any other person. There is no provision in the Land Transfer Act, 1897, for the costs of anyone except the applicant's costs, and therefore it was intended that the applicant should be the only appellant, and it was not intended that there should be an appeal on the part of the Treasury or the Attorney-General. The Treasury say they are an aggrieved person within section 96 of the Act of 1875 and rule 298, and therefore entitled to appeal, but it was never contemplated that the Treasury should appeal as an aggrieved person. The right of appeal given under rule 297, "subject to appeal to the court," is the same as given by section 7, sub-section 5, of the Act of 1897, and that right is only a right of appeal by the applicant. Rule 298 gives only a right of appeal subject to the provisions of rule 297, and the Treasury is not a person aggrieved within the meaning of this rule. The decisions on the words "person aggrieved" are mainly under the Bankruptcy Acts. In *Ex parte Sidebotham*, 28 W. R. 715, 14 Ch. D. 458, James, L.J., said: "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." This definition was cited with approval by Lord Esher, M.R., in *Ex parte Official Receiver*, 35 W. R. 660, 19 Q. B. D. 174; see also *In re Lamb*, [1894] 2 Q. B. 805. The only persons concerned in this matter are the applicant and the registrar, otherwise the Treasury would have to be made a party to every application for an indemnity. Before the Act of 1897 there could be rectification where a name got on the register by mistake, but if the property had been dealt with *bonâ fide* and for valuable consideration there could not be subsequent rectification. By section 7, sub-section 1, of the Act of 1897 compensation was given to persons suffering loss where there could not be rectification, and the indemnity fund was established for compensating persons who were damnified by reason of registration or by omission from the register. Provision for rectification and compensation was made in sub-section 2 for two additional cases where the disposition was absolutely void and where the person in possession was deprived by reason of the registration. Sub-section 3 was a proviso to both the preceding sub-sections, so that a person should not get compensation where the loss was caused by virtue of his act, neglect, or default. Under section 98 of the Land Transfer Act, 1875, where a disposition of land is fraudulent and void, the register can be rectified unless there has been a subsequent disposition for value, and this provision is continued in section 7, sub-section 1, of 1897. Under section 7, sub-section 4, additional rights to compensation were given to the original grantee or volunteers claiming under him. The effect of reading section 7, sub-section 4, together with section 98 of the Act of 1875 was to give compensation to persons damnified by rectification by reason of fraud. Sub-section 4 was intended to cover such a case as the present one. The expression "likewise" meant "also" or "in like manner." Sub-section 3 provided what was to be considered neglect or default within the meaning of the section; "act" in the sub-section meant some blameworthy act *ejusdem generis* with neglect or default, it was not such an act as carrying in a transfer for registration; the act of registration was not a voluntary act but an act in compliance with a statutory duty. The decision in *Simm* v. *Anglo-American Telegraph Co.* had been narrowed by subsequent decisions, and had been distinguished in nearly every case where it has been cited: see *Balkis Consolidated Co. (Limited)* v. *Tomkinson*, 42 W. R. 204, [1893] A. C. 396, and *Dixon* v. *Kennaway & Co.*, [1900] 1 Ch. 833, 48 W. R. Dig. 40. The case of *Sheffield Corporation* v. *Barclay*, 52 W. R. 54, [1903] 2 K. B. 580, showed that a distinction must be drawn between cases like *Simm's case*, where a request was made to someone who had no duty in the matter independently of the request, and cases like the present one, where the request was made to one who had a duty in the matter independent of the request, and that in the latter case something more than a mere request would be required to raise the contract of indemnity. The registry made inquiries but did not disclose the result of their inquiries till after the loss had resulted; they were therefore estopped from denying our right to indemnity. The point that the loss was occasioned by the forgery, and not by the rectification, would apply just as much to a transferee for value under sub-section 2. The forgery no doubt was the primary cause, but it is a fallacy to say that the loss was not caused by the rectification. Until the fraud was discovered Odell had rights under the Act. Before the Act a transfer by him would have given a good title, and since the Act to a right to indemnity, and this right he has lost. There was nothing in section 7, sub-section 4, about the applicant having acted on the faith of the register, but if there were, Odell did act in reliance on the register inasmuch as he searched for prior charges prior to the payment of his money. The case of *Gibbs* v. *Messer* had no application to the present case.

R. J. Parker replied.

KEKEWICH, J.—It seems to me that a decision in favour of the preliminary objection would be against all principle, and I am bound to consider that this Act of 1897 and also the Act of 1875 were intended by the Legislature to proceed under the ordinary principles which govern such matters. Before coming to that, I notice an argument—namely, that the registrar is appointed by the Act expressly in so many words to conduct the business of the registry, and large powers are given to him for that purpose. That is perfectly true, but I do not understand that this award of indemnity is part of the business of the registry at all and I do not think that the registrar could be said to conduct it. In truth, when you see the powers given to him with reference to the indemnity you immediately also see that it is not the business which he is conducting. It is very important to observe that what he has to do is to determine something. He has to act in a judicial capacity, he has not merely to see that the transfers are properly registered or to see that the machinery of the office proceeds in a proper manner, but he is created by these provisions a judge in a certain particular class of cases. The meaning of the words "conducting the business" would go far too wide to make them embrace the determination of this important question. The point seems to me to arise on something which is entirely outside the ordinary business of the office.

Provision is made that a certain class of persons, of whom Mr. Odell may or may not be one, shall be entitled to an indemnity, and that indemnity is guaranteed by the Treasury. We need not consider now whether it is the insurance fund that has to pay or the Treasury that has to pay. A fund is created one way or another out of which indemnity is to be paid, and in certain cases that indemnity arises. Then the Act provides how it is to be ascertained

whether a person who applies for the benefit of that indemnity fund is entitled to it or not. By section 7, sub-section 5, of the Act of 1897 it is enacted that "the registrar may, if the applicant desires it, and subject to an appeal to the court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity." Reading those words alone it is reasonably obvious that whatever the registrar does is subject to an appeal to the court; he is only a judge of first instance with an appeal, and it is only by reading the rest of the words, and from them raising an implication, which I do not think can fairly be raised, that you can say that no one is to appeal but the applicant. Of course the registrar himself cannot be appellant against his own decision. The section continues: "In the event of an appeal to the court the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the court shall consider that the appeal is unreasonable." Now, from that it is argued, and with some plausibility, that the applicant is the only possible appellant, because there is no provision for costs except the applicant's costs. There is some foundation for that argument, but I do not think that the implication arising from that sentence ought to be considered strong enough to get rid of the first provision that there is to be an appeal to the court. If you once put the registrar into the judicial position which I think he must be held to occupy, an appeal to the court necessarily follows, unless, indeed, he is to sit as arbitrator. It seems to me that it cannot have been intended that he should sit as arbitrator; the word used, though not altogether inappropriate to an arbitration, is nevertheless not the appropriate word. What he has to do is to determine whether a right to indemnity has arisen under the section, and, if so, award the indemnity. He has not only to award whether the right to indemnity has arisen under the section, but he has to determine it, and that is the particular word which is used with regard to a judicial decision. The judge has to hear and determine. Whether the amount of the indemnity is right I am not considering now, nor how far there is an appeal as regards the amount of the indemnity. I do not by any means say there is not, but as regards the right to the indemnity, to my mind it is clear that the registrar had only to determine it as a judge.

Then I am told that if that is the right view, in every case where the indemnity is claimed these must be cited before the registrar either the Crown or the Attorney-General or the trustees, it matters not which. It seems to me that that really is the consequence and I am not by any means sure, this being the first case in which the question of indemnity has arisen, that the registrar would not have done better to insist on having the parties before him. He evidently thought that the case was perfectly plain. Well, I will not say perfectly plain, but he saw his way and did not think that necessary, but my present impression is that whenever cases of this kind arise it would be better for the registrar to say: I have to determine; I am not the arbitrator; I must have someone to argue not only in favour of the indemnity but against it. If that is the necessary consequence it does not seem to me to be one to be very highly deprecated, because the Court of Appeal will then have the advantage of the case having been argued before the registrar and of his decision as a judge of first instance which the court will be able to examine.

There is only one other point, or rather, I should say, two short points. The first is in whom is the right of appeal? It matters not, it seems to me, whether it is the Attorney-General on behalf of the Crown representing the Treasury or the trustees of the fund. They really are the same persons for this purpose. They are the protectors of the fund. The trustees might possibly have been sufficient. They would, no doubt, have done their duty to protect the fund, and the Attorney-General would do the same, except that the fund is not under the control of the Treasury in the first instance. It is under the control of the trustees, and therefore they are technically necessary parties. Being technically necessary parties the better way, it seems to me, is to do that which has been done in this particular case, which is to add the Attorney-General as a party on behalf of the Crown. If my view is right it is unnecessary to consider really whether they are persons aggrieved. I cannot conceive that they are otherwise, because the indemnity is to come out of the fund of which these trustees are trustees for all persons claiming indemnity and the Treasury behind them is the guarantor of the indemnity fund. If the registrar comes to an improper decision, as it is said he has done in this case, and has ordered indemnity to be paid where it ought not to be paid, then it seems to follow, and does follow, that money is being taken out of the fund and may be possibly demanded from the Treasury which ought not to be taken or demanded. Surely a person whoever it is from whom the money is taken or is demanded under an order which ought not to have been made is a person aggrieved. Under the circumstances I think the appeal to this court lies.

The duty of the court is confined to the construction of those provisions of the Land Transfer Act, 1897, which relate to the indemnity fund and the persons who are entitled to come upon that indemnity fund, and particularly the construction of section 7 of the Act. Now, of course, in order to understand that, one must study all the other sections of the same Act which bear upon the subject at all and the other sections of the Act of 1875 which bear on the subject, but I venture to think that although it is not possible to avoid going outside to some extent it is dangerous to go much outside the two Acts, and that one must consider with very great care the application of any authority dealing with Acts of Parliament under different circumstances and different contractual relations. It is to my mind very much like the duty of the court in the construction of a will. There are certain phrases which have received construction and by which one not only is guided, but is bound. Certain principles have been laid down from time to time which apply to all wills of a similar character, but beyond using authorities of that kind in that way, it is undesirable in most cases to use any authorities at all, because one is necessarily construing different language used in reference to different circumstances and to different relations. Therefore I am not deposed to look too much for guidance nor to find much guidance in any of the cases that have been cited. There are one or two which I think are valuable and which I am bearing in mind, but my own opinion is that it is better rather to ignore them, at any rate when one has once grasped the principle on which the cases are decided, and endeavour to see how far it is applicable or inapplicable to the question in hand.

Turning to the seventh section of the Act of 1897, it seems to me that the first impression from—I do not mean, of course, only a cursory reading of the section, but from a study of it—that which appeals in the first instance to one's intelligence when one comes to the end and reflects upon the contents of it, is, that the Legislature intended to provide an indemnity to all persons with certain exceptions—certain personal exceptions—who suffered loss by reason of fraud or mistake in the registration of transfers under the Act. That is the first impression. When one looks into it more carefully, having in view the remarks which

have been made on the section, that first impression seems to me to be confirmed as being the right view of the Act. The Legislature may possibly have intended to leave something out. It may have left some claim out inadvertently or some claim which otherwise would appear to fall within it which may be excepted from it by reason of the proviso, for it all deserves attention; but, generally speaking, it seems to be a carefully framed proviso intended to embrace all the cases of loss under such circumstances as I have mentioned.

Now, the first sub-section clearly deals only with cases where no rectification was possible under the Act of 1875. That is not a case such as we are dealing with here, where rectification was possible under the Act of 1875, and the only importance of that sub-section is to see that it falls into line in a well-arranged code, I was going to say, but a well-arranged schedule of cases to which the provision for indemnity is intended to apply. Having got rid of those cases *en bloc* where there is no rectification under the principal Act, then we come to another clause which at first is not so simple or not so easy to understand—viz., sub-section 2, which might perhaps but for one consideration grasp or include such a case as this which we have here, where there is a registered disposition which is absolutely void by reason of forgery and where the register has to be rectified. But the observation upon that is that we have a direct provision here that the register shall be rectified under this section, and it seems to follow logically that this sub-section cannot be intended to apply to a case in which rectification was already possible. It follows on sub-section 1, which deals with cases where registration was not possible, and then it goes on apparently to deal with the case where it has not been possible but shall now be possible; and to include in a provision of that kind a case in which rectification is already possible would seem to contradict the provisions of the Act, or at any rate make one construe it as applying to cases where there is no necessity for providing now in 1897 for rectification. That seems to me to be a good sound comment on the Act and sub-section, and to show that this case which might otherwise fall within it was not intended to fall within it. Sub-section 3 has a proviso which must be looked at presently, but it is a proviso certainly on sub-section 2, and possibly a proviso on the interpretation of some other sub-sections, but let us pass it by now. Then we come to sub-section 4, which is the only other sub-section specifying cases in which the provisions for indemnity are to apply. Now that passes on to a different clause. We deal under sub-section 1 with cases where rectification was not possible under the principal Act, we deal under sub-section 2 with cases where it was intended now to apply the rule of rectification to cases where rectification was not possible under the principal Act. Now we deal with cases where the register could be rectified under the principal Act, and confessedly looking at section 98 of the principal Act, the case of an original grant—that is to say, where there has been no transfer by the grantee at all either for value or voluntarily, does come within that clause. I do not propose to pause to consider whether each case falls within the clause, that one particular case certainly does. This sub-section does certainly embrace a case where the man who is coming for a claim on the indemnity fund was himself the transferee, and who has, according to his own view which has to be examined, been aggrieved, suffered loss is the proper phrase by reason of what has occurred through a fraud or mistake. There can be no question that it does fall within that, and to my mind there is no reason why, unless there is some proviso or exception to exclude him, he should not come on the indemnity fund if he once convinces the registrar he has suffered loss by reason of fraud or mistake. There is one exception here which one must notice in the body of this sub-section 4, and that is that he is not to have any indemnity if he was aware of or could by the exercise of reasonable care have discovered the fraud or mistake which induced the loss. It is put in the section in just a slightly different way, but I have expressed the meaning. That may on some future occasion give rise to much discussion because we might have an entirely different state of facts, where a very serious question will arise whether the grantee was not aware of and could not by the exercise of reasonable care discover that forgery or other fraud existed. There is no question about that here. It has not been argued that Mr. Odell did not act reasonably and adopt all reasonable care and diligence; it is impossible to impute the want of that to him. Notice also could not be imputed, but I do not know that the words "was not aware of" do not include notice in the equitable sense of the word. It therefore comes, as it seems to me, clearly within the Act and within the sub-section according to the meaning of the words. But it does not follow that, therefore, Mr. Odell, the applicant, is entitled to indemnity, because he is only to be entitled "likewise"—that is to say, in the same way as others, which I think must mean also subject to the same liabilities, and he is to suffer, as others do, loss by rectification. I have to consider whether he has suffered loss by rectification, or whether by reason of the "likewise" or by reason of the "otherwise" in the application of sub-section 3 he is otherwise debarred from claiming the indemnity if he is entitled to it. Now we have throughout these sections a reference to loss by rectification; we find it in sub-section 2: "The register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity," and in sub-section 4 we have "The person suffering loss by the rectification." The words are the same in section 1: "Any person suffering loss thereby," and "thereby" clearly refers to rectification. Now, has Mr. Odell suffered loss by rectification? He has certainly suffered loss. He paid for the transfer of a registered charge. It was transferred to him; it has been vacated; the register has been rectified; his money has gone and he is no longer the owner and proprietor of that charge. In connection with his defence of his rights he has incurred certain costs which nobody says were improperly incurred by him in assertion of what he believed to be his rights. So that there is no question he has suffered loss. But has he suffered it by reason of the rectification? Has he suffered it by the rectification? Now, the first argument against him is this. The loss was occasioned by the forgery—that is to say, by there being in existence a deed purporting to be executed by Mrs. Connell, the registered proprietor of the charge, but not in fact executed by her. That has occasioned the loss. The property was gone—that is to say, his property was gone, or rather, he never had any property at all—that is the more proper view. When he advanced his money and accepted what he thought to be a transfer of the charge, he paid his money for nothing. No transfer had really been registered. There had been executed between him and Mrs. Connell no deed at all, and therefore what occasioned the loss was the forged deed, and not the rectification of the register when the fraud was discovered. Then, further, it was urged that, having got on the register, he could do nothing; at any rate, as soon as he knew that there had been a forgery, he could not possibly have transferred to anyone else. He might possibly have

done it before he discovered that, and there was an interval during which he was in the position of registered owner of the charge, with power, as the registered owner, to transfer, and possibly to make title to a third person, but he got something with which he could not deal, because it really had no existence. Therefore, again, he has not suffered loss by the rectification. He has suffered loss by unfortunately paying for and holding something with which he could not deal, and which was not valuable in his hands. That is the argument on that part of the case. Now it seems to me that is giving too narrow a construction to the words "by the rectification." The rectification is the immediate cause of the loss. As long as he is on the register at any rate, he is the registered proprietor of the charge, and he has lost that status by the rectification. It is the rectification which has deprived him of it. It might or might not have been valuable; that depends on a good many circumstances, but it was his, and it is the rectification which, as I have said, is the proximate cause of the loss, though, no doubt, looking back step by step you see that the original cause was the forgery. It seems to me it would be giving too narrow a construction to the Act to hold that in a case like this the rectification was not the cause of the loss within the meaning of the Act; but if that be so I have to consider whether he is debarred from claiming indemnity by reason of his having "caused or substantially contributed to the loss by his act, neglect, or default." I am applying sub-section 3 to sub-section 4, for on the whole I think it ought to be so applied. There is a little difficulty in construction in so applying it, not because it comes first in the Act—although it is a little out of order—but because, as I have already mentioned, sub-section 4 has its own restrictions on the claim of the grantee who may not have been aware of, and not have been able, by the exercise of reasonable care, to discover the fraud or mistake. It does seem a little strange, notwithstanding that special provision there, that the grantee should be affected by the provisions of sub-section 3. Still, I think it is general in its terms. It is found as a sub-section in this section, "persons claiming indemnity." The word is "indemnity" and so forth, and I think besides, although that is a mere verbal argument, that the word "likewise" at the end of sub-section 4, while it certainly means that the persons suffering shall be entitled to the indemnity in the same way as others are entitled to it, must also mean, subject to the restrictions. Now has he done this. He must have "caused or substantially contributed to the loss by his act, neglect, or default." The first suggestion is that "act" means something *ejusdem generis* with "neglect or default." Now that is rather a startling proposition; "act" is commission, something done, "neglect or default" are necessarily omissions, something left undone. I confess myself a little startled with the argument to say that an act of commission is *ejusdem generis* with an act of omission. I doubt whether you could apply a doctrine which after all is of very dangerous application to such a case as this. I think you must take "act" as standing alone and construe it, no doubt in connection with "neglect or default," but as meaning something done by them which either causes or substantially contributes (whatever that may mean) to the loss. There is one thing, and one thing only, that Mr. Odell has done, and that is that, having acquired the charge, he carried in, either personally or by his solicitor—it is quite immaterial which—the transfer of the charge for registration and asked that it might be registered. One may put it against him in the strongest possible way that he demanded registration of the tranfer to him purporting to be executed by Mrs. Connell. Now has he thereby substantially contributed to the loss by his act. In one sense he certainly has, because if he had left it alone, if nothing had ever been done, whether he paid his money or not, if he had simply omitted to carry in the transfer the registrar would not have been called upon to register the transfer of charge, Mr. Odell would never have obtained any apparent rights under it, and when Mrs. Connell came to claim her own she would have found her own unaffected by any transfer by a document purporting to be executed by her. So even after he had taken it in for registration and given due notice of it, he might even then not have insisted on its being registered, but, of course, he did. In that sense he has therefore contributed to the loss by his act. Now is that an act which is contemplated in this sub-section as what is intended to deprive a man of what he would otherwise be entitled to in my view—namely, indemnity for the loss he has suffered. I cannot think that it is. It must mean something independently of completing the transfer. The only person who can claim indemnity, or the only person who can have suffered loss, at any rate in such a case as we have to deal with, is the transferee or grantee, and he must, in order to put himself in a position to claim the indemnity, have put himself on the register, and must, being on the register, have had his name taken off the register. The register as well must have been rectified, or otherwise no claim to indemnity would have accrued. It seems to me impossible to suppose that the Legislature could have intended that merely requiring the registrar to perform his ministerial office of entering on the register this transfer of charge can be an act which substantially contributed to the loss. There I think those cases that have been cited about the registration of shares in companies, and particularly the case of *Sheffield Corporation* v. *Barclay*, 52 W. R. 54, [1903] 2 K. B. 580, do come in useful. They do enable one to see that such an act as is there mentioned must mean something like a voluntary act on the part of the person making the claim; something outside the mere transaction of procuring the registration. It is not necessary to consider what would do it, because, generally speaking, what is intended is that the man shall not claim if really he has induced the result in respect of which now he claims indemnity. He does nothing of that kind here; all he really has done is innocently to purchase a transfer of a charge, and then, having purchased it, to treat it in the regular manner. If that be so it is not necessary to go any further. But I wish to say one word about the case raised by way of a sort of answer to this, a sort of counterblast—namely, that Mr. Odell, even if he is not himself perfectly clear, ought not to lose his right to an indemnity because he was not protected by the register. To my mind there is not the slightest reason for any such argument. In fact, I think it is entirely unfounded. The matter was completed in the regular way. It seems to me that everything that had to be done was done with perfect regularity and propriety, and the unfortunate absence of Mrs. Connell, which resulted in the knowledge of the forgery not becoming known so soon as otherwise it would have been, is certainly no more the fault of the registrar than it was of Mrs. Connell. It seems to me that I am dealing here with a case in which everybody is innocent excepting the forger—that is to say, I have the parties here, the registrar, the trustees of the fund, and Mr. Odell, all taking their stand under the Act, which they are entitled, of course, to do, and thereupon arguing in support of their rights; but there is no moral obliquity on the part of any of them. There is no act, neglect, or

default on either side. The claim is occasioned simply by their misfortune, and I confess, as it seems to me that we have here a clear case provided for by the Act. I am told it cannot have been contemplated by the Act, and I am told that the indemnity fund may be exhausted, and also, I believe, that the Treasury may be exhausted. I am not going so far, or anything near so far, as to say that if this is not a case within the Act, it is difficult to say what other case is within the Act; but I do say most distinctly that in my opinion this case does fall within it.

Solicitors, *The Treasury Solicitor; J. T. Rossiter.*

House of Lords.

From C.A. (England). April 3.

WATT *v.* WATT. (*a.*)

Practice — New trial—Excessive damages—Power of Court of Appeal to reduce—Consent of both parties.

In an action for tort the Court of Appeal has no jurisdiction to order the reduction of the damages given by the jury without the consent of both parties to the litigation.

Belt *v.* Lawes (32 *W. R.* 607, 12 *Q. B. D.* 356) *overruled.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) setting aside a judgment of Bruce, J., and directing a new trial unless the plaintiff (the present respondent) should consent to reduction of the damages to £1,500, which the plaintiff accepted through her solicitors within the time prescribed.

The action was for libel, in which the jury gave the plaintiff damages for £5,000, and upon an application for a new trial the above-mentioned order was made.

Rufus Isaacs, K.C., and *J. R. Atkin*, for the appellant.

Lawson Walton, K.C., and *T. Mathew*, for the respondent.

Earl of HALSBURY, L.C.—In this case I think there ought to be a new trial. I say this quite independently of what I have to say hereafter upon the subject of the jurisdiction of the court to direct the amount of damages without the consent of both parties to the litigation. I think the trial itself was most unsatisfactory, and the verdict ought not to be permitted to stand. The learned counsel for the plaintiff in his opening speech read a letter which was written without prejudice, and which was undoubtedly well calculated to influence the jury against the defendant. It is only justice to the learned counsel to say that he was under the impression that it was not written without prejudice—an impression which he retained up to the time of the argument before your lordships—and he was only undeceived when the letter itself was produced. It is not necessary to discuss how it could have been evidence against the female defendant under any circumstances. It was a letter written by the husband to one of the solicitors in the case, and assumed to be evidence of malice on the part of the female defendant, because it was a copy in her handwriting. I will only say that I do not assent to its being evidence against her—its only relevancy being to show malice by her, and simply without more proof of authorship than that it was in her handwriting and a copy of her husband's letter. On the other hand, the plaintiff was encountered by a most insulting and offensive cross-examination, for some parts of which there does not seem to be the least justification. Even in mitigation of damages it is well settled you cannot go into evidence which, if proved, would constitute a justification. Nor does it appear to me that it makes any difference that the evidence is offered in cross-examination. See this question discussed in *Watson* v. *Christie*, 1 B. & P., p. 225, and *Speck* v. *Phillips*, 5 M. & W. 281. Of course, speaking generally, parties take their risk of such a course, and inflame the damages against themselves by such a proceeding; but in extreme cases, such as this is, I think the courts ought not to allow such an extravagant result, even though the parties have procured it by the conduct of which their representatives have been guilty. The whole theory of the jurisdiction of the courts to interfere with the verdict of the constitutional tribunal is that the court is satisfied that the jury have not really acted reasonably upon the evidence, but have been misled by prejudice or passion; and the conduct to which I have referred was what could not have been prevented by the learned judge, because if an objection had been made to the cross-examination in question the reply would have been that the party here was a witness, and every question to her credit was admissible; but that does not affect the controlling power of the court, if the court is satisfied that the jury have been misled. I remember a new trial granted because the learned counsel for the plaintiff read to the jury the amount of damages claimed in the declaration. Under the circumstances I think it is the duty of the court to interfere and remit the cause to be heard again under circumstances better calculated to secure a reasonable verdict. I do not think it is a case in which your lordships should follow the precedent of *Cumming* v. *Sibley*, 2 Burrows, or ord. 39, r. 7.

I am, however, further of opinion that the court has no jurisdiction to fix the amount of damages without the consent of both parties. This question was raised in *Belt* v. *Lawes*, 32 W. R. 607, 12 Q. B. D. 356, and though it was not necessary for the decision in that case, a weighty opinion was given by my noble friend Lord Lindley, which has made me hesitate before I come to a conclusion opposed to his. There has been doubtless some confusion in discussing the question of damages arising from the mode in which our law has grown up. The court itself has the right, and has exercised it in various ways when the question has arisen upon demurrer or default. It may send it, as has been commonly the practice, to the sheriff to assess; but it has the right, which has always been asserted, to decide that question for itself —probably because that question is often a question of law, where the damages are fixed by law, and where it was mere matter of law it was established in very early times (10 Hen. 6) that the court itself could even increase the damages, and so the learned editor of Reeves's History of the Common Law says: "There was always this distinction between trial by jury and mere inquisition or inquiry by a jury to assess damages—that in the latter case the inquisition was only to inform the mind of the court, and it was at their discretion whether they would award judgment for the amount found by the jury, whereas upon a trial they had no jurisdiction to interfere as to the amount of damages in cases of tort"; but where the jury had found larger damages than were laid in the declaration, the court held they were entitled to restrict them to the amount claimed (2 Hen. 6, 7). The courts, how-

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

ever, adopted the somewhat unconstitutional proceeding of refusing to give the plaintiff judgment unless he would consent to reduce his claim to what ought to be considered reasonable, and hence the practice and the impression that the court with the consent of the plaintiff could reduce the amount of damages. I am unable, after a very anxious examination of the earlier authorities, to assent to the legality of this proceeding unless by the assent of both parties. The very indirect method of the proceeding that they would not give the plaintiff judgment shows that they could not do it without the plaintiff's assent, and one can well understand that the defendant was not very likely to refuse his assent to a proceeding intended for his benefit. The theory of all the cases seems to me to be that the right of the court to interfere with a jury's verdict was only to be by the assent of both parties. Assume it to be the constitutional view that a person can only have damages assessed against him for a tort by a jury, what right has a court to intervene and say that damages which in its judgment are appropriate shall be the amount assessed against him? The only judgment by a jury is one which the court itself by the hypothesis says is unreasonable and excessive. Has not the defendant a right to say, I refuse to have judgment assessed against me by a court? The law gives me a right to a jury, and because the jury have already found a verdict against me, which you decide cannot be allowed to stand because it is unreasonable and excessive, how does that displace my right to have the verdict of a jury upon the question? Hesitating as I do to differ from the opinion expressed by Lord Lindley, I have come to the conclusion that there is no power in the court to alter the verdict except by ordering a new trial; and for these reasons I move your lordships that the judgment appealed from be reversed and a new trial had.

Lord DAVEY.—I agree that this appeal ought to be allowed. It will be sufficient for me to rest my judgment on the second ground stated by the Lord Chancellor. It appears to me an important question of principle. I assume that in an action of tort a defendant against whom a verdict has been found is entitled to have the damages to be paid by him assessed by the jury which has found the verdict. This right was perhaps of greater importance in former days than it is at present, but it is one which has always been recognized, and effect is given to it in the present Rules of Court, ord. 36, r. 2. If, therefore, the court takes upon itself to fix the amount of damages which the defendant is to pay, it is *primâ facie* usurping the functions of the jury and invading the right of the defendant. The court, however, has jurisdiction to set aside the verdict of the jury and direct a new trial where it considers the damages given by the jury are excessive or (in certain cases at any rate) inadequate. To quote the words of James, L.J., delivering the judgment of the court in *Phillips* v. *London and South-Western Railway Co.*, 28 W. R. 10, 5 Q. B. D. 78, at p. 85: "The verdicts of juries as to the amount of damages are subject, and must for the sake of justice be subject, to the supervision of a court of first instance, and, if necessary, of a Court of Appeal, in this way—that is to say, if, in the judgment of the court, the damages are unreasonably large or unreasonably small, then the court is bound to send the matter for reconsideration by another jury." But can the court, when it considers that the damages are disproportionate and excessive, say there shall be no new trial if the plaintiff is willing to accept a verdict for a reduced amount or (in other words), with the consent of the plaintiff, impose upon the defendant without his consent the payment of damages, the amount of which has been fixed by the court and not by a jury? It was held by the Court of Appeal in *Belt* v. *Lawes*, that the court has this jurisdiction. Lord Esher says: "When the complaint is only that the damages are excessive and the verdict cannot be otherwise impeached, and it is a case where the plaintiff is entitled to substantial damages, the court has power to refuse a new trial without the consent of the defendant on the plaintiff's consenting to the amount of the damages being reduced to such an amount as if it had been given by the jury the court would not have considered excessive." The learned judge also expressed the opinion that, on the converse case, where the damages are inadequate, the court might, without the consent of the plaintiff, refuse a new trial if the defendant were willing to submit to a verdict for an increased amount. The first observation that occurs to one is that, if the jurisdiction can only be exercised with the consent of one party, it is difficult to understand why that of the other party should not be equally necessary. I do not doubt that such orders have been frequently made, but they have not been challenged, and in the vast majority of cases the defendant is well advised to submit to a verdict for the reduced amount rather than incur the risk and expense of a new trial. Nor do I doubt that the power (if it exists) would be convenient, and in most cases do substantial justice, and save expense. It is said that the power to grant a new trial is a discretionary power. So it is; but it is a judicial discretion to be exercised in accordance with settled principles of law. The court, no doubt, is not bound to exercise the power on the ground of some technical misdirection or wrong admission or rejection of evidence if the court can see that the result was not affected by it, and substantial justice has been done. And the court may impose terms as to costs and other matters within its jurisdiction. No authority for the proposition laid down in *Belt* v. *Lawes* is quoted by the learned judges in that case, and no authority earlier than that case was brought to our attention by Mr. Mathew in his very careful argument. On the other hand, there are numerous *dicta* of learned judges to the contrary. The express words of James, L.J., delivering the judgment of the court in *Phillips's case*, which I have already quoted, may, perhaps, be explained by saying that this point was not present to the learned judge's mind. But in *Leeson* v. *Smith*, 4 Nev. & Man. 306, Lord Denman said: "It is clear that the verdict is at all events for too much. We cannot, however, reduce the damages without the consent of both parties, and therefore the rule must be made absolute for a new trial," and in *Price* v. *Severn*, 7 Bing. 316, at p. 320, Alderson, J., said: "But nothing is more usual than in cases of assault, where an excessive verdict has been given, to suggest to the counsel to agree to a sum to prevent the necessity of a new trial." In the present case the jury gave the plaintiff a verdict for £5,000, which has been reduced by the Court of Appeal to £1,500. The appellant succeeded in convincing the court that the amount of damages given by the jury was excessive, and that the verdict could not be allowed to stand, but she had not been heard on the question whether the reduced amount was not also excessive. What was she to do? Could she appeal from the order on the merits? It would be difficult to convince the appellate tribunal that the reduced amount was outrageous when three experienced judges had suggested it as fair. I am quite aware that I am differing from learned judges more conversant with cases of this kind than I am. But having with all the caution imposed upon me by

that knowledge come to the conclusion that the order of the Court of Appeal is contrary to principle and unsupported by any reported authority except *Belt* v. *Lawes*, I am of the opinion that the appeal shou'd be allowed.

Lord ROBERTSON (read by Lord Davey).—I agree in thinking that this appeal ought to be allowed, and a new trial ordered, on the ground that the Court of Appeal had no power without the consent of the defendant to give decree for any sum for damages other than that fixed by the jury. It appears that there has been a certain amount of practice in accordance with the course complained of, but I do not find any reasoned vindication of this practice; and now that the matter is probed, the thing is on principle indefensible.

Order of Court of Appeal reversed, and a new trial ordered; both parties to bear their own costs here and below; cause remitted to the King's Bench Division.

Solicitors, *Michael Abrahams, Sons, & Co.; Charles Russell & Co.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) — Nov. 28.

CARROLL *v.* GRAHAM. (*a.*)

Practice—Costs—Appeal—Trustees served with notice of appeal—Appearance by counsel—Taxation.

Notwithstanding the usual practice that trustees served with notice of an appeal upon the construction of a will are entitled to their costs of appearance by counsel, yet, in taxing such costs, the taxing-master should have regard to the position of the trustees, and especially whether it was such that, at the hearing of the appeal, their appearance would probably be required by the court.

Per Vaughan Williams, L.J.: *Trustees served with notice of appeal and holding a merely neutral position, without any intention of taking part in the argument, ought not to appear by separate counsel on the appeal.*

Appeal from Swinfen Eady, J.

The action concerned the administration of the estate of a testator, William Carroll, who died in 1851.

An administration decree was made in 1867, under which a fund representing the testator's residuary personal estate was paid into court in the action.

By an order made in 1903, two persons who had in 1902 been appointed administrators *de bonis non* of a deceased beneficiary interested in the residuary estate of William Carroll, obtained an order to carry on the proceedings as plaintiffs. They then presented a petition in the action with a view to ascertaining the title of various claimants to the fund in court. The question of title depended upon the construction of the will of William Carroll the terms of which were obscure.

Swinfen Eady, J., decided against one of the claimants, who thereupon appealed.

Notice of appeal was served upon the successful claimants, and also upon the plaintiffs.

Eve, K.C., and *Vaughan Hawkins*, for the appellant.

Mark Romer, for the respondents—the other claimants—was not called upon.

THE COURT (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.) adopted the construction of Swinfen Eady, J., and dismissed the appeal.

J. F. Popham, who appeared for the plaintiff, without taking any part in the argument, then asked for his costs of appearance in accordance with the usual practice in the case of trustees or other persons standing in a fiduciary position.

VAUGHAN WILLIAMS, L.J.—I protest each time such an application is made on behalf of trustees, but my protest seems unavailing.

ROMER, L.J.—The practice is settled, I am afraid, and it is too late to alter it. But what my lord means is that trustees ought not to appear upon any appeal unless they think it likely that they may be called upon to assist the court. I have no doubt that the taxing-master will have regard to the position of the trustees in the present case in taxing the costs.

COZENS-HARDY, L.J.—I agree.

VAUGHAN WILLIAMS, L.J.—I do not think that mere neutrality should be supported by separate counsel., If the trustees personally have anything to say in the matter, well and good. Then let them be represented by separate counsel. But I cannot understand why trustees who are absolutely neutral should appear here by separate counsel.

In dismissing the appeal the court ordered that the appellant should pay to the respondents, including the plaintiffs, their costs of the appeal, such costs to be taxed by the taxing-master.

Solicitors, *Farrer & Co.; Cunliffes & Davenport.*

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Farwell, J. — May 23, 24, 25, 26.

HIGGINS AND ANOTHER *v.* BETTS. (*a.*)

Easement—Light—Prescription—Substantial nuisance—Mandatory injunction—Damages.

The defendant sought to replace his old building by one which was found as a fact to seriously interfere with the light of the plaintiffs' premises, making them less suitable for business and occupation. A mandatory injunction was granted.

The judgment of the House of Lords *in* Colls *v.* Home and Colonial Stores, 53 *W. R.* 30, [1904] *A. C.* 179, *explained.*

Deprivation of light is on a par with other cases of nuisance, and an injunction will be granted if a substantial nuisance is caused thereby. The court must look at the amount of light left to a plaintiff and not at the amount taken away from his easement by the defendant's operations.

Shelfer *v.* City of London Electric Lighting Co., 43 *W. R.* 238, [1895] 1 *Ch.* 287, *upheld.*

Proper terms of injunction as in Yates *v.* Jack, 14 *W. R.* 618, 1 *Ch.* 295, *with the words "so as to be a nuisance" added.*

The facts in this case were as follows: The plaintiff Higgins was the lessee of a public-house known as the Red Lion, in Cowcross-street, Farringdon-street, E.C., and the plaintiffs Barclay, Perkins, & Co., brewers, were his immediate lessors. The Red Lion was built in 1880 with a narrow front

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

on to Cowcross-street, a wide thoroughfare, and an extended frontage to Benjamin-street, a narrow lane opening out of Cowcross-street. Along the Benjamin-street front, looking from Cowcross-street, were situated on the ground floor a public bar, a private bar, and a saloon bar, the last being lighted by a glazed door, and having on its further side a window looking out on a small yard enclosed by high walls. Opposite to this front had always existed since 1880 a china and glass warehouse, about thirty-two feet high, with no windows except towards Cowcross-street. This building lay opposite the plaintiff's public and private bars, which derived most of their light from Cowcross-street. But at a point opposite to the windows of the private bar this old warehouse ended, and there was a gap with a wall only eleven feet high for a distance of nine feet, which then sloped up to eighteen feet high at a distance of twenty feet from the warehouse. Then came another building some thirty-one feet high on an average. Opposite to this gap was the glazed door of the saloon bar, and on the first floor the windows of a dining-room. Beyond were windows lighting a staircase, pantry, scullery, and pothouse, all deriving substantial light from this gap. The new building proposed to be erected by the defendant had a uniform height of thirty-eight feet, and entirely blocked up the gap previously existing.

This action claimed an injunction to prevent the defendant from building so as to cause a substantial nuisance to the plaintiffs in the enjoyment of their easement of light, and the writ was framed on the lines suggested by Lord Macnaghten in the case of *Colls* v. *Home and Colonial Stores*, 53 W. R. 30, [1904] A. C. 179. An *interim* injunction had been granted last sittings, but the defendant had continued to build. On a motion for committal arrangements had been made to suspend building at the point where the old gap had commenced.

Evidence was given to show that there had been and would be a serious interference with the light of the Red Lion, both for business purposes and as a residence, and that old customers had ceased to use the saloon bar because of the gloominess of the room. The damages, so far as they could be estimated, were placed at £900, including sums for extra gas and for redecoration.

The defence, in substance, was that the light left to the plaintiffs' building would be enough for all reasonable requirements, and alternatively that this was a case for damages and not for an injunction.

Jenkins, K.C. (*L. B. Sebastian* and *Carden Noad* with him), for the plaintiffs.—A very substantial injury to the light of the Red Lion and to the business carried on there having been proved, the remedy is a perpetual injunction against the defendant. Before the decision of the House of Lords in the case of *Colls* v. *Home and Colonial Stores* the plaintiffs' right to this relief would have been unquestioned. Even in that case the House of Lords accepted *Back* v. *Stacey*, 2 Car. & P. 465, and *Parker* v. *Smith*, 5 Car. & P. 438, as showing the proper direction to give to a jury. The damages here are large and extremely difficult to assess, and to force the plaintiffs to sell their rights on an estimate, however liberal, would be extremely oppressive.

Upjohn, K.C., and *J. Tanner*, for the defendant.—The House of Lords in the *Colls' case* have said that no injunction should be granted if damages are sufficient, and they have overruled *Scott* v. *Pape*, 34 W. R. 465, 31 Ch. D. 554. What they meant is shown by the decision of the Court of Appeal in *Kine* v. *Jolly*, *ante*, at p. 463, [1905] 1 Ch. 480. If the court takes a serious view of the probable damages, however, the defendant will prefer an injunction.

FARWELL, J.—Inasmuch as this is the first case I have tried as to lights since *Colls' case* I will say a few words as to my understanding of that case. I think it is plain if it had not been for the decision of *Colls' case* in the House of Lords that this action would never have been defended. I do not say that Mr. Upjohn has said so, but I think it is plain that there is a general impression that *Colls' case* has disturbed the ancient rules of this court as to lights to a very much greater extent than it really has. I have carefully studied the speeches in *Colls' case* and also the exposition of it by the Court of Appeal in *Kine* v. *Jolly*, and also Bray, J.'s, recent decision in *Ambler* v. *Gordon*, in [1905] 1 K. B. 417. The result I have come to I have attempted to put down as shortly as I can without referring to the various speeches upon which *Colls' case* is founded. Apart from express contract or grant the owner of a house has no right to any access of light to the windows thereof over his neighbour's land until he has acquired it by prescription or under the Act. When he has so acquired it, he has a house with an easement of light attached to it. Any substantial interference with his comfortable use and enjoyment of his house, according to the usages of ordinary persons in that locality, is actionable as a nuisance at common law. His neighbour's brick burning or fried fish shop may be a nuisance in respect of smell, his pestle and mortar in respect of noise, and in like manner his neighbour's new building may be a nuisance in respect of light. The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement in addition to the right of property before it can be enforced—the two latter are *ab initio* incident to the right of property, but the wrong done is in both cases the same—namely, the disturbance of the owner in his enjoyment of the house. Inasmuch as the acquisition of the easement was a necessary condition precedent to the right of sue, the courts appear to have addressed themselves rather to the extent of the easement acquired and the amount of such easement taken away by the defendant than to the sufficiency for ordinary purposes of the amount of light left; so much so that many expressions can be found that lend support to the argument that the right to light was a right of property for which trespass would lie. The dominant owner was never entitled either by prescription or under the Act to all the light that came through his windows; it was not enough to show that some light had been taken, but the question always was whether so much had been taken as to cause a nuisance; but for many years the tendency of the court has been to measure the nuisance by the amount taken from the light acquired, and not to consider whether the light left was sufficient for the reasonable comfort of the house according to ordinary requirements. If a man had a house with unusually excellent lights, it was treated as a nuisance if he was deprived of a substantial part of it, even although a fair amount for ordinary purposes was left. It is in this respect, and also by negativing the suggestion of any right of property in light, that *Colls' case* has to my mind re-adjusted the law; it is still, as it always has been, a question of nuisance or no nuisance; but the test of nuisance is not, how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that the owner had previously had? but, how much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind? This latter is the direction in *Back* v. *Stacey* in 2 C. & P., p. 465, quoted in *Colls' case*, [1904] A. C., p. 187.

This puts the case of nuisance by interference with light on the same footing as other cases of nuisance—for example, noise; for apart from the question of locality, which is always important in considering the question of nuisance or no nuisance, the fact that the owner of a house had enjoyed exceptional quiet gave him no right to more than the ordinary freedom from extraordinary noises. The difficulty arises from the necessary limitation of the plaintiff's right to the extent of his ancient windows.

That, to my mind, is the alteration which the House of Lords' decision has made. There are various other suggestions thrown out by the noble and learned lords which, of course, are entitled to careful consideration when they may arise. For instance, this question as to the greater freedom of the court with regard to exercising a judicial discretion as to granting an injunction or not. But according to my understanding the mere opinions of the noble lords, as apart from decision, do not overrule the decisions of the Court of Appeal, which, at any rate so far as the judges of first instance are concerned, must remain binding upon them until they are in fact overruled. That has reference rather to the case of *Shelfer* v. *City of London Electric Lighting Co.* I cannot say that I can read anything in *Colls' case* as overruling that.

I am relieved from considering the question of injunction or no injunction in this case, because the damages, as I have intimated, are so substantial that Mr. Upjohn prefers not to argue the question as to whether I should or should not grant an injunction.

Now, the case here is reasonably simple. There are two plaintiffs, the plaintiff Higgins as tenant in possession for a term of nearly thirty years unexpired, and the plaintiffs Barclay & Perkins as lessees for a lease of between thirty and forty years, for which they gave about ten years ago the sum of something like £15,000, of a house called the Red Lion in Cowcross-street. The house in question has an exceptionally good light to the west. It faces over a large open space, where the Farringdon-street Station of the Metropolitan Railway stands. The front of the building in question is not in Cowcross-street, but is in Benjamin-street. Benjamin-street is a narrow street of some thirteen feet in width. Opposite the plaintiff's premises at one time was an old building which, at the particular point in question in this action, had a gap in it of some considerable size. The gap was eleven feet high at the lowest point; it then rose by a sloping roof to an apex which I think was eighteen and a half feet high; the width of the gap at its narrowest was eleven feet, and at its widest twenty feet. The defendant's proposal is to build up the whole of this gap, and to add an extra height of six feet along the whole of the former building, which at the Cowcross-street end was thirty-two feet high. Now, I have no hesitation whatever in finding that this erection of a house on this side so close to the plaintiff's premises, and having the effect that it has—which I will refer to in a moment—on some of his windows, is a nuisance in the sense in which I have already expressed myself. The windows which I find to be affected are these. There is, first of all, on the ground floor a private bar. As regards the private bar I think the interference is not very much, for this reason, that the only window affected now is a window which was formerly a door, and I am not sure whether when they were transposed, window and door instead of door and window, that that particular room would have had such light as is now affected by the plaintiff's building. I really put that bar out of consideration. The saloon bar is to my mind very materially affected. There was originally a window there which has now been made into a door with glass panels in it, and recessed back to a depth of three feet two inches. The door has glass panels in the face of it. The saloon bar itself is an ugly-shaped room. The only other window it has is a small window facing the east, and looking into a yard of a very small size, with a dwarf wall opposite it and a very high building fifteen feet off. The window has a reflector, and, as one of the witnesses told me, a window that is of any use at all is never spoilt by having a reflector put to it; it is because the window was not of much use in itself that the reflector was put there. That is the light the saloon bar gets from that side, and there may be some very small amount of light coming through from the front, through Cowcross-street and possibly to some extent a diffused light through the side windows of the public bar in Benjamin-street. I think the amount of light that comes from that is almost negligible, because it has to travel from Cowcross-street over a distance of some thirty-five feet, and it has to pass over a glass partition seven feet high between the public bar and the private bar, and then through a glass partition running up to the whole of the height of the ceiling before it gets to the saloon bar at all. The amount of light that the saloon bar can derive from that must, I think, be extremely small. But I find as a fact on the evidence that I have heard that before the defendant's building was put up, by reason of this gap which gave a very good light to the door of the saloon bar, that the saloon was a reasonably well-lighted and comfortable room. It is now a dark and gloomy room, and the business of the plaintiff, Mr. Higgins, therein has been undoubtedly seriously affected and prejudiced. I think the plaintiff and his wife and his customers were straightforward trustworthy witnesses who gave their evidence very well, and I accept their testimony. The saloon bar, therefore, in my judgment, has been materially injured. The same remark applies to the pothouse, which after all is a place where a great deal of work is being done all day long, and also to the staircase window to some considerable extent. No doubt the window is a very small one, and the staircase is not a very convenient one. It has a circular window at one place, and it has a window up above on a sort of half floor. The light to both these windows is materially interfered with by the defendant's building, and that staircase is undoubtedly prejudiced. Then there comes on the first floor the scullery, which is interfered with to some extent, but not so much, and the dining-room, which to my mind is extremely interfered with. There the defendant has left to the plaintiff thirty-two degrees of light only. He had before seventy-nine degrees. As I have already said, I have not to consider now that he has taken away so much as forty-seven degrees, but I am to consider that he has left him only thirty-two. This is the dining-room of his house, a house, as I have said, which cost a considerable amount of money. The defendant has put a wall where there used to be an open space going right down in front of the window. He has put a wall there, cutting that space off and leaving only thirty-two degrees of light, where formerly there were seventy-nine. In my opinion that is a most material injury. I put out of sight the passage at the back, because I am not quite sure, having regard to some of the statements in the speeches in *Colls' case* whether I ought or ought not to consider a passage which only gets its light in the inconvenient manner which has been described. Therefore I will no weaken my judgment by laying any stress upon that passage.

The result is that I find as a fact that there has been a substantial deprivation of light sufficient to

render the occupation of the house uncomfortable and to prevent the plaintiff carrying on his accustomed business, that of a licensed victualler, on the premises as beneficially as he had done before.

As to the form of injunction, we have discussed that question, and I propose to adopt as nearly as I can Lord Macnaghten's suggestion—that is to say, to grant the injunction in the form adopted in the case of *Yates* v. *Jack* with the additional words "so as to be a nuisance" qualified by stating that this is not to prevent the defendant from building from the Cowcross-street front to opposite the pillar of the door-post of the private bar on the west to the height shown on his plan.

As regards the rest there will have to be a mandatory injunction, but I propose to give liberty to apply, because I understand that there is a prospect that the architects of the plaintiff and defendant, who appear both to be reasonable men, will be able to arrive at some arrangement which will render it unnecessary for the court to specify with exactitude, if it be indeed the duty of the court so to do, the amount which the defendant has to pull down. There is an obvious convenience in this, because, assuming the ordinary practice to be as I believe it is, and as suggested by Mr. Jenkins, that I should simply make the order that the defendant should pull down, so as to comply with the order not to commit a nuisance, it would leave this question to be determined on a motion to commit, a most inconvenient way to try it. I hope, therefore, that the parties will be reasonable and will try to arrive at some *modus operandi* which will suit both parties. I give them liberty to apply and if necessary I hope I shall be able to assist them if any point arises, but I have no desire to sit as an architect and determine between two conflicting plans.

Injunction granted.

Solicitors for the plaintiffs, *Marson, Son, & Haigh.*

Solicitors for the defendant, *Letts Brothers.*

Chan. Div.
Swinfen Eady, J. } March 20, 27.

HUMPHREYS *v.* MORTEN. (*a.*)

Landlord and tenant—Lease—Relief against forfeiture for non-payment of ground-rent—Underlease—Necessary parties—Original lessee and assignee—Mortgagee by sub-demise—Time—Practice—Costs—Common Law Procedure Acts, 1852 (15 & 16 *Vict.* c. 76), *ss.* 210, 211, 212; *and* 1860 (23 & 24 *Vict.* c. 126), *s.* 1.

In an action by the mortgagees of a leasehold house, holding by sub-demise of an underlease, claiming relief from forfeiture of the lease for non-payment of rent, the lessor, who had recovered possession of the premises in an action of ejectment for non-payment of rent, disputed their right to relief under the equitable jurisdiction and the Common Law Procedure Acts, 1852 *and* 1860, *s.* 1, *on the ground that the original lessee and an assignee had not been made parties to the action.*

Held, that as under the circumstances the original lessee had become bankrupt in 1877, *and that his trustee had assigned the lease to an assignee who had disappeared and had not been heard of for twenty-six years, the general rule that in an application for relief by underlessees against forfeiture of the head lease, the original lessee should be made a party to the proceedings might be dispensed with, both as regards the original lessee and the assignee.*

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

Hare *v.* Elms, 41 *W. R.* 297, [1893] 1 *Q. B.* 604, *discussed.*

The order in Howard *v.* Fanshawe, 43 *W. R.* 645, [1895] 2 *Ch.* 581, *as to the costs of the applicants for relief followed.*

Newbolt *v.* Bingham, 72 *L. T.* 852, 43 *W. R. Dig.* 89, *distinguished.*

Witness action.

The plaintiffs were the mortgagees of a leasehold house, holding under an underlease, and they claimed relief from forfeiture for the non-payment of ground-rent.

On the 1st of May, 1872, certain premises were demised to a lessee for a term of ninety-nine years, from the 24th of June, 1870, at £6 10s. per annum, by the predecessors in title of the lessor in the present case, a mortgagee being also a party to the demise. There was the usual proviso for re-entry on non-payment of rent, or the breach of any of the covenants, and the lessee paid the insurance. Later, the affairs of the lessee having been liquidated by arrangement, a trustee was appointed who, with others, in March, 1878, assigned the term to an assignee.

The assignee having, in 1879, mortgaged the said premises for the residue of the term (less one day), went off, and had not since been heard of, nor did anyone know where he had gone, nor could he be traced anywhere. Under a statutory power of sale the underlease was disposed of, and finally was assigned to one Burch.

On the 1st of March, 1899, he, as mortgagor, mortgaged the said premises to the predecessors in title of the present plaintiffs for the residue of the original term (less three days), and later put a charge on them in favour of certain second mortgagees.

In November, 1904, the mortgagor having failed to pay the rent, possession was obtained by the lessor on execution under a writ of ejectment, and he subsequently relet the premises to the occupying tenant. The day after the lessor had obtained possession the plaintiffs first became aware of the proceedings in ejectment, and early in December, 1904, began this action against the lessor, mortgagor, and the second mortgagees for relief under the equitable jurisdiction and the Common Law Procedure Acts, claiming that they were entitled to a lease from the lessor for their mortgage term subject to the existing tenancy on their paying all arrears of rent and the costs of the ejectment action and all other costs and certain premiums on insurance paid by the lessor. The lessor contended that no ordinary relief could be given under the equitable jurisdiction nor the said Acts in the absence of the lessee and assignee of the head lease.

Johnston Edwards, for the plaintiffs.—Section 4 of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), is inapplicable; and see *Rogers* v. *Rice,* 40 W. R. 489, [1892] 2 Ch. 170.

He referred to *Hare* v. *Elms,* 41 W. R. 297, [1893] 1 Q B. 604, 607, 611; *Gray* v. *Bonsall,* 52 W. R. 387, [1904] 1 K. B. 601; *Howard* v. *Fanshawe,* 43 W. R. 645, [1895] 2 Ch. 581, 44 W. R. Dig. 87; the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 210, 211, 212; and the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1.

Eve, K.C., and *Jason Smith,* for the lessor.—We rely on our legal position, and one must look at it apart from the Conveyancing Act, but having regard to the old cases in equity: see *Hare* v. *Elms,* 41 W. R. 297, [1893] 1 Q. B. 604; *Gray* v. *Bonsall,* 52 W. R. 387, [1904] 1 K. B. 601, on p. 606. [SWINFEN EADY, J.—*Doe dem. Whitfield* v. *Roe,* 3 Taunt. 402.] That decides that a mortgagee of a lease has the same

relief against forfeiture for ejectment for non-payment of rent as a lessee against whom the recovery is had. [SWINFEN EADY, J.—Here the original mortgagee is a bankrupt.] I agree. Formerly a court of equity never relieved against forfeiture other than a money forfeiture: *White* v. *Warner*, 2 Mer. 459; and see Turner, V.C., in *Gregory* v. *Wilson*, 9 Ha. 683. Down to Lord St. Leonards' Act a court of equity could not restore the land to the tenant, but this was altered by 22 & 23 Vict. c. 35, s. 4. We are in possession. Section 14, sub-section 1, of the Conveyancing Act repeals this, so the landlord is restored to the position he was in before the Act 22 & 23 Vict. c. 35, s. 4, and the Conveyancing Act, 1881.

Johnston Edwards replied.

S. R. Earle, for second mortgagees.

W. A. Peck, for mortgagor.

March 27.—SWINFEN EADY, J.—The plaintiffs here are the mortgagees of a leasehold house. The defendant Morten, who alone has appeared, has recovered judgment in an action for the recovery of the premises for non-payment of ground-rent payable under his lease. The action was begun in July, 1903, but the writ of possession was not executed until the 24th of September, 1904. It was not until the 17th of November, 1904, that the plaintiffs in this action acquired knowledge of these ejectment proceedings, and on the 8th of December, 1904, the writ in this action was issued. It is to be observed that the only ground on which the landlord has brought his action was for non-payment of rent, and no other matter entitling him to re-enter has been proved, and no notice given under the Conveyancing Act. The plaintiffs come in within due time, and seeking relief, which would follow as a matter of course. According to the long established practice of the Chancery Division for non-payment of rent, it would in certain cases grant relief to the lessee, and in the same way equity would have done so. Therefore, if the plaintiffs came within due time, they would obtain relief as a matter of course. Now the defendant contends that the plaintiffs cannot obtain this relief on account of the non-appearance of the original lessee and assignee, having regard to the decision in *Hare* v. *Elms*, 41 W. R. 297, [1893] 1 Q. B. 604, 607, 611, and that their absence precluded relief from being granted. It was pointed out in that case that where a lessee or others are claiming relief, as Day, J., said, "they must bring the proper parties before the court, or give some good excuse for not doing so"; and the present Master of the Rolls concurred, on the ground that by granting relief some liability might be imposed on the lessee, and in his absence it would not be right, until he had appeared and had an opportunity of being heard. I am of opinion that the present circumstances are such that a sufficient reason has been given on the facts proved for not making the lessee or assignee parties to the action. The lessee was long ago a bankrupt, and his lease was assigned, and the assignee has long ago disappeared; he was, I believe, once in the army, and has not been heard of for nearly twenty-seven years. Under the circumstances, I am of opinion that the plaintiffs have shewn sufficient special grounds why the original lessee and the assignee need not be made parties.

The second point on which stress was laid was with respect to the covenant to insure. The practice of the Court of Chancery where a lessor was proceeding by ejectment was to grant him an injunction so far as it related to the action, leaving him to go on with his claim. [His lordship here stated the facts with respect to the insurance, adding that in his opinion the plaintiffs had been diligent and not negligent in keeping it on foot, as they were not mortgagees in possession.] It seems to me clear that the plaintiffs are entitled to succeed in the action.

I will now hear counsel on the question of costs.

Johnston Edwards, for the plaintiffs.—The costs should be as in *Howard* v. *Fanshawe*, 43 W. R. 645, [1895] 2 Ch. 581, on p. 592. Really here it is an undefended action, and the defendants have failed on every point.

Eve, K.C., for the lessor, relied on *Newbolt* v. *Bingham*, 72 L. T. 852, 43 W. R. Dig. 89.

Johnston Edwards replied.

SWINFEN EADY, J.—The proper order as to costs will be to follow the order in *Howard* v. *Fanshawe*. I think the plaintiffs are bound to pay the costs of the action, except those that have been increased by the lessor's resisting their claim to relief, but the plaintiffs must certainly pay for that relief: *Croft* v. *London and County Banking Co.*, 14 Q. B. D. 347, 33 W. R. Dig. 58. *Newbolt* v. *Bingham*, 43 W. R. Dig. 89, was a different case; A. L. Smith, L.J., said: "I have only to say that I think the appellant has come up to the Court of Appeal with an entirely new case. I have no doubt that, if the mortgagee had asked for it, he could have got relief from the judge at chambers on the same terms as he gets it here." No such considerations arise here, and I must therefore follow *Howard* v. *Fanshawe*.

Solicitors, *Joseph Pearce; Morten, Cutler, & Co.*

K. B. Div. (Bray, J.) March 2, 11; April 8, 19.

WEINER v. SMITH AND OTHERS.
WEINER v. GILL AND OTHERS. (a.)

Sale of goods—"Sale for cash only or return"—Approbation note—Property in goods—Estoppel—Pawnbrokers—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 18 (4), 21 (1), 25 (2).

The plaintiff handed goods to H. under the following terms of an approbation note: "On sale for cash only or return . . . goods had on approbation or on sale or return remain the property of W. (the plaintiff) until such goods are settled for or charged." H. had the option of buying at a fixed price. H. handed the goods to L., on the terms that he should pay immediate cash or return the goods in a day or two. L. obtained the goods by representing that he had a particular customer who wished to buy them. Such representation was false. L. pledged the goods with the defendants (pawnbrokers), the latter believing that L. was acting in good faith.

Held, that the plaintiff could recover the goods from the defendants. The property had not passed from the plaintiff, and there was no such conduct as to estop the plaintiff from saying that the property had not passed. Mere parting with possession is not sufficient to amount to an estoppel.

Actions tried before Bray, J., sitting without a jury.

The plaintiff's claims were for the delivery up of certain articles of jewellery or for their value, and for an injunction to restrain the defendants from parting with the jewellery.

The facts, as found, were as follows: The plaintiff sought to recover four articles of jewellery, one a diamond necklace of the value of £170, from the

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

executors of a pawnbroker named Gill, and three others, a diamond brooch, a diamond circular pendant, and a pair of ear-rings, of the value of £205, from the executors of another pawnbroker named Robinson. The defendants resisted the claim on the ground that the goods had been validly pledged to them by one Longman.

The case was one of considerable importance to pawnbrokers and to jewellers, and, having regard to the recent decision in the Scotch courts in the case of *Bryce* v. *Ehrmann*, [1904] 42 L. R. Sc. 23, of some difficulty.

The plaintiff was a manufacturing jeweller and diamond merchant, and was originally the owner of all four articles. In the months of August and September he handed these articles to one Huhn on the terms of a special approbation note, which had this printed heading: "On approbation. On sale for cash only or return. From S. Weiner, diamond mounter and manufacturing jeweller. Goods had on approbation or on sale or return remain the property of S. Weiner until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession."

The note contained the true and only terms between the parties.

Below the heading the article was described and the price named at which Huhn had the option of buying it. Huhn had been known to the plaintiff for twenty-five years. He had formerly been in a very good position in the trade, but at this time was not a man of means and was in the habit of taking goods on approbation to resell to his customers.

In each case, within a short time of receiving the goods from the plaintiff, Huhn handed them to Longman. Longman had been known to Huhn for many years. He had been a shopman in two different shops, but at this time was a dealer in jewellery in a small way, having no place of business except his residence, and was known by Huhn not to be a man of means.

In each case Longman represented to Huhn that he had a particular customer who wanted to buy the particular article, and the article was handed to him by Huhn that he might offer it to this particular customer. He was to pay immediate cash or return the article in a day or two. In fact in no case had Longman any customer, nor had he had any previous communication with any customer. He had pledged other articles with the defendants which he desired to redeem and in each case he obtained the goods from Huhn that he might pledge them in substitution for articles which he desired to withdraw. He never showed or offered the articles to any customer, and never intended to do so, and in each case he pledged the goods with the defendant either the same day or within a day or two of the day when he received them from Huhn, and he intended to misappropriate them at the time when he obtained them from Huhn.

When Huhn called upon Longman to return the goods Longman told him that his customer was still considering whether he would buy. Eventually Huhn prosecuted Longman for larceny. He was committed for trial, but the jury acquitted him.

The following are the facts with reference to the pledging:

The goods were taken in by the respective managers of the two defendants from Longman. No question whatever was asked by either of them as to Longman's title to the goods, and Longman made no representation at all as to his title. In the cases of both defendants Longman had pledged jewellery with them before and gave these goods in substitution for jewellery which they already had in pledge.

In *Gill's case* Longman had throughout given a false name and address, viz., George Howard, 79, Calabria-road, but no inquiries had been made to ascertain if it was correct. When the goods were claimed, but not before, the manager looked in the directory and found there was a 79, Calabria-road, but no name of Howard appeared. He said he took Howard to be a dealer in jewellery in a large way, because he brought so many articles to be pledged, and this gave him confidence, and therefore he asked no questions.

In *Robinson's case* Longman gave his correct name and address, but the manager asked him no further questions. He judged from his transactions that Longman was a dealer in jewellery. In neither case did the pawnbrokers abstain from asking questions because they believed or suspected that anything was wrong. They both *bonâ fide* thought Longman had the right to pledge the goods, and they were content to run the risk without making any special inquiries or asking for any proof of title, but it certainly was a careless, and, as one of them said, an unusual mode of doing business. The plaintiff first learnt that the goods had been pledged from Huhn's solicitor. He had been demanding back his goods from Huhn for some time previously, but Huhn had put him off by saying that they were still in the hands of his customer, who had not decided whether he would buy them. On hearing that they had been pledged with the defendants the plaintiff demanded their return from the defendants, who refused to deliver them up, and then he commenced these two actions, which were consolidated by consent.

Rawlinson, K.C., and *H. Dobb*, for the plaintiff.—As to the passing of the property, the approbation note shows that the articles were to remain the property of the plaintiff until they were settled for or charged. "On sale for cash only" shows that there was no intention, as between the plaintiff and Huhn, that the property should pass until the former received cash. The property did not pass from the plaintiff, and if the terms had been the statutory "sale or return" terms there was no adoption, approval, &c., within section 18 (4) of the Sale of Goods Act, 1893. The property did not pass from Huhn, even if he had the power to pass it, to Longman. The goods were not handed to Longman on the ordinary sale or return terms. Section 25 (2) of the Sale of Goods Act, 1893, does not apply. As to estoppel, there was no such conduct on the plaintiff's part as to amount to estoppel. That the pawnbrokers believed in Longman's *bona fides*, or their belief that Longman could pass the property, is not sufficient. The mere parting with possession cannot amount to an estoppel.

The cases of *Farquharson* v. *King*, 51 W. R. 94, [1902] A. C. 325, and *Q.* v. *Oliver*, 4 Taunton 274, Archbold's Criminal Practice (21st ed.) 398, were referred to.

J. A. Hamilton, K.C., and *C. L. Attenborough*, for the defendants.—The goods were "on sale or return," and when Huhn did an act of approval the property passed to him. The act of approval was the giving the goods to Longman "on sale or return" terms. The note is similar to the terms in *Bryce* v. *Ehrmann*, [1904] 42 L. R. (Sc.) 23. The contract of sale or return is a conditional contract of sale: *Moss* v. *Sweep*, 20 L. J. Q. B. 167, 16 Q. B. 493; *Kirkham* v. *Attenborough*, 45 W. R. 213, [1897] 1 Q. B. 201. As to estoppel, both the plaintiff and Huhn by their conduct allowed persons dealing with the articles to believe that the property would pass to Longman in such a way as to enable him validly to sell the articles.

The cases of *Fuentes* v. *Montis*, 17 W. R. 208, L. R.

4 C. P. 93; *Brown* v. *Marr*, 7 Ret. 427; *Delaurier* v. *Wyllie*, 17 Ret. 167; *Cowan* v. *McMinn*, 3 Irving (Sc.) 312; *R.* v. *Ashwell*, 34 W. R. 297, 16 Q. B. D. 190; *R.* v. *Henderson*, 11 Cox 593; *Hastings* v. *Pearson*, 41 W. R. 127, [1893] 1 Q. B. 62; *Singer Manufacturing Co.* v. *London and South-Western Railway Co.*, 42 W. R. 347, [1894] 1 Q. B. 833; *Pickering* v. *Busk*, 15 East 38; *Keene* v. *Thomas*, *ante*, p. 336, [1905] 1 K. B. 136, were cited.

Cur. adv. vult.

BRAY, J., after stating the facts as set out above, continued: The defence was the same in both cases: (1) That the goods had ceased to be the property of the plaintiff when Longman pledged them, and that Longman had either title or authority to pledge them. (2) That if this was not so, the plaintiff was estopped by his conduct from denying it.

These two questions must be considered separately, and I will take the first point first.

The question whether the property passed must depend, in the first instance, on the contract between the plaintiff and Huhn.

I have found that the printed note contained the terms of the contract. Are these the statutory "sale or return" terms?

By statutory I mean the terms stated in rule 4 of section 18 of the Sale of Goods Act. In my opinion they are not. Under the statutory terms an option is given by the seller to the intending purchaser to buy the goods on credit. He can elect to buy or, as the statute says, can adopt the transaction in three ways: (1) By signifying his approval or acceptance to the seller or by paying the price; (2) by doing some act indicating that he elects to be purchaser or inconsistent with his being other than the purchaser; (3) by retaining the goods beyond the stipulated time, or, if no time is stipulated, beyond a reasonable time. This is pointed out by Lopes, L.J., in *Kirkham* v. *Attenborough*, [1897] 1 Q. B. 201.

Under the terms of the note in question Huhn could, in my opinion, only exercise the option of buying by bringing cash to the plaintiff. The note says "on sale for cash only," and the subsequent words make this quite clear, for the goods are to remain the property of the plaintiff until they are settled for or charged. The words "or charged" apply to a case where the plaintiff by some subsequent act expressed his willingness to give credit by debiting the purchaser. He is not bound to give credit, but if he does the property passes. In my opinion it was the clear intention of the parties not to contract on the ordinary statutory "sale or return" terms, and that no right should be given to Huhn to buy except he bought for cash.

It is argued by Mr. Hamilton that business would be impossible if these were the terms, because Huhn's customer would not pay cash if he knew that Huhn could not pass the property to him. I can understand this difficulty arising, but it does not appear to have arisen, and the parties do not seem to have considered how it should be met. In practice it could easily be met by the plaintiff's representative attending when Huhn's customer paid cash to receive his share of the cash. It appeared in evidence that when the customer proposed to give a bill the plaintiff had to be consulted and to approve before the transaction could be carried out, and the plaintiff could be consulted in case the suggested difficulty arose. It does not alter my opinion that the parties had no intention that the property should pass till the plaintiff had received his cash. It was perfectly open to the parties to so agree, and I think they did so agree. If, contrary to my opinion, some exception or condition ought to be implied to meet the suggested difficulty, I cannot see why such exception or condition should be wide enough to make the property pass in case of a pledge. I think one of the objects of the special terms was to provide that the property should not pass in such a case, as it was held in *Kirkham* v. *Attenborough* it did under the ordinary "sale or return" terms. I am referred to the case of *Bryce* v. *Ehrmann*, Scottish Law Reporter, vol. 42, p. 23. It is true that in that case some of the learned judges expressed the opinion that in the case of a somewhat similar note the object was only to protect the goods while they were still in the hands of the dealer, and that if the dealer found a purchaser he was bound to let him have them at the stipulated price. The note there contained no such words as "on sale for cash only," and it is sufficient for me to say that I rely on those words here, but I cannot help expressing a doubt whether the learned judges were right in construing the note before them as they did. There seems, however, to have been good ground for their decision against the plaintiff in that case, as he had in fact invoiced the goods to the dealer and agreed to take a bill from him.

As there is no pretence for saying that the goods here were either settled for or charged, I hold no property passed from the plaintiff.

But Mr. Rawlinson further argued that if the terms between the plaintiff and Huhn were the statutory terms of sale and return, yet the property did not pass here. He argued that Huhn had done no act adopting the transaction, that by delivering the goods to Longman for a special purpose he had not signified his acceptance, nor had he done any act inconsistent with the plaintiff being still the owner, and that he could not be said to have retained the goods, as their misappropriation by Longman was not with his consent. I think this argument is sound. I think, assuming in favour of the defendants here that there was a contract between Huhn and Longman, it was not the intention of the parties that the property should pass, except in the event of Longman selling and paying cash, which he never did, and in my opinion the property never did pass to Longman, and Huhn did no act as between him and the plaintiff adopting the transaction. It seems to me unnecessary to find that Longman was guilty of larceny. If I had to consider that question I should not feel bound by the verdict of the jury who acquitted Longman. I should have to decide it on the evidence before me.

On these grounds, therefore, I must hold that the property never passed out of the plaintiff, and the defendants' first point fails.

I come now to the defendants' second point—viz., that even though no property passed from the plaintiff, the plaintiff has by his conduct estopped himself from denying it. Now the general rule of the law is stated clearly by Lord Herschell in *London Joint Stock Bank* v. *Simmons*, [1892] App. Cas., p. 215, 40 W. R. Dig. 12: "The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him in the belief that the person dealing with the property had authority to do so. If this can be shown a good title is acquired by a personal estoppel against the true owner."

I have, therefore, to ask myself, what has the plaintiff, the true owner, done to mislead the defendants into the belief that Longman had the

authority to pledge the goods? The plaintiff made no express representation to anyone except by giving the "appro. note," but that did not represent that he had parted with the property, quite the contrary. If the defendants had asked for proof of title the only proof forthcoming would have been the "appro. note" which would have told them that no property had passed without cash payment, and no receipt could have been produced. But the defendants did not ask for proof and did not rely on any representation of the plaintiff or on any warrant.

They relied on former dealings between themselves and Longman and on Longman's possession. I think they relied mainly on the former dealings, but with these dealings the plaintiff had nothing to do. So far as appeared from the evidence none of the plaintiff's goods had been pledged with the defendants before.

It comes to this, therefore, that the only conduct of the plaintiff on which the defendants can rely is that Longman had possession which may be said to have been caused by the plaintiff having parted with possession to Huhn. I asked for some authority to show that parting with possession alone was conduct which estopped the person so acting from setting up his title. No authority could be produced. It seems to me to be an absurd proposition. The statement of the law by Lord Herschell presupposes that the owner has parted with possession, and yet he says that it must be shown that the owner has acted so as to mislead. I think this implies that there must be something more than the mere parting with possession. If it were true that merely parting with possession was sufficient there would be no necessity at all for the Factors Act. Indeed, the Factors Act would have limited instead of extending estoppels. Why should mere parting with possession create an estoppel? Why should the defendants assume that because Longman had possession he had authority to pledge, when everyone must know that in the ordinary course of business owners of goods are every day parting with possession without authorizing the person to whom possession is given to pledge? Business could not go on if it were so; no one would be safe in parting with the possession of anything.

Mr. Hamilton suggested that there was some peculiarity in the jewellery trade, viz., that it was a very common practice to deliver jewellery on sale or return. But the defendants did not know or ask whether they were delivered on sale or return, or what were the circumstances under which the plaintiff, or whoever were the true owners, had parted with the goods. Mr. Hamilton relied on some observations in *Brown* v. *Marr*, Court of Session Cases, 7 R., p. 427. But the case on the facts was the same case as *Kirkham* v. *Attenborough*, and any observation made by the judges on the estoppel point were certainly not adopted in *Mitchell* v. *Heys*, 21 R., p. 600, but, however that may be, they are clearly overruled, in my opinion, by the principles laid down by the House of Lords in *Farquharson* v. *King*, [1902] App. Cas., p. 325. It is sufficient for me to refer to the judgments of the learned lords in that case without repeating them. They are absolutely inconsistent with the doctrine that the mere parting with possession will create an estoppel.

But if I look at the merits, who has been guilty of indiscretion or carelessness here which has caused the loss? Surely the defendants who have chosen to advance money on goods brought to them without a single inquiry of any sort or kind. It may well be that the business is so profitable that pawnbrokers can afford to run the risk, but I fail to see that that gives them any right to throw the loss on the plaintiff. It certainly would not be to the advantage of the community that pawnbrokers should be encouraged to make advances on goods without having first made most careful inquiries. In my opinion there is no estoppel here, and the plaintiff is entitled to recover all the four articles claimed.

Judgment for the plaintiff.

Solicitor for the plaintiff, *Julius A. White.*

Solicitors for the defendants, *Attenborough & Son.*

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Kennedy, Ridley, and Channell, JJ.) April 8.

REX v. OLIPHANT. (a.)

Criminal law—Falsification of accounts—Omitting or concurring in omitting—Jurisdiction—Falsification of Accounts Act, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.

It was the duty of A., the servant or clerk in Paris of B. & Co., of London, to pay any moneys received by him into a bank, and on the same day to transmit slips, supplied to him, to his employers in London by post. He knew that entries were made from these slips into a book called the Paris Cash Account Book kept in London. A. fraudulently misappropriated two sums of money received by him in Paris, and did not forward slips for these sums, in consequence of which no entries were made in the London book. On an indictment under section 1 of the Falsification of Accounts Act, 1875,

Held, there was jurisdiction to try the offence in England, because an essential part of it was completed in London.

Held, by Lord Alverstone, L.C.J., *and* Lawrance *and* Ridley, JJ., *that the omission to send the slips with the intent to defraud, knowing that thereby there would be an omission from the London book, was omitting or concurring in omitting material particulars from that book within the meaning of the statute.*

Held, by Channell, J., semble, *also by* Kennedy, J., *that the mere omission to send the slips with the intent to defraud, knowing thereby that there would be omission from a book, not the book of, nor kept by, the sender, would not amount to an offence under the section; but on the finding of the jury that A. intended the London book to be falsified, that the conviction should be upheld.*

Special case stated by the Common Serjeant on the trial of William Clarke Oliphant on an indictment charging him under the Falsification of Accounts Act, s. 1, as a clerk or servant with omitting or concurring in omitting material particulars from a book belonging to his employers with the intent to defraud.

The Falsification of Accounts Act, 1875, s. 1, enacts: "That if any clerk . . . shall wilfully, with intent to defraud . . . omit or concur in omitting any material particular from or in any such book . . . the person so offending shall be guilty of a misdemeanour."

The evidence set out in the case showed that the defendant was employed in Paris as a clerk or servant of Messrs. Sandon & Co., tailors, of London, who had a branch establishment in Paris. He was paid a salary and a commission on orders and received remittances weekly from London on account of expenses. It was his duty amongst other things to receive money on account of his employers, and to pay every day the moneys so received into a Paris bank, and on every day he had received such moneys to enter on slips furnished to him an account of every

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

sum so received and to transmit the same by post to the firm in London. A book, called the Paris Cash Account Book, was kept in the office in London, and showed all the sums received and paid by the defendant in Paris for his employers. The entries in this book were made by Mr. Moore, one of the partners in the firm, items of receipt being entered from the slips made out and transmitted to London by the defendant. The defendant knew that this book was so kept and that items omitted by him in his daily slips would necessarily be omitted by Mr. Moore in that book. He himself from time to time when in London went through the entries in that book with one of Messrs. Sandon's clerks, compared the entries with the slips that he had sent from Paris, and caused any entries to be corrected which he showed to be wrong. He went through the book in this way in 1904, after the misappropriation and omission from the book of two of the sums mentioned in the indictment.

The Common Serjeant directed the jury that if they were satisfied that the defendant had fraudulently omitted from the slips returned to London the receipt of the sums he had misappropriated, intending that they should be omitted from the Paris Cash Account Book, and thereby caused such payments to be omitted from that book, and that his conduct and acts above set out were a scheme of fraud, they should find the defendant guilty. The jury on this direction found a verdict of guilty, and the Common Serjeant convicted the defendant, reserving the two points submitted by counsel for the defendant: (1) That the defendant could not upon this evidence be convicted of omitting or concurring in omitting particulars from the book referred to; (2) there was no jurisdiction in the court to try the case, as the offence was not completed in England.

The question for the court was whether the defendant could rightly be convicted on any and each of the counts in the indictment.

Gill, for the defendant.—On the first point I submit that the defendant is charged with omitting or concurring in omitting particulars from the book, whereas in fact he has only omitted them from the slips. The dates of the offences as set out in the indictment are in point of fact the dates of the slips, not the dates when the entries from the slips were made. But even supposing the offence is properly charged in the indictment, yet the defendant did not omit the particulars because he did not keep the book; nor can he be said to have concurred in omitting, because it was the master who kept the book; and I submit it is impossible to say that the master is the innocent agent of the servant. This is the distinction to be drawn between this case and *Regina* v. *Butt*, 15 Cox C. C. R. 564. On the second point I say that there was no jurisdiction to try this offence. It is not a case of venue, and cases of venue are not authorities for cases of jurisdiction: *British South Africa Co.* v. *Companhia de Moçambique*, [1893] App. Cas. 603, at p. 631; see also Wright, J.'s, judgment in *Regina* v. *Ellis*, 47 W. R. 188 [1899] 1 Q. B. 230, at p. 241.

RIDLEY, J.—The judgment of Bruce, J., in that case is supported by *Rex* v. *Buttery*, cited in 4 B. & A., at p. 179. If Bruce, J., is right it is fatal to your principle—*i.e.*, distinction between venue and jurisdiction—for he says: "The offence can be properly dealt with in the county where the offence is completed, notwithstanding some act constituting a material circumstance may have happened altogether beyond the jurisdiction."] My contention is that the omission was in Paris, and I again call attention to the dates in the indictment as being the dates the slips were sent from Paris. Sir J. Stephen, in his History of Criminal Law, at p. 9, states the law on this subject.

He also referred to *Rex* v. *Johnson*, 29 State Trials, p. 500, and *Reg.* v. *Keyn*, 2 Exch., at pp. 65, 112, 115, 234.

Muir, for the prosecution.—The difficulty here is created by the fact that the offence is constituted by an omission, and there is no act to show where the offence was committed. The duty of the defendant must be looked at. The whole object of sending the slips to London was to make the book to be accurately kept in London. The omission was therefore to do something in London. Alderson, B., in *Regina* v. *Davison*, 7 Cox 116, lays down the rule that where the offence is an omission it is committed at the place where the act should have been done. The defendant was not indicted for falsifying the slips, for they were true, as far as they went; see the cases cited in argument in 29 State Trials 391; also *Rex* v. *Brisac*, 4 East 172. Cases of venue, prior to 1826, are equal authorities for jurisdiction.

He referred also to Chitty on Crimes (1816) p. 161; *Rex* v. *Guerdwood*, 1 Leach 142; *Coomb's case*, 1 Leach 388.

Gill, in reply.—*Brisac's case* is no authority on jurisdiction, because it could certainly have been tried in the Admiralty Court. [Lord ALVERSTONE, L.C.J.—It was decided purely upon the fact that the letter was received in Middlesex. There was no jurisdiction prior to 1826 to try an offence in two counties, and I think therefore that cases on venue are authority for questions of jurisdiction.]

Lord ALVERSTONE, L.C.J.—I am of opinion that this conviction ought to be upheld. I think the real point is that put by Mr. Muir, what was the duty which the man had to perform, and what was the act done which is alleged to be the omitting or concurring in omitting the particulars from the book? The statute is framed, I think wisely, in wide terms in order to prevent the class of fraud referred to in *Regina* v. *Butt*, when the act is done by some innocent party. His duty is stated in this way. [His lordship quoted from the case.] I understand that his duty was to enable the Paris account to be correctly entered up by the means of information transmitted day by day through the post, and I can draw no distinction between sending it by letter or by telephonic communication or by direct instructions when he from time to time came to London. In this case I will admit the information given by the slips was true as far as it went. But I think sending three items of an account whilst omitting the fourth item involves the statement "That is all I have received and no more." The case goes on to state: "The entries were made by the master, the items of receipt being taken from the slips . . . in that book." I stop there to point out that there is no other means of keeping the book other than from the slips supplied, therefore from a point of view of enabling a watch to be kept it seems to me it was essential that the account should be properly made up, and if that watch is made ineffectual by incomplete entries which are made by his concurrence then the man has omitted to send or has concurred in omitting to send the proper entries. The case goes on to say: "He himself from time to time went through the books . . . this way in 1904." I think it was sufficient to support the conviction that in regard to these two particular matters he actually stated in effect that the entries were complete, or in other words concurred in the omission from the book of items that should have been there. But in my opinion the conviction could be upheld apart from the fact of his having come to London. That being the state of the things, the learned Common Serjeant told the jury as follows: [His lordship read the direction.] It seems to me that that

is putting it in the strictest way in favour of the defendant, or in other words that it could not be said at least that the defendant was convicted on wrong grounds.

The first argument addressed to us was that the fact of the master having entered up the accounts prevented the offence coming within the statute. That cannot be seriously pressed, because *Regina* v. *Butt* has decided that an innocent entry is sufficient to support the offence. Lord Coleridge there held that false entries made by the directions of a person was an offence within the statute. The next question is whether the court had jurisdiction to try the case. I think that the principle of the decision in *Rex* v. *Munton*, 1 Esp. 62, applies in this case. There from Amigua false charges had been returned to the Government Navy Office in London. Lord Kenyon said "there was thereby an offence committed where such false returns were received and where the fraud had been complete by their having been there allowed, upon which the jurisdiction of the court attached." The only distinction that can be suggested is that between an improper entry in the book occasioned by false returns and an improper entry in the book by an omission from an otherwise genuine return. I cannot see the distinction. If a man who receives five sums of money sends the receipt of four correctly and suppresses the fact that he received five, but in effect says "I have received no more," then, to my mind, it causes an omission in the book just as if he had incorrectly stated the sum of money received, and as far as the offence is concerned it seems of little importance. I think *Rex* v. *Brisac*, 4 East 172, lays down the same principle. It may be Mr. Gill was right, that there being an admiralty jurisdiction the language of the judge in that case is not so strong on the view I have submitted as it was in *Rex* v. *Munton*. In any case it is another illustration of the same view. I think this conviction must be upheld.

LAWRANCE, J., concurred.

KENNEDY, J.—I am not prepared to differ from the view which my lord has taken, but with great respect I think it is a case of difficulty, and the danger one has in these cases is where you find a man has acted with dishonesty one is not inclined to see whether it comes very near to the statute, but to see whether that statute might not be held quite fully to cover the dishonesty of which he is guilty. My difficulty here is that he is not charged with any act of wrongdoing with regard to the slips themselves. The man is charged with omitting or concurring in the omission from a book which was not his book, nor was it a book in any way under his control or for which he was responsible. It was not kept in the same country. I agree it does not make the offence less punishable here that the perpetration of the offence was committed abroad if only the essential part was committed here; but the doubt I have felt is, can you say within the statute that the mere fact of transmitting wrong information is "to omit or alter or concur in omitting or altering any material particular from or in any such book"? One of my brothers has suggested to me this question, ought you under this section to find a man had been guilty of omitting from a ledger because he has made an omission from the cash book? One posts from the cash book, and of course the result is an omission from the ledger. Can a clerk be indicted for an omission from the ledger? If I thought it came to that, I should have difficulty in adhering to the view of my brothers. But there is this to be said, that this jury has found against the prisoner on the direction. "If they were satisfied that the defendant had fraudulently omitted from the slips . . . intending that they should be omitted from the Paris Cash Account Book. . . ." If it was intended that this particular book should be made a false book by the omission caused by the slips, I am not prepared to differ from the judgment.

RIDLEY, J.—I am unable to share in the doubts of my brother Kennedy. I have no doubt we have arrived at the right conclusion. I wish to say very little more in the case. I will refer to the direction of the learned Common Serjeant to the jury, and if one refers to that, one finds that the omission of the sums misappropriated was a part of a scheme to defraud for which he was held guilty. If that is the finding of the jury, it seems to me it was abundantly established on the authorities that there was jurisdiction to try this case in London. The only authority I need refer to is *Rex* v. *Munton*. It seems to me an authority in this case, for I am quite unable to see any difference between an omission of the whole of the slip from the sending of part of that slip.

CHANNELL, J.—I agree, but I share in the doubt my brother Kennedy has expressed. It seems doubtful whether it is sufficiently made out here that the defendant did omit or concur in omitting any material particular from the London books. I do not think a servant who sends a wrong return and knows his employer keeps books with which he has nothing to do falsifies the books or concurs in it. I think to justify a conviction under this section the servant must have something to do with the keeping of the books, and it seems to me not actually clear in this case that such was the case; but as it does not amount to a matter of principle I am not prepared to differ with the decision of this court.

Conviction upheld.

Solicitors for the defendant, *Barrington, Matthews, & Co.*

Solicitor for the prosecution, *F. Freke Palmer.*

IN BANKRUPTCY.

K. B. Div.
(Bigham and Darling, JJ.) — May 22.

In re MOSS.
Ex parte HALLETT. (*a.*)

Bankruptcy—Proof—Principal and surety—Guarantee of interest—Covenant to pay premiums on policy of insurance—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *Schedule II., r.* 12.

The debtor borrowed £500, *and covenanted jointly and severally with a third party to pay interest upon the loan so long as any part of the principal sum should remain due, and also to keep up the premiums upon a policy assigned by him to the lender as security. Upon the bankruptcy of the debtor the lender put in a proof assessing the value of his security at* £100, *and proving for the balance of the principal sum advanced. The third party also claimed to prove on the estate by way of indemnity for his liability for interest and premiums to the lender.*

Held, that the principal sum ceased to be due upon the bankruptcy of the borrower, and that the security having been valued must be deemed to have been realised, consequently the third party was under no liability to the lender, and his proof must be rejected.

Appeal from the rejection of a proof by his Honour Judge Tindal Atkinson in the county court at Hertford.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

On the 11th of December, 1901, an indenture was made between Moss, the bankrupt, Hallett, the appellant, and Philip Henry Cooke, whereby Cooke agreed to and did advance to Moss the sum of £500 which Moss covenanted to repay upon the 11th of March, 1902, with interest at 10 per cent., and Moss and Hallett jointly and severally covenanted with Cooke to pay him interest thereon so long after the 11th of March, 1902, as any principal money remained due. By the same indenture Moss assigned to Cooke as security all his interest in a policy of insurance, and Moss and Hallett jointly and severally covenanted with Cooke to pay the premiums which should from time to time become payable for keeping the said policy of insurance on foot.

The loan was not paid off by Moss upon the day named, and a receiving order was made against him upon the 28th of November, 1903. Cooke proved in the bankruptcy for the amount of the loan and interest to the date of the receiving order, and valued the policy in his proof at £100. Hallett also claimed to be entitled to prove in the bankruptcy in respect of his liability to Cooke under the indenture of the 11th of December, 1901, to pay interest on the sum owing from Moss to Cooke, and to keep up the premiums on the policy. He assessed the liability for interest at £600 and the liability to keep up the premiums at £813 16s. 2d., and presented a proof for that amount which was rejected by the trustee, whose decision was upheld by the county court judge upon the ground that, Cooke having proved in the bankruptcy, Hallett was no longer under any liability to him against which he could claim to be indemnified.

Hallett appealed.

Tindale Davis, for the appellant.—The appellant has covenanted to pay interest on the loan from Cooke to the bankrupt "so long as any principal remains due." The principal is still due, and although Moss upon obtaining his discharge will be freed from any liability to Cooke, yet by section 30, sub-section 4, of the Bankruptcy Act, 1883, it is provided that an order of discharge shall not release any person who at the date of the receiving order was jointly bound with the bankrupt, or who was surety or in the nature of a surety for him. It was held in *In re Fitzgeorge, Ex parte Robson*, 53 W. R. 384, [1905] 1 K. B. 462, that a guarantee of interest on a debenture "until the principal sum secured by the debenture was repaid by the company" still remained in force, although the company had gone into liquidation and had been dissolved: see also *In re London Chartered Bank of Australia*, 42 W. R. 14, [1893] 3 Ch. 540, and *Ex parte Jacobs*, 23 W. R. 251, L. R. 10 Ch. 211. If the debt is still due the appellant is also bound under his covenant to keep up the premiums on the policy held by the creditor as security for the debt.

Herbert Jacobs, for the trustee, was not called upon.

BIGHAM, J.—The first question in this case is whether Hallett can prove in the bankrupt's estate in respect of his covenant to pay Cooke interest so long as any of the principal sum advanced by Cooke to the bankrupt remains due. The principal debtor is now bankrupt. As soon as he became bankrupt it was untrue to say that the principal money remained due. The sole liability left was the liability of the trustee in bankruptcy to pay a dividend in respect of the debt. I take the view that Hallett's liability to Cooke is gone, and that it cannot be said that any part of that debt is due, and I agree with the following reasons given by the learned county court judge: "The liability of Moss on his covenant to pay the principal sum, being provable in the bankruptcy, will be discharged when the order of discharge has been granted to him. It would seem a strange conclusion that, the obligation to pay the principal sum being discharged, the liability of Hallett to pay the interest is still to continue. If so, when will this liability cease, unless, without any obligation to do so, Hallett pays the balance of the principal sum after deducting the dividend received by Cooke? In my judgment, a proof having been made in respect of the principal sum in the bankruptcy, there cannot be another proof for interest springing from the debt already the subject of proof. The principal sum no longer remains payable under the covenant in the deed of the 11th of December, 1901, and in my judgment the liability of Hallett under this covenant has determined."

The second question is whether Hallett is still bound under his covenant to keep up the premiums on the policy. Cooke has valued the policy in his proof at £100. That is just as if he had sold it to a stranger; indeed, for all I know he may have done so. If he chose to keep up the premiums he may, or if he prefers he may surrender the policy. Here again I agree with the reasoning of the learned county court judge. "Cooke has valued the policy at £100, and therefore must be taken to or be deemed to have realized his security. He has proved for the balance of the debt after deducting the value of his security, he cannot have a further proof in respect of the personal covenant of the debtor to pay premiums to maintain the security at its full value for securing this balance: see *Deering v. Bank of Ireland*, 35 W. R. 634, 12 A. C. 20. Cooke having proved in respect of the balance, Hallett cannot have another proof to indemnify him in respect of his liability to maintain the security for the payment of the same balance. The whole matter can be summed up in a few words: The estate of a bankrupt cannot be called upon to contribute to the maintenance of a security in respect of a debt which is extinguished by the bankruptcy."

DARLING, J.—I am of the same opinion. It is admitted that after the discharge of the bankrupt no action to recover the principal sum advanced would lie against him, and I do not see how it can be contended that money which is not recoverable at law can be said to be money "due" from Moss under the covenant relied upon.

Appeal dismissed.

Solicitor for the appellant, *R. Jennings.*

Solicitors for the trustee, *Bate & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — April 4.

REX v. DODDS AND OTHERS, LICENSING JUSTICES OF BIRKENHEAD. (*a.*)

Licensing law—Renewal of on-licence—Condition to renewal—Undertaking by applicant—Power of justices of licensing district—Licensing Act, 1904 (4 *Ed.* 7, *c.* 23), *ss.* 1, 9.

The justices of a licensing district have no power, under the Licensing Act, 1904, *to require, as a condition to the renewal of an existing on-licence, that the applicant should give any undertaking as to the conduct or manage-*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ment of the premises, apart from the matters mentioned in section 1, *sub-section* 1, *as grounds for refusing the renewal.*

So held by Collins, M.R., *and* Cozens-Hardy, L.J., Mathew, L.J., *dissenting.*

Decision of the Divisional Court *in* Rex *v.* Dodds (ante, *p.* 377), *reversed.*

Appeal from a judgment of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) discharging two rules *nisi* for writs of *mandamus.*

The question was whether licensing justices have power under the Licensing Act, 1904, to require persons seeking renewals of existing on-licences to give reasonable undertakings as a condition of the renewal of such licences. The facts of the case were as follows:

At the general annual licensing meeting for the borough of Birkenhead, held on the 1st of February, 1905, the chairman announced that the licensing committee would ask all persons applying for the renewal of on-licences to give certain undertakings on the renewal of their licences, and that the applications for renewal would be adjourned, and that notices to that effect would be served on the registered owners of the premises. Notices were accordingly served on all the owners of on-licensed premises within the borough, including Messrs. Peter Walker & Son, the owners of the Commercial Hotel, whose tenant, Joseph Henry Roberts, had applied for a renewal of his on-licence, stating that licensed persons would be required to give to the justices upon the renewal of their licences an undertaking to observe certain conditions.

The conditions as to which the undertaking was required were as follows: (1) No intoxicating liquor shall be sold or supplied upon credit. (2) No intoxicating liquor shall be supplied to any child under the age of fourteen years. (3) No games, draws, or raffles shall be suffered to take place upon the licensed premises (except billiards in alehouses). (4) The licensee shall devote the whole of his time to the business of this licence. (5) The back door of the premises shall be kept locked except for domestic purposes. (6) No clubs for the purpose of a distribution of drink at Christmastide or any other period shall be permitted at the premises.

At the adjourned meeting of the licensing committee on the 15th of February the owners of the Commercial Hotel and the owners of all the other licensed houses in Birkenhead, with one exception, refused to give their consent to the licensees' giving the required undertaking. The chairman thereupon stated that the whole of the licences would be renewed and would be in the hands of the clerk to the licensing justices, and would be delivered by him to the licensees on their giving to the clerk the undertakings which had been printed on the back of each of the licences. The meeting was then adjourned until the 1st of March.

At the adjourned meeting counsel for the applicants requested the committee to adopt the course of refusing the licences, so that they might appeal to quarter sessions, and in that way test the right of the committee to require the undertakings to be given. The committee declined to adopt this course, and the chairman again stated definitely that the licences were not refused, and that they might be obtained by the respective licensees upon giving the undertakings required.

Subsequently, the tenant of the Commercial Hotel applied to the clerk to the justices for his licence, but as he refused to give the undertakings required the licence was not handed to him.

Upon these facts a rule *nisi* was granted at the instance of the tenant and owners of the Commercial Hotel calling upon the justices to show cause why a writ of *mandamus* should not issue commanding them to deliver up to Roberts his renewal licence in respect of the Commercial Hotel, and also a rule *nisi* calling on the justices to show cause why they should not hold an adjourned meeting to hear and determine the application of Roberts according to law. The justices showed cause against these rules.

On behalf of the justices, it was contended that section 9, sub-section 2, of the Licensing Act of 1904 empowered licensing justices to insist that reasonable undertakings should be given as a condition to the renewal of a licence; that no intelligent meaning could be given to that portion of the Act unless it was assumed that the licensing justices had the power to impose such a condition.

On behalf of the prosecutors it was submitted that licensing justices had no statutory power before the Act of 1904 to insist on a person seeking the renewal of a licence giving any undertaking, and that there was nothing in the Act of 1904 which gave any such power. The language of sub-section 2 of section 9 showed clearly that what was contemplated was an undertaking voluntarily given by the person applying.

The Divisional Court were of opinion that the justices had power to deal with the case as they had dealt with it, and they ordered that both the rules should be discharged.

The Divisional Court heard this case together with another case (*Rex* v. *Grimwade*) which related to a licence to sell beer to be consumed on or off the premises, which had been in existence before the 1st of May, 1869, and had been continuously renewed. The court held that in that case the justices had no power to require from the applicant an undertaking that no intoxicating liquor should be supplied to any customer unless such liquor should be paid for at the time of delivery.

The tenant and owners of the Commercial Hotel appealed.

Pickford, K.C., and *Rigby Swift*, for the tenant.

A. H. Bodkin and *F. E. Smith*, for the owners.

Asquith, K.C., *Low, K.C.*, and *T. Shepherd Little*, for the justices.

Cur. adv. vult.

April 4.—COLLINS, M.R., read the following judgment: The question on this appeal is whether, although the Licensing Act, 1904, s. 1, has expressly limited the power to refuse the renewal of an existing on-licence to five named grounds, it is nevertheless competent to the justices of the licensing district to refuse it unless the applicant consents to give an undertaking to keep and observe certain conditions to be endorsed on the back of the licence as to the conduct and management of the business, and not covered by the five grounds named. The Divisional Court has decided that it is. A technical question arises also—viz., whether, even if the justices were wrong, the appellants ought not to have appealed to quarter sessions instead of proceeding as they have done by motion for a *mandamus*. The court below has decided the case upon the merits, and both sides are anxious that it should, if possible, not be determined on merely technical grounds. I will address myself therefore to the main question above stated.

The circumstances under which the Act of 1904 came to be passed are well known. The House of Lords had finally decided in *Sharp* v. *Wakefield*, 39 W. R. 561, [1891] A. C. 173, that the discretion of justices was absolute in refusing renewals except in the case of licences falling within the Act of 1869 and in existence on the 1st of May of that year. The discre-

tion was of course to be exercised judicially "according to the rules of reason and justice, not according to private opinion; according to law, and not humour": see the judgment of Lord Halsbury in *Sharp* v. *Wakefield*. After that decision renewals were more frequently refused on grounds of general policy, and not by reason of defects in the premises or of misconduct of the licensee. The *Farnham case*, *Rex* v. *Howard*, 51 W. R. 21, [1902] 2 K. B. 363, decided in 1902, was much discussed, and legislation was called for to mitigate the hardship of individuals whose means of livelihood had been lost by the withdrawal of licences for the benefit of the community without misconduct on their part. This led to proposals of compensation, which were adopted and embodied in the Act of 1904. In order to discriminate between those who on a general reduction of licences might be deemed fairly entitled to compensation and those who might not, it was necessary to ascertain the grounds upon which the justices in any particular case had acted in refusing a renewal. It was apparently thought by the Legislature that the simplest way of working out this result was to take away the unlimited discretion of justices and substitute a limited discretion based on defined grounds, which were no doubt those by which the justices had in practice guided themselves. Hence the provisions of section 1 controlling the discretion and obliging the justices to specify in writing the grounds of their refusal. A practice had also grown up, known to all persons conversant with licensing procedure, for the justices, having the general discretion I have referred to, to demand from applicants undertakings as to the conduct and management of the business if the licence were renewed. We were told that such undertakings were sometimes asked for and given even in cases of licences under the Act of 1869, which had existed at the date of the passing of that Act.

This brief anticipatory statement is necessary in order to appreciate the bearing of the sections and the precise point raised for decision. Section 1 enacts as follows: "(1) The power to refuse the renewal of an existing on-licence, on any ground other than the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable, or grounds connected with the character of fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. In every case of the refusal of the renewal of an existing on-licence by the justices of a licensing district they shall specify in writing to the applicant the grounds of their refusal. (2) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other person appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district) an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates." Section 2 deals with the amount of compensation. Section 3 provides for a compensation fund. Section 4 deals with new licences and the attaching of conditions thereto. Sections 5 to 8 deals with machinery. Then comes section 9, which, coupled with section 1, raises the point for decision. It enacts as follows: "(1) The provisions of this Act shall apply to the transfer of an existing on-licence as they apply to the renewal of an existing on-licence, with the substitution of transfer for renewal. (2) If the justices of a licensing district refuse to renew an existing on-licence on the ground that the holder of the licence has persistently and unreasonably refused to supply suitable refreshment (other than intoxicating liquor) at a reasonable price, or on the ground that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted: Provided that where the justices, on an application for the renewal of an existing on-licence, ask the licence-holder to give an undertaking as aforesaid, they shall adjourn the hearing of the application and cause notice of the required undertaking to be served upon the registered owner of the premises and give him an opportunity of being heard." Sub-sections 1 and 2 create no difficulty. The latter merely makes it clear that the two classes of acts named therein may be treated by justices as falling within one of the grounds of refusal limited by the first section of the Act. It is upon the proviso to sub-section 2 that the decision of the court below is based. It is upon the words "required undertaking" that the learned judges mainly, if not wholly, found themselves. If these words may be fairly read as merely a synonym for the undertaking which the justices are supposed to have "asked for" in the earlier part of the sentence, the whole fabric of implication based on the use of the word "required" falls to the ground. Unless it is to be read as equivalent to "insisted upon as a condition of renewal," it cannot ground the inference drawn from it, that the Legislature assumed the existence of a power to require in that sense an undertaking, as surviving the inhibition of the first section, with the result that it must be taken to have sanctioned an additional ground for the refusal of a licence as arising upon a failure to give an undertaking. In other words, we must first construe "required" in a sense not necessarily demanded by the context, and then infer that it was intended by the use of that word to repeal or modify the express and unambiguous enactment of the first section, and vest in the licensing justices another ground of refusal, although the power to refuse except on the five grounds named has been expressly withdrawn from them and vested in the quarter sessions. Surely a bold inference to draw from such slight materials. Down to this point in the discussion there can, it seems to me, to be no possible doubt as to the effect of the enactment. The intention to limit the discretion to refuse a renewal to the grounds named in section 1 is clear beyond controversy. "The power to refuse the renewal of an existing on-licence on any ground other than" the five named "shall be vested in quarter sessions instead of the justices of the licensing district"; and to withhold a renewal unless the applicant will give an undertaking as to the mode of carrying on the business is, in my judgment, the same thing as to refuse it on a ground other than one of the five. *A fortiori* when the undertaking relates to matters outside the five grounds. This provision is express and absolute, and

leaves nothing to implication, and yet it is contended that, notwithstanding this clear and peremptory inhibition in the governing enactment, it is to be read as not meaning what it says, but as covering and permitting a refusal on a ground not falling within any of those named, but the right to act on which is to be implied out of a proviso to a sub-section which is addressed, by way of greater caution apparently, to providing that a particular line of conduct may be deemed misconduct within the governing enactment. In my judgment it is not competent for this court to introduce by implication only, a provision directly contradictory of an unambiguous enactment addressed to the very point itself. If we are at large to draw inferences and make implications, why are we to leave out the inference arising from the fact that the Legislature has not only abstained from enacting this sixth ground of refusal, but has by the limitation to five other grounds directly excluded it? And why are we to suppose that it intended that the refusal to give an undertaking should be a ground of refusal of the renewal, when, its attention being obviously called to the existing practice as to undertakings, it addresses its enactment expressly to the breach of such undertakings when given, and not to the refusal to give them at all? The proviso, as I have pointed out, does not in its context purport to relate at all to the first section, and surely, if there is any apparent inconsistency between the two, it is the scope of the proviso which must be limited so as to make it harmonize with the primary and unambiguous inhibition of the first section. To contradict the plain language of the Act by a surmise based on such materials is, in my judgment, to substitute legislation for interpretation. But it cannot be contended that the proviso is altogether nugatory if it be held not to add another ground of refusal to those named in the first section. We learn that such undertakings were sometimes given in cases under the Act of 1869, though it is clear that the justices had no power to refuse the renewal except upon the four grounds named in that Act, and it may be that others hereafter may do what one of the applicants has done in this case, voluntarily give the undertaking asked for. Though the court below have arrived at the conclusion that the justices were acting within their powers in refusing renewals in the cases under appeal, I am nevertheless entitled to pray in aid of my own opinion their decision in *Rex* v. *Grimwade*, a case of a licence in existence before May, 1869, and governed by the Act of that year. They held that in such a case the justices had no power to exact the undertaking, presumably because to do so was to refuse upon a ground other than the four named in the Act of 1869. Now, by sub-section 3 of section 9, the grounds mentioned in section 8 of the Act of 1869 are substituted for the grounds mentioned in the present Act as the grounds on which the power to refuse the renewal of an existing licence is reserved to the justices of the licensing district. On what grounds they can have held that the justices had no power to refuse the renewals in those cases which do not equally apply to the cases under review I am, with deference, at a loss to determine. The words of section 8 of the Act of 1869 are no more clear and peremptory than those of section 1 of this Act, and the practice as to asking undertakings from applicants under the former Act existed, as we were told by Mr. Low, in some places. The words of the redoubtable proviso do not purport to be limited to one class of licences more than another. They are—"where the justices, on an application for the renewal of an existing on-licence, ask the licence-holder to give an undertaking." Why is this provision to be limited to licences other than those existing in May, 1869, and regulated by the Act of that year? If it does apply to them, and no reason has been given why it does not, then the court below, on their decision, must read the word "required," on which they rest the whole weight of their conclusion in the cases now under discussion, in two different senses according as to whether the licence is one governed by the conditions of section 8 of the Act of 1869 or not—in the former class in the sense contended for by the appellants, —viz., as a synonym for "asked for"; in the latter, in the sense which they have adopted as governing their decision in the cases now under appeal—*viz.*, "stipulated for as a condition of allowing the renewal." While cordially agreeing with the decision of the court below in the cases under the Act of 1869, I must, with great deference, express my inability to adopt their conclusion in the cases which are the subject of this appeal.

With regard to the technical point, I think that the true effect of what the justices did was that they did not refuse the renewals in such a form as to admit of an appeal to quarter sessions. In fact, when asked to give a positive refusal so as to facilitate an appeal, they declined to do so, and insisted that they had allowed renewal. What they, in fact, had done, was to cause licences to be printed containing on their face a variation from the statutory form by the introduction of the following words: "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions indorsed on the back hereof"; and on the back were indorsed six conditions. These licences were deposited with their clerk, to be delivered to the applicants on their giving the undertakings. Not having, in their view, refused the renewals, they did not specify in writing to the applicant the grounds of their refusal. Nevertheless, it is now contended on their behalf that the applicant was bound to treat what they had done as a refusal to renew, and to have appealed if he objected, and that the remedy by *mandamus* was therefore not open. It seems to me that, if I am right in the construction I have placed upon the statute, what the justices have done is to decide in favour of renewal with a condition which they had no power to impose and which is therefore nugatory, and that a *mandamus* ought to go to compel them to deliver the renewal licences without the condition. If their decision cannot be so treated, then I think the result is that they have not decided the point submitted to them at all, and that a *mandamus* should go, as in *Reg.* v. *Bowman*, [1898] 1 Q. B. 663, 46 W. R. Dig. 83, and *Reg.* v. *Cotham*, 46 W. R. 512, [1898] 1 Q. B. 802. In my opinion, therefore, the appeal must be allowed.

MATHEW, L.J., read the following judgment: In these cases I differ, I need not say with much hesitation, from the opinions of my learned colleagues. I think the judgments of the Divisional Court were right and ought to be affirmed. The statute which we are called on to construe is entitled "An Act to amend the Licensing Acts, 1828 to 1902, in respect to the extinction of licences and the grant of new licences," and by section 10 the Act is to be construed as one with the Licensing Acts aforesaid. Before the statute in question the right of appeal to quarter sessions was granted to all persons aggrieved by any act of any justices done in or concerning the exercise of their powers. Where there was a refusal to grant the renewal of a licence, the decision of the licensing justices might be reviewed by quarter sessions, and subject to this their discretion was absolute. For many years this practice had been followed all over England of granting a renewal of a licence upon an undertaking

to observe certain conditions intended to secure the orderly and proper management of licensed houses. Each applicant was required to satisfy the magistrates either by verbal or written assurances that the conditions which they required would be complied with. If any objection were made to the act of the justices in this respect, it seems clear that there would be an appeal to quarter sessions. When the Act of 1904 was passed, the licences then in existence were for the most part of this limited character. The undertaking which was in these cases required was admitted to be of the usual character and to be perfectly reasonable. This is shown by the statements which counsel were instructed to make to the justices. For many years the conditions had been accepted and assented to by those interested in licensed premises in Birkenhead.

The question upon this appeal is whether the procedure which had been previously adopted of granting a renewal of a licence upon conditions had, under the Act of 1904, been placed beyond the jurisdiction of the justices. This was said to be a necessary implication from the language of the statute. Under section 1 the absolute discretion previously conferred upon the justices was confined to the cases therein specified, and in respect of the decision of the justices in those cases there would be for persons aggrieved an appeal to quarter sessions. Refusal to renew in cases other than those specified in section 1 was vested in quarter sessions instead of the justices of the licensing district. No provision is made for a direct application in such cases to quarter sessions. By sub-section 2, where the justices come to the conclusion that the renewal of any particular licence required consideration, they were to refer the matter, together with their report thereon, to quarter sessions, and that court was, as appears from the rules, to have the power either to continue the licence or to cancel it subject to the payment of compensation as provided by the Act. They appear to have no further powers. This enactment only applies when there has been no default on the part of the applicant, and the only question is whether the licence should be continued or withdrawn. It has no application to cases where the renewal is granted on the undertaking to fulfil conditions. There is no ground for any implication so far that the authority of the licensing justices to impose conditions was in any way affected. That there was no distrust of the discretion of the justices is shown in section 4, where they are empowered to attach to the grant of a new licence such conditions as they think proper in the interests of the public. Further, under section 9, sub-section 2, where an applicant agrees to the condition, the justices may, upon giving an opportunity of being heard to the registered owner, grant the renewal in the exercise of their discretion, and may disregard any objections the owner may offer. But then it is said the language of sub-section 2 shows that the discretion of the justices can no longer be exercised when the holder of the licence objects to any conditions and refuses to enter into any undertaking. The enactment, it is argued, only applies where there has been a consent to a condition, and where there has been no consent there can be no condition or undertaking. Here it is said that, as the applicant refused to give an undertaking, the justices had no power to refuse the licence on any ground. But I see no reason why the enactment should receive this interpretation. The section in terms applies only where consent has been given. It is intended to provide a mode of punishment where an undertaking has not been fulfilled. It has no reference to the question of the terms upon which a renewal may be granted. But it is said that the proper inference from the language of the section is that consent is optional; in other words, that there should be added by implication to the section a proviso that an applicant should not be compellable to consent to a condition, however reasonable it may be. But, in the first place, under the second clause of section 9, sub-section 2, the authority of the justices to require an undertaking seems to be taken for granted. In the next place, this construction would have the effect of nullifying the section. No applicant would consent to an interference with the conduct of his business, particularly where the breach of an undertaking might jeopardize his licence. Further, the control which has hitherto been exercised by the justices would be completely swept away. This condition of things would, no doubt, be an advantage to publicans, but it would be secured at the expense of the interests of the community in each locality. Without clear language I do not think that there should be attributed to the Legislature the intention to sanction so formidable, and if I may be permitted to hazard the opinion, so lamentable a revolution in the mode which has hitherto been adopted in administering the Licensing Acts. There is no apparent reason for the supposed change. With respect to what took place before the licensing justices, the evidence appears to me not to be quite clear. If there were any doubt it is removed by the subsequent correspondence. The justices declined to say that they refused the applications, for the reason that they were willing to grant them if their conditions were complied with. They were quite right in declining to give any effect to the hollow assurances offered on behalf of the trade that the publicans in the locality were anxious to do what the justices thought right. The sure test of their willingness was that they should give the undertaking required of them. I desire to express no opinion upon the decision of the Divisional Court as to beerhouses. There has been no appeal from their judgment in this respect.

COZENS-HARDY, L.J., read the following judgment: This appeal raises an important and difficult question as to the powers of licensing justices under the recent Act of 1904. The Birkenhead justices, acting in perfect good faith and with the sole desire to promote the welfare and order of the borough, desire to exact from all applicants for the renewal of "on" licences certain undertakings, which I assume to be reasonable. The licences are in the usual form, except that the following clause is inserted: "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions indorsed on the back hereof." Six conditions are indorsed, but it is not contended that all those conditions should be exacted in the case of every house. The justices deny that they have refused the licences; on the contrary, they assert that they have renewed the licences, although the clerk has been directed not to hand them out unless and until the undertakings are given. The licence-holders decline to give any undertaking. The Divisional Court have held that the justices may require a reasonable undertaking to be given as a condition of granting a renewal; and the main point in this appeal is whether that view is correct.

Prior to the 1st of January, 1905, justices had a general discretion to grant or refuse renewals of licences of the class with which this appeal alone deals (*Sharp* v. *Wakefield*, [1891] A. C. 173), and a practice very naturally grew up by which the justices made terms with the licence-holders, and insisted, as a condition of renewal, that certain undertakings should be given. These undertakings were sometimes

indorsed on the licence, sometimes entered in the clerk's book, and sometimes were verbal. I cannot doubt that this was a most wholesome practice. The undertakings were given because without them the licence would not have been renewed. The undertakings were observed because a wilful breach would have almost certainly been a fatal objection when the next application for renewal came before the justices. But, except in the manner and to the extent above indicated, these undertakings were voluntary and had no sanction. They are not mentioned in any of the licensing statutes.

A great change was effected by the Licensing Act, 1904, in the position of licensing justices. By section 1 the power to refuse renewal on any ground other than one of five particular grounds is taken away from the licensing justices and is vested in quarter sessions, and quarter sessions can only act on a reference from the justices and on payment of compensation. The only one of the five grounds on which the justices may refuse a renewal which need be referred to is, "that the licensed premises have been ill-conducted." It is, however, contended that, notwithstanding the plain language of this sub-section, there is to be found in section 9 (2) an implied power in the justices to refuse renewal unless reasonable undertakings are given, or, which amounts to the same thing, to grant renewal only upon such undertakings being given. [His lordship read section 9, sub-section 2.] I cannot adopt this contention. It really involves the addition of a sixth ground on which the justices may refuse. The first paragraph of the sub-section lends no support to the contention It is fully satisfied by regarding the undertaking as one which is not exacted, but volunteered. And although the second paragraph of the sub-section contains the words "the required undertaking," I think the context shows that "required" is merely equivalent to ask for or requested.

The judges in the Divisional Court seem to have thought that the construction which I have adopted renders section 9 (2) perfectly useless, because no licence-holder would be so foolish as to volunteer an undertaking the non-fulfilment of which might entail the refusal of renewal without possibility of compensation. With the utmost respect, I am unable to concur in this view. Although the general discretion upon which the former practice of undertakings rested is gone, it is easy to see that it may still be greatly to the interest of the licence-holder to give a reasonable undertaking. For example, the justices may ask for a reasonable undertaking which they think ought to be given, and may say that if it is not given they will refer the matter to quarter sessions, under section 1 (2), with a view to the refusal of renewal. The licence-holder will not be very desirous to run the risk of having the renewal refused by the quarter sessions. A refusal means to him the loss of his occupation and trade, and it will be a poor consolation to him to know that compensation will be payable "to the persons interested in the licensed premises"—see section 2 (1) (2)—for the fraction attributable to his interest will in most cases be very small. Nor does it appear unreasonable that the registered owner of the licensed premises should have an opportunity of being heard before a voluntary undertaking is given, inasmuch as the giving of such an undertaking may result in the refusal of the licence and the loss of the compensation, the greater part of which would go to the owner. And, further, it is perfectly reasonable that the breach of an undertaking voluntarily given, after notice to the registered owner, should be held to amount to ill-conduct, so as to bring the case within the jurisdiction of the justices under section 1. In my opinion the old practice of exacting undertakings on renewals of "on" licences cannot survive the destruction of the general discretionary power to grant or to refuse, to which the existence of the practice was due. It is not for us to legislate; our duty is limited to interpetation. In my opinion the introduction in the licence of the undertaking, which is not found in the form prescribed by the Secretary of State under section 48 of the Licensing Act, 1872, was not authorized. I agree with the judgment of the Master of the Rolls on this point.

It is, however, contended by the respondents that, even if the justices were wrong in view of the law, the appellants ought to have appealed to quarter sessions under section 27 of the Alehouse Act, 1828, and that the remedy by *mandamus* is not available. I think this objection would be valid if the justices had refused, on wrong grounds, to grant renewal: *Reg.* v. *Smith*, 21 W. R. 382, L. R. 8 Q. B. 146. But they did not refuse. They attempted to attach a condition or impose a term which was not authorized, and in such a case the remedy by *mandamus* is appropriate: *Reg.* v. *Bowman*. I think the proper order is that a *mandamus* should issue to the justices commanding them to deliver up to the applicants their renewal licences in the proper statutory form, without exacting any undertaking.

Appeal allowed.

Solicitors for the prosecutors, *Godden, Son, & Holme*, for *Thompson, Hughes, & Mathison*, Birkenhead.

Solicitors for the defendants, *Lloyd-George, Roberts, & Co.*, for *Gerrard Copeland*, Birkenhead.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — March 29, 30.

JAMAICA RAILWAY CO. v. COLONIAL BANK. (a.)

Practice—Writ—Amended writ—Filing—Non-appearing defendant—Re-service—Discretion of court—R. S. C, 1883, *ord.* 9, *r.* 2; *ord.* 16, *r.* 13; *ord.* 17, *r.* 4; *ord.* 19, *r.* 10; *ord.* 28, *rr.* 1, 10; *ord.* 67, *rr.* 4, 5.

An amended writ is not a document in respect of which personal service is requisite by the Rules of the Supreme Court, and may, therefore, under rule 4 of order 67 be served on a defendant who has not appeared by filing it with the proper officer. When this is done the court has jurisdiction to try the action as against such a defendant. But though there is no hard and fast rule requiring service of an amended writ on a non-appearing defendant, the court has a discretion in the matter, and if by the amendment of the writ a substantial alteration is made in the character of the action, the court may either require re-service of such amended writ on the non-appearing defendant as a term of permitting the amendment, or on the case coming on for hearing may direct it to stand over until the alteration that has been made has been brought to the personal notice of the defendant.

This was an appeal from a decision of Swinfen Eady, J.

The plaintiffs were the Jamaica Railway Co. and Sir A. Hemming, who, when the writ was issued, was the Governor of Jamaica. In paragraph 40 of the statement of claim it was alleged that he sued on behalf of the Government of Jamaica.

The defendants were the Colonial Bank and the West India Improvement Co.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

By their statement of claim the plaintiffs claimed (*inter alia*): (1) A declaration that certain moneys stated to be in the hands of the defendant bank were applicable for the purposes (*a*) of providing rolling stock for the railway of the plaintiff company, and (*b*) of completing the extension of that railway in accordance with a contract mentioned in the statement of claim, and that those moneys might properly be applied for those purposes by or under the direction of the plaintiffs; (2) that the defendants might be ordered to pay over the said moneys to the plaintiffs on their undertaking to apply the same for the purposes aforesaid.

The writ was duly served on both defendants.

The Colonial Bank entered an appearance to the writ, but the West Indian Co. did not appear.

Before the action came on for trial Sir A. Hemming had ceased to be Governor of Jamaica, and Sir James Swettenham had been appointed governor in his place.

On the 21st of November, 1904, upon a summons by the plaintiffs, and on the consent of Sir James Swettenham and his submission to be bound by and have the benefit of all proceedings in the action up to that time, an order was made by Swinfen Eady, J., at chambers, that the applicants should be at liberty to amend the writ and pleadings in the action, and also paragraph 40 of the statement of claim so far as might be necessary in consequence of the addition of Sir James Swettenham as a plaintiff.

In pursuance of this order the writ and statement of claim were amended by adding Sir James Swettenham, and paragraph 40 of the statement of claim was amended by stating that he had succeeded Sir A. Hemming in the office of governor of the island on the 30th of September, 1904, and that he sued as such governor and on behalf of the government of the island.

The amended writ was served on the West Indian Co., the non-appearing defendants, by filing at the Central Office.

When the action came on for trial a preliminary objection was taken on behalf of the Colonial Bank that the West Indian Co. had not been properly served. Swinfen Eady, J., allowed the objection and made an order directing the action to stand over generally with liberty to apply. His lordship said that he had made inquiries of the masters and had ascertained that it was the invariable practice of the Central Office to require a writ which had been amended by adding one or more plaintiffs, or by altering the claim indorsed in the writ, to be re-served on a defendant who had not appeared. In his opinion that was the correct practice. A writ required personal service, and after the writ had been amended the writ in its original form no longer existed on the file; and unless it was re-served, the document as amended, which was the writ then in force, would not have been served on the defendant.

The plaintiffs appealed.

The following orders and rules were referred to in the arguments and judgments:

Ord. 9, r. 1: "No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance."

Rule 2: "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just."

Ord. 16, r. 2: "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

Rule 11: ". . . The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as a defendant shall be served with a writ of summons or notice in such manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

Rule 13: "Where a defendant is added or substituted the plaintiff shall, unless otherwise ordered by the court or a judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served."

Ord. 17, r. 4: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the court or a judge upon an allegation of such change or transmission of interest or liability or of such person interested having come into existence."

Ord. 19, r. 10: "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer."

Ord. 28, r. 1: "The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Rule 10: "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same."

Ord. 67, r. 4: "Where no appearance has been entered for a party, or where a party or his solicitor,

as the case may be, has omitted to give an address for service as required by orders 4 and 12, all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer."

Rule 5: "Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons."

Neville, K.C., Carson, K.C., and *Greenland*, for the appellants.—An amended writ is not the same as a new writ. It is a writ in respect of which personal service is not requisite within ord. 67, r. 4, and under that rule may be served by filing it with the proper officer, and in the case of a non-appearing defendant such filing is to be sufficient notice to him of what has taken place: *In re Hartley*, 39 W. R. 604, [1891] 2 Ch. 121. Here the claim is made on behalf of the Government of Jamaica, and all that has been done is to substitute one name for another as the agent of the government. The present case is not, therefore, like the case of *Gee* v. *Bell*, 35 W. R. 805, 35 Ch. D. 160, where the plaintiff against a non-appearing defendant was held strictly to what was claimed by the writ. Nor is the case of *The Cassiopeia*, 27 W. R. 703, 4 P. D. 188, an authority against the appellants. The decision of the court there really was that if a writ is amended so as to introduce a new claim it must be served in the same way as the original writ.

They also cited *In re Jones*, 25 W. R. 303, and *Dymond* v. *Croft*, 24 W. R. 842, 3 Ch. D. 512.

Eve, K.C., and *Christopher James*, for the respondents.—It is submitted that ord. 67, r. 4, does not apply at all to writs of summons. As to the power of the court to amend, the court will often give leave to amend in cases which would work injustice to a defendant who has not appeared to the original writ. Take the case of a trustee defendant who has no defence to an action brought by infant plaintiffs, and therefore does not enter appearance. If adults were added as plaintiffs he might have a good defence against them, but if filing were sufficient without personal service, he might never have notice of the amendment. The principle which underlies the decision in *Gee* v. *Bell*, that a statement of claim cannot be enlarged against a defendant who has not appeared, is that you cannot get any more relief against a man than you have told him that you claim against him. But if this suggested practice is to be adopted it will only be necessary to amend a writ and then file the amended writ to enable a plaintiff to obtain relief of which the defendant has no notice whatever.

They cited *Webster* v. *Myer*, 33 W. R. 407, 14 Q. B. D. 231; *Tilling* v. *Blythe*, 47 W. R. 273, [1899] 1 Q. B. 557; *Jackson* v. *Kilham*, W. N. (1891) 171.

No reply was called for.

VAUGHAN WILLIAMS, L.J.—In my opinion this order of Swinfen Eady, J., is wrong. In my judgment it is not true to say that the West Indian Co. have not been properly served with the amended writ. The amendment with which we have to deal is of this nature: The action having been brought by the Jamaica Railway Co. and Sir A. Hemming, the then governor, representing the Government of Jamaica, there occurred a change in the person of the governor. Sir A. Hemming ceased to be governor and Sir J. Swettenham succeeded him. That necessitated the amendment, and the order was to add Sir J. Swettenham as plaintiff. The question whether this amended writ required personal service upon the defendants who had not appeared must depend upon the rules.

The rule upon which reliance has been chiefly placed by those who say that there was no necessity for personal service of the writ thus amended is rule 4 of order 67. [His lordship read the rule.] There is no question but that, if filing is sufficient, the writ has been duly filed with the proper officer in compliance with rule 4 of order 67. But it is said that the filing is not sufficient, because it is necessary to serve the amended writ personally upon the West Indian Co. That being said, I look in the first instance to see whether this amended writ falls within the terms of rule 4. It is suggested that it falls within the term "writs," and in my judgment an amended writ does fall within that term. If the amended writ was a new writ it would not fall within rule 4, because the words of that rule exclude from its operation writs or other documents in respect of which personal service is requisite. It applies only to writs and documents "in respect of which personal service is not requisite." I do not suppose anyone will deny that an amended writ, if it is not a document in respect of which personal service is requisite, falls within rule 4.

In those circumstances the question I have now to ask is simply this: Is a writ, amended in the way in which this writ has been amended, a document in respect of which personal service is requisite? Now, dealing merely with the rules, it seems to me that personal service is not requisite. Ord. 9, r. 2, provides for the personal service of a writ. [His lordship read the rule.] There is no dispute that in the present case the original writ was served personally. I can find in this rule no obligation to serve a writ personally a second time, and therefore I have to ask: Is this writ after the amendment still the same writ? If it is, it has been served, and I can find in the rules no provision that a writ which has once been served shall be re-served or served as a separate writ. In these circumstances it seems to me in the first instance that this amended writ is a writ within the meaning of rule 4 of order 67, and that it is not a writ to which rule 2 of order 9 applies. *Primâ facie*, therefore, this amended writ not requiring personal service, and having been dealt with in the manner required by rule 4 of order 67 in respect of documents not requiring personal service, the order of Swinfen Eady, J., is wrong in saying that the document has not been properly served. In my judgment it was properly served as the original writ was, and there is no provision in the rules for the re-service of a writ upon its being amended in the way in which this writ has been amended.

The respondents' counsel met this by saying that this is a *casus omissus*; it is not dealt with by the rules at all, and we ought to assume that, independently of any express provisions in the rules, every amended writ ought to be re-served after amendment. I cannot agree that we ought to make that assumption. Amongst other reasons for not doing so I find that by rule 10 of order 28, "Whenever any indorsement or pleading is amended such amended document shall be delivered to the opposite party" (not personally served) "within the time allowed for amending the same." An amendment of the indorsement of the writ, or an amendment of the pleading, may affect the character of the action just as much as, and generally speaking more than, an amendment of the writ by the addition of a new party. In the face of this provision of rule 10 of order 28 it seems

to me impossible to say that every amendment of a writ requires a re-service of the writ. I think counsel for the respondents in the course of his argument admitted that he could not maintain that general proposition. I quite assent to the suggestion that every amendment of a writ which makes it a new writ will require personal service, but that is true because such a case falls plainly within rule 2 of order 9. But, in my judgment, unless the nature of the amendment is such as to make the amended writ a new writ, there is nothing in the rules which requires any personal service of the amended writ. If an amended writ comes within the terms of rule 4 of order 67, and it is not a new writ, there is nothing in the rules which requires personal service. But, in addition to that, if we look at the substance of the transaction, it is plain that it is covered by ord. 17, r. 4, and that in a case which did not differ in substance from the present case you could, by making the proper application and obtaining the proper order, effect an amendment of this character without anything in the nature of a re-service of the writ.

Then it is said that there are many cases in which the absence of personal service might work great hardship and do grave injustice, or render grave injustice possible or probable, and that, therefore, we ought so to construe the rules as to render the occurrence of injustice impossible. I am inclined to think that I am stating this argument in too complimentary language. It is not really an invitation to the court so to construe the rules as to make an injustice impossible; it is, I think, an invitation so to misconstrue the rules as to render an injustice impossible. In my judgment that is not part of the functions of the Court of Appeal. If the rules are so expressed that, construed according to their plain and obvious sense, injustice will be worked by them, the proper way of preventing that is, not by legislation or rule-making in the Court of Appeal, but by bringing the matter to the notice of the Rule Committee or the Legislature, as the case may be. But, in my judgment, there is no substantial danger of any such injustice. It is admitted that in many cases by the addition of a plaintiff the substance of the action will not be altered at all. It will hardly be denied that in such cases there could be no necessity, so far as justice is concerned, for the re-service of the writ upon a defendant who has not appeared. Although there are no doubt cases in which it would be unjust to proceed to judgment, because of the danger that the absent defendant may have been lulled into a sense of false security, by reason of the amendment not having in fact come to his notice, no case has yet been suggested in which, as it seems to me, the actual occurrence of the injustice could not always be prevented by the judge before whom the case came for trial. I am not, therefore, very much impressed with the argument of necessity or convenience, based upon the suggestion of the possibility of injustice being done.

Cases have been cited to us, such as *Gee* v. *Bell* and *Tilling (Limited)* v. *Blythe* and *Webster* v. *Myer*, in regard to which it was suggested that the judges had adopted the course of amending the rules, or refusing to read them according to their natural sense, because they were found difficult or dangerous of application. I do not say that in *Gee* v. *Bell* and *In re Hartley* there are not observations in the judgments of North, J., which suggest that he did take such a course. But, whatever those observations seem to point at, in truth and in fact in each one of those cases there was no necessity to misread the rules then in question or to refuse to read them according to the natural meaning of the words, for in each one of those cases the judge might have arrived at exactly the same result by simply saying "Although the right procedure has been taken, having regard to the wording of the rules, I shall not give effect to that which has been done by ordering judgment, because I have a jurisdiction and a duty, in any case in which I think there is any probability of danger of injustice, to take care in the exercise of my discretion that there shall be personal notice or personal service of the writ upon the absent defendant before I give the judgment against him which is asked for." Moreover, in *Tilling (Limited)* v. *Blythe* and *Webster* v. *Myer* the court expressly affirmed its jurisdiction.

In these circumstances, for the reasons which I have given, I think the judgment of Swinfen Eady, J., is wrong. The case ought now to be restored to the list, and then the learned judge when he hears the case can, if he considers any order necessary for the protection of the defendants who have not appeared, make that order at the trial. But in my opinion he ought not to have refused to continue the hearing upon the ground that the amended writ had not been properly served.

ROMER, L.J.—I am of the same opinion, but, as the case is an important one as to practice, I think it right to state somewhat at length the reasons why, in my opinion, the appeal ought to succeed. Swinfen Eady, J., acted, as I gather, on the view that there is a hard and fast rule without any exception that, as regards a defendant who has not appeared after due service on him of the original writ of summons, if the writ be then amended—whatever be the nature of the amendment—the amended writ must be personally served on him, and that, if that be not done, the court has no jurisdiction to proceed with the trial of the action as against that defendant. In my opinion that view cannot be maintained. I can find nothing in the rules or in any Act of Parliament or in any decision of the court, nor can I see any other reason which requires personal service on an absent defendant of an amended writ in every case of amendment.

In the first place, it is clear from the rules of court that when a defendant has appeared personal service of an amended writ upon him is not required. It is also clear that an amended writ is not a fresh writ—a commencement of a new action—and there is, in my opinion, nothing in the rules or in any Act of Parliament, nor is there any decision of the court (and how far those decisions have gone I will consider in a moment), nor any other good reason which shows that a defendant who has not appeared is entitled as of right in every case to be placed in a different position from a defendant who has appeared with regard to an amended writ, or to require personal service of the amended writ as if it was the original writ of summons. In my opinion, ord. 67, r. 4, applies in such a case; for I think that, as regards an amended writ, personal service is, to use the words of ord. 67, r. 5, "not required by these rules or otherwise." That being so, ord. 67, r. 4, provides that in the case of a defendant who has not appeared, "all writs, notices, pleadings, &c., in respect of which personal service is not requisite may be served by filing them with the proper officer." An amended writ is a writ, and as I have already pointed out, it is not a writ which, by the rules or otherwise, requires personal service.

In a case in which a defendant has not chosen to appear, the plaintiff is *primâ facie* entitled to act upon rule 4 of order 67, and to file an amended writ with the proper officer; and if he does that (and the plaintiff did it in the present case), then to my mind it cannot be said that the court has no jurisdiction to proceed with the trial of the action.

But there is undoubtedly a principle on which this

court has for long acted in mercy to a defendant who has not appeared—a principle which in favour of such a defendant trenches to a very large extent upon the rules of the court. The court has always borne in mind that an absent defendant served with the original writ may have acted upon the supposition that he thereby gathers substantially what the case made against him is and relies upon it that that case and no other substantially different case will be made against him, and on that footing does not choose to appear. Accordingly the court has refused to act upon a rule which in terms covered a defendant who had not appeared, in cases in which the court came to the conclusion that it would not be just to enforce the rule against such a defendant—not that the court had no jurisdiction to proceed, but that it did not think it right to proceed in such a case.

Let me give as an instance ord. 20, r. 4, which on the face of it could not be clearer. It says that "whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ," and yet it has been repeatedly held—for example, in *Gee* v. *Bell*—that when the statement of claim goes substantially beyond the indorsement on the writ in asking for relief against an absent defendant the court will refuse to act upon ord. 20, r. 4, and will require the plaintiff, if he desires to obtain against such a defendant greater relief in substance than that which appears on the indorsement of the writ, to amend his writ and reserve it. But that is a matter of grace. It is not that the court has not jurisdiction, but it will not exercise the jurisdiction in such a case, and I think that is the right view to take of *Gee* v. *Bell* and similar cases.

Again, it has been held in favour of a defendant who has not appeared that if a writ be amended by altering the claim indorsed on it so as substantially to increase the claim against the defendant the court in the exercise of its discretion will not allow the plaintiff to obtain as against such a defendant the relief sought by the amended indorsement or extended claim unless the defendant be re-served personally with the amended writ. In that case, again, to my mind, the court acted on its general discretion in refusing under the circumstances to apply a rule, and not because the court had not jurisdiction to apply it. If *The Cassiopeia* be examined it will be seen that it gives no countenance to the idea that every amended writ must of necessity be personally re-served upon a defendant who has not appeared. If you look at the judgment of Brett, L.J., in which the other Lords Justices concurred, when the court had to consider the question of re-service of an amended writ the indorsement on which had been amended, they expressly limited their view as to personal service being required to the case in which the writ is amended, as it had been in that case, by making a substantially new claim on the indorsement. The very form of the judgment in that case shows that the hard and fast rule which Swinfen Eady, J., supposed to exist, and on which he has acted, cannot be maintained.

The only other authority which has been referred to is really against the present respondents—namely, *In re Hartley*. I agree in thinking that that case went too far, but I do not agree that it was wrongly decided so far as it was held that the court had jurisdiction to proceed in a proper case even against a defendant who has not appeared when the plaintiff has acted on ord. 67, r. 4, and has filed the amended writ with the proper officer. To my mind, therefore, in the present case the court had jurisdiction to try the action notwithstanding that the amended writ had not been re-served personally on the non-appearing defendants. But I will go so far with the respondents as to say that I can well understand how the practice of the masters of requiring an amended writ to be re-served in every case has grown up, and how it can to a certain extent be justified. In most cases an amendment of the writ does substantially affect a defendant even if the amendment be only the addition of a plaintiff. There are many cases in which the effect of adding a plaintiff to a writ will be to make substantially a different case against a defendant, at any rate as regards the new plaintiff, and may make the action assume a subtantially different form against that defendant. I think, therefore, that in the majority of cases—probably the great majority—a plaintiff who amends his writ will be well advised in re-serving the amended writ personally on a defendant who has not appeared. But to my mind there are at any rate some cases in which personal service of an amended writ is not required in the true interests of the absent defendant, and in which there is no reason why the rules of court as they exist should not be acted upon, or why the court should not exercise its jurisdiction and proceed to judgment at the trial of the action against the absent defendant although he may not have been personally served with the amended writ.

Take the case which I put in the course of the argument, of an action brought against two defendants, A. and B., asking for relief against them jointly, and also special separate relief as against B. A. does not appear. There is an amendment of the writ asking for further relief as against B. alone, but not affecting the claim against A. at all. Is there any reason why that amended writ should be personally served on A., who has not appeared? I think not. As I have pointed out, it is not required by the rules or by an Act of Parliament, or by any decision which is binding on us, and I can see no good reason why in such a case personal service of the amended writ should be required. Take another case which my lord suggested in the course of the argument, of one of the old companies suing by a public registered officer. In the course of the action that officer is changed; the writ is amended by substituting the name of the new public officer for that of the old one. Is there any reason why that amended writ should be personally served on the defendant? To my mind there is none. As I have pointed out, there is no hard and fast rule which requires that it should be re-served personally. In such a case, again, I think the court ought to proceed with the trial of the action, notwithstanding that there had been no personal service of the amended writ on the absent defendant. Other cases might, of course, be suggested. I have already said that in the great majority of cases the plaintiff would be well advised to re-serve his amended writ on an absent defendant, but I will say that there are, at any rate, exceptional cases in which the plaintiff may be able to satisfy the court at the trial that the amendment of the writ was one which did not substantially change or affect the claim made against the non-appearing defendant by the original writ so as to render it just that the amended writ should be re-served upon him. In such a case the plaintiff ought to be able to call on the court to proceed with the action. The plaintiff would, of course, decide at his own risk for his own purposes whether the case was an exceptional one which justified him in taking that course. It might be that at the trial of the action he would fail, and the court would still exercise its discretion if it thought the case was one in which it was not fair as against the non-appearing defendant that the action should be proceeded with, and then the court would do what was right with regard to costs and other-

wise. In the present case the learned judge has not considered the question whether in substance the absent defendants have been prejudiced by the amendment of adding a co-plaintiff. So far as I can see, and so far as counsel have made any suggestion, the addition of a plaint made by amendment in the present case did not substantially affect the absent defendants—that is, did not substantially change the nature of the case made against them, and was not such an alteration as in justice to them would render it requisite or proper that they should be personally re-served with the amended writ. Therefore in my opinion the case must go back for trial. Of course this will not prevent the learned judge when the case comes before him for trial, if he finds (contrary to what appears to me to be probably, if not almost certainly the case) that justice does require that the absent defendants should be personally served with the amended writ, from requiring that to be done. As at present advised I think the absent defendants would not be entitled to call upon the court to take such a course. I cannot help thinking that when this action is tried out it will be found that the judge would be right in every point of view in proceeding to try it notwithstanding that personal service of the amended writ had not been effected upon the absent defendants. For these reasons, therefore, I think the appeal ought to be allowed.

STIRLING, L.J., after stating the facts, continued: The question is whether according to the rules of court the learned judge was justified in making the order that he has made. The point which has been mainly argued before us is whether according to the rules of court the amended writ has been properly served. I will state shortly my view upon that point and then deal with the application of the rules to this particular case. There is no question that the original writ in this action was properly served personally, in accordance with the rules, upon the defendants who do not appear. The question is as to the service of the amended writ.

Now, the amendment of a writ may, according to the rules, take place in one of two ways—either by adding parties or by amending the indorsement on the writ. The amendment by adding parties is governed by ord. 16, r. 11. [His lordship read rule 11, and continued:] There is in that rule an explicit direction that the writ of summons shall be served on new defendants in the way pointed out by the rules. Nothing is said as to what is to happen either when a new plaintiff is added, or as to service upon the original defendant when a new defendant is added. The rule is silent about this and does not in terms require in the two instances which I have just mentioned that the amended writ shall be re-served personally. The second case is when the indorsement on the writ is amended. The rule which deals with that is ord 28, r. 1, which provides that "the court or a judge may at any stage of the proceedings allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just," and rule 10 provides that "whenever any indorsement or pleading is amended such amended document shall be delivered to the opposite party within the time allowed for amending the same." It is plain, therefore, from that rule that personal service of a writ amended in its indorsement is not required. What is required is simply that the amended writ shall be delivered to the opposite party. Then we come to ord. 67, r. 4, which provides that "where an appearance has been entered for a party . . . "—and that applies here—"all writs (*inter alia*) in respect of which personal service is not requisite may be served by filing them with the proper officer." Now, the question to be determined is whether personal service of the amended writ is requisite in the present case. I cannot find that it is according to the rules, and therefore it seems to me that *primâ facie* the proper course has been pursued and by filing the amended writ it has been properly served upon the absent defendant.

But it is said that if full effect is given to this which seems to me the proper construction of the rule, injustice may be done to the absent party.

I am in full sympathy with the view that the court ought to take great care that no injustice is done to an absent party by an amendment. But I think the rules themselves indicate the way in which injustice is to be avoided. No amendment of a writ, whether by the addition of parties or by alteration of the indorsement, can take place after service without the leave of court, and by both rule 11 of order 16 and rule 1 of order 28 the amendment is to be permitted by the judge only upon such terms as seem to him to be just. In my opinion, therefore, when an application is made for amending it is the duty of the judge to consider the nature of the amendment which is proposed, and if he finds that the alteration proposed either in the constitution of the suit by the addition of parties or in its character by the alteration of the indorsement is such as to introduce a substantially new case which would not naturally be brought to the notice of the absent defendant by the original writ it would be right for him to impose as a term of granting leave to make the amendment the condition that the amended writ should be personally served on the absent defendant.

But I do not think the matter stops here. I think that when the action comes on for trial the judge has still a right to deal with it in the way in which Swinfen Eady, J., has dealt with the present case. If when he hears the case it appears to him that by the amendment of the writ a substantial alteration has been made in the character of the action, it is quite within his power to direct the action to stand over until the alteration which has been made has been brought to the personal notice of the defendant, so that he may have an opportunity of defending himself, if the judge thinks that substantial justice so requires.

That being so, I will now say why, with all respect to Swinfen Eady, J., I think that in this case he went too far. What is the nature of the action? The action was brought by the Jamaica Railway Co. and Sir A. Hemming, who was the Governor of Jamaica at the time when the writ was issued. The Government of Jamaica claim, as appears by paragraph 40 of the statement of claim to have some interest in the subject-matter of the action. Though Sir A. Hemming was one of the plaintiffs, he really, according to the allegations in that paragraph, represented the government of the island. Now what has happened? Sir A. Hemming ceased to be governor of the island and was succeeded by Sir J. Swettenham, and thereupon an order was made giving leave to the plaintiffs to add Sir J. Swettenham as a co-plaintiff, and that is all the alteration which has been made. Now, the allegation in the statement of claim is that Sir A. Hemming was suing not in his own personal capacity, but on behalf of the government. The government was the real plaintiff. The same allegation is made in the amended statement of claim, and though Sir J. Swettenham has been added as a plaintiff, the real plaintiff—namely, the government still remains before the court. Upon the materials before us I am unable to see that there is any substantial change in the nature of the action or that any injustice can be done to the absent defendants by allowing the actions to proceed in that state of things.

I agree, therefore, with my brethren in thinking that in the present case the learned judge in his desire to protect the absent parties has gone too far. He has never exercised his judgment on the question whether injustice would be done to the absent defendants, but has acted on a supposed hard and fast rule that every amended writ must be served as if it were a new writ requiring personal service. I agree, therefore, that the order must be discharged and the case go back to the learned judge for trial.

Solicitors, *Frank Stuttaford; Druces & Attlee.*

High Court of Justice.

Chan. Div. } June 6, 7.
Farwell, J. }

SHEPHERD *v.* HARRIS AND OTHERS. (*a.*)

Trustee—Purchase of inscribed stock by broker co-trustee—Acceptance of half commission—Liability for loss of trust property through fraud of co-trustee—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 24—*Judicial Trustees Act,* 1896 (59 *&* 60 *Vict. c.* 35), *s.* 3.

A trustee is not liable for the fraud of a broker co-trustee where, the latter having been instructed to buy inscribed stock, the former has done all that could be expected of an ordinary prudent man to see that the investment has in fact been made. The fact that a share of the commission has been accepted from the broker co-trustee, who is entitled to remuneration under the terms of the trust deed, does not affect his liability.

Speight *v.* Gaunt, 32 *W. R.* 435, (1883) 9 *App. Cas.* 1, *and* Jobson *v.* Palmer, 41 *W. R.* 264, [1893] 1 *Ch.* 71, *considered.*

Witness action.

By his will dated the 15th of July, 1884, Charles Shepherd devised and bequeathed to his trustees all his real and personal estate upon trust for sale and conversion, and after payment of his personal and testamentary expenses and debts upon trust for investment in certain named securities, and to pay the income to his wife, Jessie Nisson Shepherd, for life, and after her decease as to five-sixths thereof upon trust for his five daughters (co-defendants in the action), and as to the remaining one-sixth in trust to stand possessed thereof with power to vary the investment at their discretion and to pay and apply the income thereof for the maintenance of the plaintiff Shepherd during his life, and after his decease in trust for the children of the plaintiff or their issue as the plaintiff should by will appoint. And in default of appointment in trust to pay the income to the wife (if any) of the plaintiff during her life, and after her decease in trust for all the children of the plaintiff living at her decease equally, and if there should be no children in trust for the testator's daughters living at the death of the plaintiff.

The will also contained a provision to the effect that the trustees might in their uncontrolled discretion employ a solicitor or any other person to transact any business or do any act of whatever nature required to be done in the execution of the trusts, including the receipt and payment of money, and that any trustee of the will being a solicitor or other person engaged in any profession or business might be so employed or act.

Mrs. Shepherd, who survived the testator, died in 1892, and the surviving executor and trustee, George Wilson Dawes, thereupon duly converted the trust estate into money, and after distributing the five-sixths amongst the five daughters of the testator held the other one-sixth in trust for the plaintiff and the other persons entitled on his decease.

By an indenture dated the 2nd of August, 1893, George Wilson Dawes retired from the trust, and the defendants Harris and Janvrin were appointed trustees in his place, the plaintiff's one-sixth share at that date consisting of the sum of £6,713 12s. 11d. New Consols.

The trustee defendants from time to time varied the investment of the New Consols, and in the month of April, 1900, the same was represented by a sum of £2,191 5s. 5d. Tasmania 3½ per cent. Stock, £2,100 Western Australia Stock, and £2,100 Victoria 4 per cent. Stock.

In April, 1900, the plaintiff, wishing to obtain a better rate of interest, suggested to the defendant Janvrin that the Tasmania Stock should be sold and reinvested in Western Australia 4 per cent. Stock.

The defendant Janvrin was at that time a half commission clerk upon the London Stock Exchange, and his co-trustee Harris, who was a member of an old-established firm of brokers, was instructed to carry out the sale and reinvestment. The stock was accordingly sold by Harris, but it did not appear that any such reinvestment was in fact ever made by him, the proceeds of the sale being eventually fraudulently retained by him for his own use.

The commission upon the transaction was shared by Harris with Janvrin, but upon the advice of his solicitor the share received by Janvrin was ultimately returned to the trust fund. The defendant Janvrin made no inquiry at the London and Westminster Bank to ascertain whether the Western Australia Stock (which being inscribed stock passed by transfer in the books of that bank) stood registered in Harris' and his own name, but was satisfied that the transaction had in fact been completed on production of what purported to be a stock receipt by Harris, and a statement by the plaintiff that he had duly received the amount of the dividends from Harris and had checked them with the dividend vouchers or counterfoils. The amount of the dividends upon the Western Australia Stock was regularly paid by the defendant Harris down to September, 1902.

In or about August or September, 1902, the plaintiff, upon the advice of the defendant Harris, requested Janvrin to consent to a sale of the £2,100 Western Australia Stock with a view to reinvestment in Victoria 4 per cent. Stock, and Harris was instructed to carry out the transaction as broker for the trustees.

Within about a month of the latter transaction Harris was declared a defaulter upon the London Stock Exchange, and Janvrin, being put upon inquiry, ascertained that the reinvestments in Western Australia Stock and Victoria Stock had in fact never been made by him, and that no such stock stood registered in his name and in that of the defendant Harris. Immediately upon Harris's default becoming known to Janvrin, the latter consulted his solicitor and acting upon his advice the sum which he had received as half commission upon the first transaction was restored to the trust fund, and a writ issued against Harris claiming payment into court of the sum of £4,451 18s. 5d., being the amount of the proceeds of the two sales.

An order to this effect was obtained on the 31st of October, 1902, which was, however, never drawn up or enforced, Harris having disappeared in the meantime.

A writ was eventually issued by the plaintiff claiming a declaration that the defendants Harris and

(*a.*) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

Janvrin were jointly and severally liable for the two sums in question and interest thereon, and that new trustees might be appointed in place of the said defendants.

The five daughters of the testator, having refused to join as plaintiffs in the action, were ultimately joined as co-defendants.

In the course of the evidence it was proved that the stocks in question were transferred by registration of the name of the transferee or transferees in the transfer books at the London and Westminster Bank, the stockholder attending by himself or his duly authorized attorney for that purpose. It was also shown that the only evidence of title which the transferee would ordinarily obtain would be the stock receipt signed by the transferor, and which was always acted upon by brokers, jobbers, and business men as sufficient evidence of title. Although in order to prevent fraud the transferee was recommended by the bank to attend personally or by attorney when the transfer was made, this course was in fact only pursued in rare and isolated instances. Further, the bank would not answer inquiries by a stockholder as to whether his name stood registered in the transfer book unless he brought a person known to and approved by the bank to identify him.

Upjohn, K.C., and *A. Beddall*, for the plaintiff Harris.—The defendant Janvrin did not exercise reasonable care and prudence in not having made inquiries at the bank to ascertain whether the transfer of the Western Australian Stock had in fact been registered in his name and that of Harris. That being so Janvrin was estopped from setting up the defence that Harris was a fit and proper person to be entrusted with the second transaction, since but for his own default in not making the proper inquiries he would have ascertained in the course of the first transaction that Harris was a fraudulent person.

Eve, K.C., Jenkins, K.C., and *A. C. Clauson*, for the defendant Janvrin.—*Speight* v. *Gaunt*, 32 W. R. 435, (1883) 9 App. Cas. 1, applies, Janvrin having done all that a man of reasonable prudence could have been expected to do under the circumstances. Further, Janvrin was not estopped upon the second occasion from saying that Harris was a proper person to employ: *Mendes* v. *Guedalla*, (1861) 2 J. & H. 259; and the burden of proof is upon the plaintiff to show negligence: *In re Brier*, 33 W. R. 20, 26 Ch. D. 238.

Bateman Napier, for the daughters.

Upjohn, K.C., in reply.—This case does not fall within *Speight* v. *Gaunt*, as Janvrin had accepted remuneration; his obligation to use diligence to see that the stock was bought was therefore greater than that of an unremunerated trustee. The acceptance of half the commission from Harris brought the transaction within something of the nature of a partnership transaction, though I cannot put it as high as an actual partnership.

He referred to *Joy* v. *Campbell*, (1804) 1 Sch. & Lef., at p. 341.

FARWELL, J.—This is one of those cases in which it is attempted to make an honest man liable for the fraud of a dishonest co-trustee. The trustees Harris and Janvrin were appointed by the Court, and Harris was a person in a good position and a member of a well-known firm of brokers. As to the first transaction, Harris produced to Janvrin the contract notes and a statement of the account, and this was done in a perfectly regular manner and according to the ordinary course of business. On three occasions Janvrin inquired of Harris whether the latter had obtained delivery of the Western Australia Stock, and upon the third occasion Harris handed to Janvrin the usual stock receipt, which Janvrin carefully examined, and, finding it in order, handed it back to Harris, who as the senior trustee, and the person whose name would stand first upon the transfer books was the proper custodian of the trust documents of title. It is unfortunate that this stock receipt is not before the court, but it appears manifest that it must have been a forgery. It appears from the evidence that blank stock receipt forms are issued in the ordinary course of business to any banker or broker applying for them. The transfer of inscribed stock takes place, the transferor attending by himself or his attorney and signing his name in the transfer book kept at the bank. No notice of the transfer is given by the bank to the transferee, and it is not usual for the transferee to attend and accept the transfer, he relies apparently upon the stock receipt in the same way as he would upon a share certificate. The stock receipt cannot, in fact, be said to be a document of title, though to a certain extent it is in practice treated as such. If a person attends with it at the bank he is allowed to accept the transference of the stock then and there; moreover, it is acted upon by brokers and jobbers upon the Stock Exchange as though it were a document of title. I think the circumstances bring this case within *Speight* v. *Gaunt*. What more could Janvrin have done, not being suspicious of Harris, and having every reason to believe him an honest man? The bank does not answer inquiries, the register being kept secret unless the holder attends personally and is identified by a broker known to the bank. Such a course does not appear to be usual in the ordinary course of business. It is said, further, that Janvrin is in a worse position because he accepted half the commission from Harris. But Janvrin did not ask for this, and he has in fact repaid it to the trust before trial. I cannot see that the fact of payment makes any difference to his liability. That point was decided in *Jobson* v. *Palmer*, [1893] 1 Ch. 71. The second transaction was similar to the first, except that between the date when the order was given and before the time when the stock receipt would have been shown to Janvrin, Harris was hammered upon the Stock Exchange and disappeared. It does not appear that Janvrin allowed an unreasonable time to elapse before making the necessary inquiry of his co-trustee. The result is that the action against Janvrin fails, but I think his costs should be paid out of the trust fund.

Solicitors for the plaintiff, *Churchman & Winser*.

Solicitors for the defendant Janvrin, *Freeman, Cooper, & Co.*

Solicitor for the daughters, *Haynes Reed*.

Chan. Div.
Swinfen Eady, J. } May 23, 25.

In re FRANCIS (DECEASED).
FRANCIS *v.* FRANCIS. (*a.*)

Will—Construction—Real estate—Devise to A. "when she shall attain twenty-five years of age"—Vested or contingent gift—Residuary devise and bequest.

Where, in a will, there is a devise to A. "when he shall attain the age of twenty-five years," or any given age, and such devise stands alone and is not preceded by any intermediate interest, nor aided by any preceding or

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

subsequent context, then such devise will be deemed to be a contingent devise on the devisee attaining the prescribed age, and the attainment of such age is a condition precedent to the estate vesting in the devisee. In such a case no distinction can be drawn between "when" and "if" the devisee attains the required age.

A testator by his will gave, devised, and bequeathed certain freehold houses to his niece H. "when she shall attain the age of twenty-five years." He made similar devises to another niece and nephew on similar conditions, and he gave all his residuary real and personal estate to his brother C. F. absolutely, whom he also appointed executor. The brother had always treated the nieces and nephew (his own children) as having merely contingent interests under the will, subject to executory limitations over on their each attaining twenty-five. On a summons being taken out to determine whether the specific devise was contingent on their each attaining twenty-five or whether each took a vested interest liable to be divested on death under that age,

Held, that the devise to each, standing alone, and not preceded by any intermediate interest or aided by the context of the will, must be treated as contingent, and the attainment of twenty-five was a condition precedent to the estate vesting in each niece and the nephew.

Love *v.* Love, 7 *L. R. Ir.* 306, *followed.*

Adjourned summons.

By his will dated the 2nd of December, 1893, the testator, William C. Francis, after appointing his brother Charles Randall Francis executor of his said will, and giving him a legacy, continued: "I give, devise, and bequeath my two houses situate in Princes-street, Brighton, aforesaid, unto my niece Hilda May Francis when she shall attain the age of twenty-five years; I give, devise, and bequeath my two houses situate in Hamilton-road, Brighton, aforesaid, unto my niece Eva Noel Francis when she shall attain the age of twenty-five years; I give, devise, and bequeath my house situate in York-road, West Brighton, in the county of Sussex, and numbered 10 in the said road, to my nephew Horace Arthur Francis when he shall attain the age of twenty-five years." And after sundry other devises and bequests not material, the testator continued: "And I give, devise, and bequeath all my real and personal estate not hereby otherwise disposed of, subject to the payment of my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this my will or any codicil hereto, unto my brother Charles Randall Francis absolutely and for his own use and benefit."

The testator died on the 21st of May, 1895, and probate of his will was granted to the said C. R. Francis.

The testator was at the time of his death seised of two freehold houses called 55 and 57, Princes-road, Brighton (erroneously called Princes-street in the will), and also of the houses in Hamilton-road and York-road aforesaid. The nieces and nephew mentioned in the will were the children of the said Charles R. Francis, the applicant to the summons, and were still infants under the age of twenty-one years at the date of its issue. Since the testator's death, the executor, the said Charles R. Francis, had always treated the children as having merely a contingent interest under the will, and had been in receipt of the rents and profits as tenant for life subject to the contingent devises to the children on their respectively attaining twenty-five years of age. Having received certain offers for the property which he considered advantageous, and being desirous of selling if he should have the power of a tenant for life under the Settled Land Acts, he took out an originating summons for the determination of the following questions and the relief following under order 54 (*a*), ord. 55, r. 3, and the Settled Land Acts, 1882 to 1890, whether on the true construction of the will the plaintiff was entitled in fee simple to the above-mentioned houses in Princes-road, Hamilton-road, and York-road, subject to an executory limitation over in fee simple in each case to the defendants Hilda May Francis, Eva Noel Francis, and Horace Arthur Francis if and when they should respectively attain the age of twenty-five years, and also that certain fit and proper persons therein named be appointed trustees for the purposes of the Settled Land Acts, 1882 to 1890, of the settlement created or deemed under the said Settled Land Acts to be created by the above-mentioned will in regard to the above-mentioned houses.

T. Pakenham Law, for the plaintiff the residuary devisee, who claimed the gift was contingent.—There is no direct authority which expressly decides whether a devise to a person contingent on his attaining a certain age can be claimed before he or she attains that age, but see *Hanson* v. *Graham*, 6 Ves. 238; *In re Jobson, Jobson* v. *Richardson*, 44 Ch. D. 154, 33 W. R. Dig. 220. "When" is a word of contingency.

F. E. Farrer, for the niece Hilda May Francis.—The rules governing realty and personalty are wholly different. Here there is an immediate vested interest in fee, but liable to be divested if the devisee should die before twenty-five. The word "when" in this case means indefeasibly "when." Look at the words of the will "not hereby otherwise disposed of"; these must be read in connection with the whole will. All the old cases show a difference according as the subject-matter is freehold or leasehold. There are a great number of cases on the word "if" differentiating it from the word "when": see *Grant's case*, 10 Co. Rep. 50*a*, Cro. Eliz. 122; *Boraston's case*, 3 Co. Rep. 19*a* (also Co. Rep., vol. 2, p. 51). All the text-books are against me slightly, but see Hawkins on Wills, p. 240, where the case of *Edwards* v. *Hammond*, 1 B. & P. N. R. 324*n*, is given, also *Bromfield* v. *Crowder*, in the same volume and page of Hawkins on Wills, and is in reality to the same effect.

He cited *Duffield* v. *Duffield*, 3 Bligh N. S. 269; *Phipps* v. *Ackers*, 9 Cl. & Fin. 583; *Snow* v. *Poulden*, 1 Keen 186; *Simmonds* v. *Cock*, 29 Beav. 465; Theobald on Wills (5th ed.), p. 496. [By SWINFEN EADY, J.—*Andrew* v. *Andrew*, 24 W. R. 349, 1 Ch. D. 410.]

T. Pakenham Law replied.

He cited *Love* v. *Love*, 7 L. R. Ir. 306, and on p. 309 (per Chatterton, V.C.).

May 25.—SWINFEN EADY, J., read the following judgment: By his will the testator gave, devised, and bequeathed his two houses in Princes-road, Brighton (in the will described as Princes-street), unto his niece Hilda May Francis "when she shall attain the age of twenty-five." The will contains a similar devise of two other houses to his niece Eva when she shall attain twenty-five, and a similar devise of another house to his nephew Horace when he shall attain twenty-five. Several pecuniary legacies are given, and the will contains a devise and bequest of all the testator's real and personal estate not thereby otherwise disposed of, subject to the payment of his funeral and testamentary expenses and debts and the legacies and annuities bequeathed by his will or any codicil unto his brother, the plaintiff Charles Randall Francis absolutely. The testator died on the 21st of May, 1895. The two nieces and the nephew are still under twenty-one. The question is, What interest do they take under the will? The plaintiff, their father, contends that under the will he is now entitled to the houses as residuary devisee in fee simple defeasible, however, and subject to an executory limitation, however, in fee simple to the nieces and nephew

respectively on their attaining twenty-five. The infants contend that they are now respectively entitled to immediate vested estates subject to be divested upon death under twenty-five. If the devise to testator's niece Hilda is contingent upon her attaining twenty-five, it is not disputed that the plaintiff will acquire under the residuary devise all interest in the property not given to Hilda. The language of the residuary devise does not, however, in my opinion, assist the construction of the will, or afford a context for construing the devise to Hilda, as vested, when otherwise it would be contingent. In my opinion the devise to Hilda, standing alone, as it does, and not preceded by any intermediate interest, is contingent, and the attainment of twenty-five is a condition precedent to the estate vesting in her. It is the case of a devise which is in form contingent, and which stands alone, and without any context to enable the court to hold it to be vested. There is not in terms any gift or disposition of the rents until Hilda attains twenty-five, which might have enabled the court to say that attaining the prescribed age no more imported a condition precedent than any other words indicating that the remainderman was not to take until after the determination of the particular estates. Nor is there in terms any gift over on Hilda dying under twenty-five, which might have enabled the court to hold that Hilda took whatever was not given over to the party claiming under the devise over, and to construe the condition as a condition subsequent, divesting a previously vested estate. It is a simple case of a devise to Hilda when she shall attain twenty-five. All the authorities agree that such a devise unaided by any context is contingent upon the devisee attaining twenty-five. In such a case I can draw no distinction between "when she shall attain twenty-five" and "if she shall attain twenty-five."

In *Grant's case*, decided in 29 Eliz., and cited in *Lampet's case*, 10 Co. Rep. 50*a*, and reported Cro. Eliz. 122, the case was that William Grant devised certain land to John Grant when he came to the age of twenty-five years, to have and to hold to him and the heirs of his body. After John attained twenty-one, and before twenty-five, he levied a fine under proclamations, and afterwards he attained to twenty-five, and had issue, and died; it was resolved that the estate tail was barred, although the conusor had but a mere possibility to have an estate tail at the time of the fine levied, and not a vested estate tail. The devise was clearly treated as contingent, and not as vested, liable to be divested on death before twenty-five. Mr. Fearne's opinion was that in such a case the devisee until he attains the prescribed age takes no interest whatever in the devised lands: see Mr. Fearne's Posthumous Works, p. 191, where the reasons for that opinion are fully set forth. In *Phipps* v. *Ackers*, 2 Cl. & Fin. 583, at p. 590, Tindal, L.C.J., in delivering the opinion of the judges upon the question submitted to them, stated that Mr. Fearne might be right in that opinion, found among his posthumous works.

In *Andrew* v. *Andrew*, 24 W. R. 349, 1 Ch. D. 410, there was a devise of certain lands to the eldest son of Thomas Andrew if he shall have attained twenty-one, or so soon as he shall arrive at that age; these words of gift were preceded by a life estate to Thomas Andrew, and followed by a gift over in default of Thomas Andrew having a son. James, L.J., in delivering the judgment of the court, said (1 Ch. D.), at p. 417: "It must be conceded that the words of gift, to Thomas Andrew's eldest son, if standing alone, and unaffected by any preceding or subsequent context, would have been a mere gift of a future contingent interest."

In *Love* v. *Love*, 7 L. R. Ir. 306, a testator gave lands partly freehold and partly chattels to his nephew William Love, the plaintiff, on his attaining the age of twenty-three. He was still under twenty-one, but he claimed in the action that he was entitled to have the rents and profits accumulated for him until he attained twenty-three. It was, however, held that the gift to him was contingent upon his attaining twenty-three, and that he was not entitled to the rents and profits accruing before he reached that age. The Vice-Chancellor said, on p. 309: "The plaintiff in this case contends that the gift to him by the will of the testator of all the land the testator possessed in Rathcraven, Corvina, and Crossrea, and part of the townland of Ross, on his attaining the age of twenty-three, gave him a vested interest, subject to be determined by his death under twenty-three, and that he is therefore entitled to the intermediate rents and profits. The assignees in bankruptcy of the residuary legatee and devisee oppose this contention, insisting that the gift is contingent, and contend that the intermediate rents and profits belong to them. It appears that some of these lands were held by the testator for freehold interests and others for terms of years. I am of opinion that the gift of all is contingent. There is no difference, in my opinion, between the words 'on his attaining' and 'when' or 'if' he shall attain twenty-three, or 'at twenty-three.' All equally import contingency, when they are contained in the gift itself, and are uncontrolled by the other portions of the will. In this case there is nothing to control the effect of the words of contingency; there is no separate direction as to enjoyment to which they can be referred, as they form portion of the gift itself; there is no gift of intermediate rents and profits, either for the benefit of the devisee or any other person; no prior interest given; nor any gift over in case the devisee should not attain the prescribed age. In such a gift as the present there is no distinction between real and personal estate. A pecuniary legacy in such terms will be conditional, just as a devise of real estate. The postponement is not on account of the position of the property, but only for a reason personal to the legatee; there is no gift of *interim* income, nor any gift save that of which the condition forms part of the substance. I must therefore hold that the plaintiff is not entitled to a vested estate or interest, and consequently that he is not entitled to the intermediate rents and profits."

The opinions of text-writers are also to the same effect.

In Jarman on Wills (5th ed.), p. 762, it is said: "It is quite clear that a devise to A., if or when he shall attain the age of twenty-one years, standing isolated, and detached from the context, would confer a contingent interest only." So in Hawkins on Wills, p. 240, "A devise to A., when he shall attain a given age, standing alone and unpreceded by any intermediate interest, would probably be contingent," and Theobald on Wills (5th ed.), p. 496, (6th ed.), p. 551, refers to the opinion of Mr. Fearne to the same effect. I therefore declare that as regards the two houses in Princes-road, Brighton, the plaintiff is entitled in fee simple under the residuary devise, subject to an executory limitation over in fee simple to the defendant Hilda May Francis if and when she attains the age of twenty-five years, and I make a similar declaration as regards the other properties. I appoint trustees for the purpose of the Settled Land Acts as asked, and direct that the costs of the summons be borne by the three properties in equal third parts.

Solicitors, *Radford & Frankland*, for *Holmes & Johnson*, Brighton.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) June 21.

FORDER v. GREAT WESTERN RAILWAY CO. (a.)

Contract—Railway company—"Owners risk" note—Wilful misconduct—Negligence—Knowledge—Burden of proof.

Wilful misconduct means misconduct to which the will is party as distinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who either acts with reckless ignorance or knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do, as the case may be, a particular thing, and yet intentionally does or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences. [*Definition of* Johnson, J., *in* Graham *v.* Belfast and Northern Counties Railway Co., [1901] 2 *I. R.* 13, *adopted.*]

Notice to a company that an act will cause damage is not sufficient to constitute wilful misconduct, unless it can be proved, the burden being upon the party alleging, that notice came to the knowledge of the person actually doing the act complained of. Hence, notice, e.g., *to the manager of the goods depot of a railway company, that a particular method of loading is objectionable, is not sufficient. It must be proved that the foreman in charge of the loading had notice.*

Appeal from the decision of the judge of a county court holden at Winchester.

The respondent, William Drake Forder, having purchased 137 sheep skins from certain London butchers, contracted with the Great Western Railway Co., the appellants, that the skins should be carried from Bermondsey to Winchester by the said company. A reduced rate for carriage was charged, the consignment note containing the usual condition that in consideration of the reduced rate the respondent should relieve "the company and all other companies over whose lines the goods may pass from all liability in case of damage and delay except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants."

It is the custom of the company to make a litter of wood chips in the goods trucks, with the object of keeping the trucks clean, and it was not denied that in the general case it is beneficial to do so. In the case of the skins, however, the wood chips became entangled with the wool of the skins and loss was incurred in removing the chips. The respondent immediately acquainted the company with the fact that the litter was harmful, and the following correspondence passed:—

"Lower Brooks, Winchester,
Oct. 8, 1904.

"The Manager, Great Western Railway Co.
"Winchester Station.

"137 skins from Bermondsey Market and Paddington, this morning were loaded in a truck covered with wood chips which is very injurious to sheep skins and is totally unnecessary and wrong to be used where they are loaded. I am injured to the extent of fully 1d. per skin to clear off this objectionable matter, which I claim from the company, say 11s. 5d., and you can send anyone to see the state the skins are in say before 11 p.m. Communication should be sent to Paddington this a.m., as there will be more skins sending to-day from there, to prevent the recurrence of this injury.—WILLIAM FORDER."

"Great Western Railway, Passenger Department,
"Winchester, Nov. 7, 1904.

"Sir,—With reference to your claim for 11s. 5d. respecting alleged damage to sheep skins from Paddington, I regret to inform you that owing to the 'owner's risk' condition of carriage the company must respectfully decline to entertain the claim. I have, however, asked our Paddington people not to use the kind of litter you object to in the future.—I am, sir, your obedient servant,

"W. F. KNUTTON.

"Mr. W. Forder, Woolstapler, Winchester."

On the 21st of December a second consignment of 267 skins were carried over the company's lines, the same litter of wood chips being used. Mr. Forder sued the company for damages. The learned county court judge gave judgment for the plaintiff, and the company now appealed. The following passages from the judgment of the court below are material:

(1) I am of opinion that upon the cases this act of the company may be within the exception of "wilful misconduct."

(2) No case has been called to my attention which shows that in no circumstances can a railway company be liable under such consignment note as that now in question, unless it be shown that the particular servant who actually performed the act complained of knew or ought to have known that it would cause damage.

(3) I am of opinion that if a railway company knows that in any particular description of traffic it will cause or probably cause damage to goods if a particular system of packing be adopted, and that system is adopted by their servants with regard to any goods carried by the company, and consequent damage to the goods ensued, the owner of the goods consigned under a consignment note in the form of that in the present case may be entitled to recover damages on the ground of "wilful misconduct" having caused the damage.

(4) I am of opinion with regard to the second consignment that the packing by the servants of the company on the wood shavings after the defendant company had had their attention called to the question, and after the letter from the station master to the plaintiff of the 7th of November, 1904, amounted to "wilful misconduct" within the meaning of the consignment note and the decided cases.

Asquith, K.C., and *Hume*, for the appellants.—The respondent relied upon the letter of the 7th of November as evidence that the persons in charge at Paddington had notice. The entire burden of proof was upon the plaintiff, and it was for him to prove that as a matter of fact the information reached the proper authorities. But even assuming in favour of the plaintiff that the station master at Winchester communicated the complaint to the manager of the goods depot, that is not sufficient. He must show that the foreman responsible for loading the trucks knew of the complaint. Negligence, culpable negligence even, on the part of the manager of the goods depot in not giving the information to the foreman is not enough. The latest case on the question of what amounts to wilful misconduct in cases of this description is to be found in *Graham* v. *Belfast and Northern Counties Railway Co.*, [1901] 2 I. R. 13, where all the English authorities are collated and discussed. There is no evidence at all here to support the finding of the judge.

Foote, K.C., and *Rowland Whitehead*, for the respondent.—The county court judge had evidence from which he was entitled to draw the inference he did. I admit it is not enough for me to show negligence. Of course if this second consignment had

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

been sent months or years after the first complaint, it would no doubt have only been a question of negligence, but it is surely only a matter of degree, and the judge has decided in my favour. The county court judge drew the inference, which he was entitled to do, that in a huge company like the present the goods manager would without question communicate the complaint to the parties having control of the loading. What else could the respondent possibly have done to protect himself more than he did do—viz., write to the company and receive their assurance that his complaint had been sent on to the proper quarters. The following cases are of assistance on the interpretation of "wilful misconduct" in this class of consignment note: *Lewis* v. *Great Western Railway Co.*, 26 W. R. 255, 3 Q. B. D. 195, Bramwell, J., at p. 206; *Glenister* v. *Great Western Railway Co.*, 29 L. T. N. S. 423; *Hoare* v. *Great Western Railway Co.*, 37 L. T. 186.

Asquith, K.C., replied.

Lord ALVERSTONE, L.C.J.—This case raises a point of great interest and difficulty. It is one that comes very near the dividing line. I have with much hesitation come to the conclusion that there was no evidence before the learned county court judge upon which he could base his finding. Speaking for myself, I am not prepared to say that it is necessary to show that there was wilful misconduct on the part of the persons who loaded the wool upon the trucks. Counsel in argument have not said that it was necessary. If the act was the act of a person in charge of the loading, the fact that the porters knew nothing about the mischief would not prevent the act from being wilful misconduct. If the learned judge could have drawn the deduction from the evidence that the person in charge of the loading knew that what he was doing was a wrong thing, and deliberately did it, I think that that would be wilful misconduct. I think that follows from the judgments of Lord Coleridge, C.J., and Lindley, J., in *Hoare* v. *Great Western Railway Co.*, which was a case of misdelivery to a person named Jarvis, the goods having been sent to a person of the name of Jeeves. The court could have come to the conclusion that the conduct of the company's servants amounted to a negligent reading of the name, but the court held it to be wilful misconduct. That case is important because it emphasizes the fact that there must be a deliberate act on the part of the person doing that which is the cause of complaint. I do not think I can better the words of Johnson, J., in *Graham's case*: "Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross and culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequence. It is not sufficient, I think, that the facts proved from which the injury arose are consistent with wilful misconduct; they ought to be inconsistent with the absence of wilful misconduct." The only addition I should be disposed to make is this, that acting in reckless ignorance of what the result would be would amount to wilful misconduct. I do not think the words I have quoted differ from those used in the judgments in *Lewis* v. *Great Western Railway Co.* Brett, L.J., says at p. 210: "If it is brought to his notice that what he is doing or omitting to do may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct and that, as he does it intentionally, he is guilty of wilful misconduct." In the present case if there were evidence that the people in charge of the loading knew that the goods would be endangered by loading in the manner complained of, then I should not be prepared to differ from the finding of the learned judge. That being the test, one must look carefully at the evidence. [His lordship read the correspondence set out above.] I assume in favour of the plaintiff that an actual communication was made in the terms of the station master's letter. It cannot be taken that the communication was handed on to the person in charge of the loading. If such a communication was made, the plaintiff could have proved it. He could have obtained the information by means of interrogatories. As it is, is the knowledge upon which he relies sufficient to make the act of sending the goods forward, under the conditions in which they were sent, wilful misconduct? If Johnson, J., is right in coming to the conclusion that it is necessary to prove something which is inconsistent with the absence of wilful misconduct, then this letter will fall far short of that. Whatever may be the side of the line on which the cases may fall when definite notice is brought to the knowledge of the company, I think that, assuming against the company that a person responsible for the loading of the goods at Paddington knew that he had been requested to see that the litter objected to was not again used, the present case falls short of wilful misconduct, there being no evidence of an improper act on the part of the person in charge of the loading of the truck. This appeal must be allowed.

KENNEDY, J.—I am of the same opinion. I do not think the learned county court judge has approached the case from quite the correct point of view. One must bear in mind that the onus of proof of wilful misconduct in a contract of this kind is upon the plaintiff. One is struck on reading the notes in this case with the fact that the railway company called no evidence; the reason is that the burden was upon the plaintiff. The terms of the consignment note state two rates—first the usual rate, secondly the reduced rate. [His lordship read the owner's risk clause, set out above, in so far as it is material.] On the terms of that contract the plaintiff must prove affirmatively his case. Did he discharge that burden? In my opinion he did not. I think the learned county court judge hardly realized upon whom the burden of proof should lie. [His lordship read paragraph 3 of the judgment set out above.] I do not think that is a correct way of stating the proposition. The knowledge of the company for this purpose must be the knowledge of some official of the company who has been placed—not in the manual discharge of the work—in the position to control the transaction in respect of which the mischief has arisen. I am willing to assume that the contents of the letter of complaint were communicated to the proper person. But there is no evidence here whatever that those who had control of this particular loading had in fact that letter before them, nor is it clear, to my mind, that what was proved amounted to misconduct on their part even if they had the knowledge. However, the learned county court judge did not think of referring the misconduct to those who could exercise will in the matter—namely, those who had control of the loading of the goods in question. It seems to me that to say that there is wilful misconduct because the head of a department received that letter which we assume to be written is going far beyond anything that has been decided before.

RIDLEY, J.—I agree with the judgments that have been delivered and have little to add. I should like to refer to one passage in the judgment of Cotton, L.J., in the *Lewis case*: "There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless whether it will or will not cause injury to the goods carried or other subject-matter of the contract." There is no evidence which will bring the case within the judgment I have quoted of Cotton, L.J.

Appeal allowed with costs.

Solicitor for appellant, *R. R. Nelson.*

Solicitors for respondent, *Church, Adams, & Prior*, for *P. W. Snelling*, Winchester.

K. B. Div. (Channell, J.) March 15, 16.

McFADDEN BROS. & CO. v. BLUE STAR LINE (LIMITED). (*a*.)

Ship—Bill of lading—Warranty—Seaworthiness—Fitness to receive cargo—Loading stage—Application of principle of voyage in stages—Harter Act.

The warranty of seaworthiness at the time of loading a cargo is that the vessel is fit to receive her cargo, and does not extend until the time of the sailing of the vessel. That warranty, though not a continuing warranty, is an absolute warranty, and the incorporation of the provisions of the Harter Act in a bill of lading does not limit the shipowners' obligation to an undertaking to exercise due diligence to make his vessel fit to receive the cargo.

Action tried in the Commercial Court.

Claim for damages for breach of contract, or breach of duty in relation to the carriage of certain bales of cotton from Wilmington, U.S.A., to Bremen. After the cotton was taken on board the steamship *Tolosa*, but before the vessel sailed, part of the cotton was damaged by the incursion of sea water, and was consequently delivered in a damaged condition at Bremen.

The incursion was caused (1) by the seacock not being tightly closed owing to some obstruction which took place after the goods were put on board, (2) a sluice-door in a watertight bulkhead not being completely closed after the goods were put on board, (3) the giving way under continued pressure of the water of a joint in the valve chest, which had been last remade, and remade improperly, prior to the goods being put on board.

The plaintiffs were the holders of the bills of lading, which provided as follows: "(3) Also that the carrier shall not be liable for loss or damage occasioned by causes beyond his control; by the perils of the seas, rivers, canals, and navigation; by fire, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, or robbers; by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labour; by explosion, bursting of boilers, breaking of shafts, or any latent defect in hull, machinery, or appurtenances; by collisions, stranding, or other accidents of navigation of whatever kind (even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them; or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, . . . insufficiency or absence of marks, . . . nor for accidental obliteration thereof; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage from any of the aforesaid perils, matters, or things." "(14) . . . It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from, liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled 'An Act Relating to Navigation of Vessels,' &c." [the Harter Act].

The Harter Act provides: Section 2: "That it shall not be lawful for any vessel transporting merchandize or property from or between the ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence (to) properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage . . . shall in any wise be lessened, weakened, or avoided."

Section 3: "That if the owner of any vessel transporting merchandize or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel."

Bailhache, for the plaintiffs.—There was a breach of the warranty of seaworthiness, the vessel not being fit to receive the cargo. That warranty lasts from the time the cargo is put aboard until the vessel sails. The Harter Act therefore affords no protection, and the defendants cannot rely on the exceptions in the bills of lading: *The Carib Prince*, (1898) 170 U. S. 655.

Lewis Noad, for the defendants.—The vessel was fit to receive the cargo at the commencement of the loading; that is the only warranty, and there was no breach of the warranty of seaworthiness. The damage was caused by an accident in the navigation or management, caused by negligence. The Harter Act protects the defendants. The damage was caused by perils of the sea, caused by latent defects and causes beyond the defendants' control.

The following cases were referred to: *Tattersal* v. *National Steamship Co.* (*Limited*), 32 W. R. 566, (1884) 12 Q. B. D. 297; *The Accomac*, 39 W. R. 133, (1890) 15 P. D. 208; *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association*, 35 W. R. 783, (1887) 19 Q. B. D. 242; *The Carron Park*, 39 W. R. 191, (1890) 15 P. D. 203; *The Cressington*, [1891] P. 152, 60 L. J. P. D. & A. 25, 39 W. R. Dig. 206; *The Southgate*, [1893] P. 329; *Hedley* v. *Pinkney & Son Steamship Co.* (*Limited*), 42 W. R. 497, [1894] A. C. 222; *The Glenochiel*, [1896] P. 10, 65 L. J. Ad. 1, 44 W. R. Dig. 148; *Dobell* v. *Rossmore Steamship Co.*, 44 W. R. 37, [1895] 2 Q. B. 408; *The Xantho*, 36 W. R. 353, 12 App. Cas. 503; *Hamilton* v. *Pandorf*, 36 W. R. 369, 12 App. Cas. 518; *Blackburn & Scholes* v. *Liverpool, Brasil, and New River Plate Navigation Co.* (*Limited*), 50 W. R. 272, 7 Com. Cas. 10, [1902] 1 K. B. 290; *Steel* v. *State Line Steamship Co.*, (1877) 3 App. Cas. 72; and *The Vortigern*, 47 W. R. 45, [1899] P. 140.

CHANNELL, J.—In this case there is a claim for damage to certain bales of cotton, carried for the plaintiffs by the defendant under a bill of lading, and

(*a*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

a good many questions arise as to whether there was a warranty of fitness of the vessel in which they came, and also as to the exceptions and immunities given by the bill of lading incorporating the Harter Act of America. I do not think there is any real difficulty in deciding what are the principles applicable to the case, except on one small point. I do not think there is much difference about the facts. I had better first, I think, state the facts as I understand them. There is no real dispute about any of them. The water which did the damage came into the vessel at the port of loading soon after the bales of cotton were put on board, and it came in through three apertures at various points in the vessel from outside. The sea water, or river water, came into the vessel through a sea-cock, or an inlet from the outside which was used to let in the water for the purpose of filling the ballast tanks. The damage happened at night, and on the previous day to its happening that sea-cock had been used for the purpose of filling right up—hardening up, No. 4 ballast tank, which had been full before, but which it was desirable to make quite full before going to sea. That was a proper operation. On the same day the bilges and some of the other ballast tanks I think had been drained, and that having been done the sea-cock was opened and left open for a period of about three hours, which would be the correct way of hardening up this ballast tank, and filling it completely full, and would be a proper operation to undertake. What was done was, about four or five o'clock, I forget the exact hour, the valve was opened for about three hours, and ought to have been, and, as I think, had been, closed down before the chief engineer came on board and looked round the place at about eleven o'clock at night. Early the next morning, at about half-past five the stoke-hole was found with a great deal of water in it, as much as four feet of water, which had obviously come in during the night, and so far as regards the particular aperture which I am dealing with, the sea-cock, it became evident after a time, and what had happened was that some small obstruction had got into the valve, and had prevented the valve being closed right down. When the second engineer went and closed it the night before he had screwed it down as hard as he could, but it was obvious that something had got into the valve that prevented its being closed right down, so that the water continued to come in as soon as there was any outlet in the pipe, and let it come out at the other end. It continued to have pressure to come in through this small aperture. I do not think there is any doubt at all that that is what took place.

By opening up the valve and pumping water through it the obstruction was got rid of. What had happened, therefore, was that there was an obstruction in the valve, and that it was screwed down as far as it could be. That was what had let water in from the outside into the vessel, and I think from that description it is clear that it was in the ordinary term —it is not a very appropriate term if one did not understand it—a peril of the sea. It was an ordinary accident by which the sea water got in by accident. Further, I do not know whether it is material for that purpose whether there was negligence or not, but for some other purposes it may be material whether there was negligence. I do not see how you could find that there was any negligence there, because it was agreed that the man who screwed down the valve, and screwed it down as far as he could, could not know for certain that it had been screwed down absolutely tight if there was an obstruction, and so preventing it going any further. Consequently that letting the water into the vessel, which, after all, is, I suppose, the most important matter, arose from what is called a peril of the sea.

Now you get to the next aperture through which the water has to come. The water coming in in that way comes into a pipe which takes the water, when it is being let in purposely, into one or other of the ballast tanks. That is to say, where the valves are which were closed in reference to the tanks which were not desired to be filled, but open, of course, with reference to the one that has to be filled. That valve chest has a lid on it, and fastened down to a flange by bolts and screw nuts, and screwed down in that way. I suppose it is screwed as close as it can mechanically be in that way, but made watertight as a joint with lamp cotton and tallow. That is the proper way of making that joint. Of course it has to be properly done. It was necessary to re-make it from time to time. The joint had been re-made about a fortnight or three weeks before this accident; and if it had been properly re-made at that time it ought to have lasted more than three weeks. I had not any definite evidence as to the exact life of it—the time that it would be expected to go without being renewed again. The practice is to renew it or to re-make it at a convenient opportunity on every voyage; but if it had been thoroughly well done it ought to have resisted not only the pressure which it would have during the three hours or so when the sea-cock would be opened for the purpose of hardening up the tank, but it ought to have been good enough to resist the pressure somewhat longer than that. I suppose this operation may last a considerable time at times. They may want to harden up all the ballast tanks, and then there would be a considerable time when this valve chest and lid would be under pressure, but the fact appears to be that it was good enough to stand the pressure for some considerable time. Probably what happened was that the pressure caused the water to ooze through this joint in the first instance, and as it oozed through the water did, as often it will do, make for itself by going through a bigger passage, and took away some portion of the packing which had originally been put in and so made a larger hole, and so eventually a very large amount of water came in there. That is, I suppose, what happened. Therefore the result is that the joint could not have been made quite as good as it ought to have been, but it was good enough to stand the pressure for a considerable time, and probably good enough to stand all the pressure which it would have had during the ordinary operation of hardening up the tank. That I shall come back again to presently, as it is a point which appears to me to be of some difficulty. The next thing that happened was this: If there had been nothing but those two apertures the water would not have got to where the bales of cotton were, because they were in the No. 2 hold, and No. 2 hold had between it and the stoke-hole a bulkhead which ought to have been watertight. It was described in the plan of the ship as a watertight bulkhead, and had got in it, and properly got in, certain apertures, amongst others a thing described as a sluice valve to let the water get off from one to the other and let it get to the pumps. It was a proper thing to be there, and which ought to have opened at times, and a thing which ought to have been shut down so as to be shut watertight. It could not have been so on this occasion, because there is no other way in which the water could have got through the stokehole into No. 2 hold, where it did in fact get, and did damage to the cotton. The consequence is that what must have happened was that that sluice value could not have been properly screwed down. It is important to

recollect that that sluice valve had for a proper purpose been opened on the previous day. It had been opened for the purpose of draining out the bilges and No. 2 hold, I suppose, if there were any water in, and it had been opened for a proper purpose. Therefore the time at which it had been improperly shut was on the previous day, and when the goods were already on board. That is important for a reason I am coming to presently. Now, these being the facts, and there being, under those particular circumstances in the way I have described, three apertures through which the water could get, it did get through and did damage to the bales of cotton.

Under those circumstances I have to consider whether the shipowners are liable for it. Mr. Bailhache puts his case first upon the warranty of seaworthiness, as it is called in general terms; but it means a little more than what is described, unless one was familiar with the term "seaworthiness." It means that the vessel must be fit for carrying goods on the voyage in question, including, of course, such matters as the state of the refrigerating machinery when the goods to be carried consist of meat on a long voyage, and things of that sort. So it means a little more than what one would call in ordinary language seaworthiness, it means it must be fit for the carriage of the goods upon the voyage in question. Now it is, I think, perfectly clear that apart from this Harter Act and other matters, that warranty is an absolute warranty; that is to say, if the ship is in fact imperfect at the time when the warranty begins, when it ought to be perfect, it does not matter that is from some latent defect which the shipowner does not know of, even if he has used his best endeavours to make the ship as good as it can be made. That question about his endeavour to make it good only arises under a special clause under the Harter Act.

But the one thing which appears to me also clear is that the warranty of seaworthiness is a warranty of the condition of the vessel at a particular time; it is not a continuing warranty. Take the ordinary warranty of seaworthiness for the voyage, and leaving out the special matter of putting the goods on board before for the moment, the ordinary warranty is that the ship at the time she sails is fit for the voyage on which she is sailing; that she is then fit, and that she is in such a condition as to stand the ordinary perils of the voyage which might then be expected to happen during the voyage. There is no warranty that she shall continue fit during the voyage. If anything happens during the voyage whilst the goods are there in the custody of the carrier, the carrier is liable because he is an insurer unless it happens from some cause as to which he is protected either by the common law or by the exceptions in his bill of lading, or what not. His liability, then, for anything that happened after the vessel sailed does not depend upon there being a breach of the then continuing warranty; it depends upon his position of carrier. That is the case in reference to the ordinary warranty of seaworthiness on the voyage beyond all question. Then it is equally clear that there is no warranty when the goods are put on board at a port of lading that the vessel is then fit to start on a voyage. It would be absurd that there should be, because, of course, during the time, after the goods are put on board, and whilst the vessel is still loading, there are a great many things that require to be done, and before the vessel does start is the most natural time to do them. Therefore it would be ridiculous to say that there was then a warranty that the vessel was then fit to start on her voyage. She must be made fit to start on her voyage before she does start, and when she does start there is a warranty that she is then fit for the voyage. That is also clear. The effect of it is, as has been held, and naturally held, that when the goods are put on board there is a warranty that the vessel is there and then fit to receive them. That is equally clear. There is no difficulty about that. Then comes a point that Mr. Bailhache raised. He says that warranty differs somewhat from the warranty of seaworthiness at the time of the vessel's sailing. He says that warranty is a continuing warranty, and that the vessel must be fit to receive the goods at the moment when they are put on board, and must remain fit during the period of loading, and until she gets ready to sail, and until the larger warranty takes effect. Now there is very little authority about the warranty as to the vessel being fit to receive the goods at the time when they are loaded. Mr. Bailhache referred me to some passages in Mr. Carver's book, and I think to one or two cases which he said indicated the view which he was taking; but there is no direct authority upon it. One has to consider it as a matter of principle and, as a matter of principle, I do not think there is any real difficulty about it. I think one must apply the rule which one would have to apply when the voyage is in stages. When a voyage is in stages the warranty is that on starting on the particular stage of a voyage she is fit for that stage. If she is going to an intermediate port she has to have coals to take her to that port, but she is not bound to have coals to take her the whole voyage that she is going until she come back to her original port. It is a separate warranty for each stage of the voyage. I think one must apply precisely that rule to the loading stage of a vessel when she is loading in a port and when there is a warranty at the time when the goods are put on board that the vessel is fit then to receive them. I think that is a warranty that she is then fit to receive them, and is then fit to stand the ordinary perils and chances which must be expected to be likely to take place during the period of loading, treating that as a separate stage in the voyage and a separate warranty for the purpose; that there is no warranty during that stage, that all through that stage the vessel shall continue, notwithstanding anything that happens to her, to be fit for the goods to be put on board, but that, at the commencement of that stage when the goods are put on board, there is the warranty that the vessel is then fit to receive them and is then in a condition fit to stand the ordinary perils that can ordinarily be expected to take place during that particular stage of the proceedings, and until the vessel is ready to go to sea, when she must be fit to go to sea. The reason of that is just the same reason as there is for so holding in reference to the warranty of seaworthiness which takes effect from the time when the vessel goes to sea. The goods then on board are in the custody of the carrier, and he is an insurer of them, and he is then liable as a carrier for the goods if any damage happens to them, unless he is protected by some clause in his bill of lading or by some other thing that gives him protection. I think there is nothing whatever to the contrary of that. The cases where exceptions have been dealt with, and it has been considered whether they applied to that stage of loading, all seem to me to be really consistent with that view of the matter. Mr. Bailhache says that the case of *The Southgate* is contrary to all the rest of the cases. I think that is the case he referred to. No doubt that case arrives at a somewhat different result to what other cases arrive at; but it seems to me it was approached from the same point of view. When you are considering whether or not there is an immunity applicable to that particular stage, or to something that happens during the stage of loading, the courts have always looked at the words to see whether the words are such that they can apply to a thing happening during

that stage of the loading. In some cases they have come to the conclusion that the words used do apply to the stage of loading, and in some cases they have come to the conclusion that the words do not; but they have not said it is unnecessary to consider this, because during that stage there is a continuing warranty. Therefore it seems to me all the cases really are consistent with that view, that that warranty is a similar warranty to the other warranty, that it is a warranty that at a particular time, that is to say, when the goods are put on board, and when this stage of the matter of the transit of those goods, namely, when they are not actually in transit, but while the vessel is loading, at that stage of the matter there is a warranty at the commencement of it for the condition of the vessel as being fit for that stage of the proceedings. But it is not a continuing warranty any more than the other, and, if anything happens during that stage, then you have to consider whether or not there is a breach of warranty, because if there had been a breach of warranty at the commencement of the voyage there would have been an end of it. Proceeding upon that view of the matter, I have to consider whether there was any breach of that warranty of seaworthiness at the time in question. I think it is quite clear that if there was a breach of the warranty at the commencement of that stage when the goods were put on board that these things, the immunities or exceptions, would not apply unless you can find express words specifically dealing with the warranty. It is possible to have express words dealing with the warranty. There is one case, the case of the *Goods ex Laertes*, (1887) 12 P. D. 187, 56 L. J. P. 103, I think it is, where the words were such that the courts held that these words did not show that the parties intended to alter the warranty that would otherwise be implied. But you want express words for that purpose, and ordinary words, giving immunity to the carrier, mean immunity from his liability as carrier, and do not alter the warranty as to the fitness of the vessel.

Now, that being so, I now come to the question, Was there a breach of this warranty? The apertures, as I have called them, through which came the water have to be considered in reference to this. First of all, I will begin from the hold. There is the sluice valve there which was left open. I think, upon the facts as I have stated them, that it must have been left open on the night before, and after the goods were put on board. It does not seem to me that there is a breach of the warranty of seaworthiness, as I have interpreted it. If that had happened before the goods had been put on board I think it would, because what had happened was that there was an aperture which in the ordinary state of things ought to have been closed except when it was being used, and it was imperfectly closed. It was not, obviously, left open. It was imperfectly closed and consequently it was in a dangerous state. If that had existed at the time when the goods had been put on board in all probability it would have been a thing which would have amounted to a breach of the warranty, because where you have a thing to be used, such as portholes, or sea-cock, or anything that may be the source of danger, if it is negligently used, the mere existence of that is not a defect, nor is it a defect, it has been said, to go to sea with your portholes open in fine weather, because you may expect to get warning of any storm which is coming on which would enable them to be shut in time. But it is a defect to go to sea with a porthole improperly closed which you believe to be closed and which ought to have been closed, such as a cargo port, which is a thing you cannot conveniently close after you get to sea. That has been held to be a defect as in the case of *Dobell & Co.* v. *The Steamship Rossmore Co. (Limited)*, [1895] 2 Q. B. 408. So that in this case this sluice valve, left as it was negligently, if that had happened before the goods had been put on board, then being, in a case like that, as it may very likely have been, found out afterwards, I think that might possibly be said to be a defect; but as we know it was in use the night before, after the goods had been put on board, it is a mere negligence during the time when the goods are on board at the risk of the carrier; and, therefore, the question will be whether that was protected as a thing done in the management of the ship, or comes under one of the other clauses which protect him; but it is not in my judgment a breach of the warranty of seaworthiness or of fitness of the vessel for the purpose of the carriage of the goods. The sea-cock was intended to be closed, and was in fact insufficiently closed, and was therefore in a dangerous condition. That, however, took place after the goods were on board, and was therefore not a breach of the warranty.

The next question is: Is the valve chest leaky? Now, as to that, the result proves that there was a defect. It was a defect that was not known of. There was, I suppose, some amount of negligence on the part of the man who made it, but when we come—as I have come—to consider the Harter Act, of course it is decided that negligence for the purposes of that clause is the same as the negligence of the owner, but for the purposes I am now upon it is unnecessary to consider negligence. It is defect in fact, and there was a defect in this in fact in the sense that it was not as good as it ought to have been. It appears to have been good enough to stand a certain amount of pressure, and was good enough apparently. We do not know, but the water may have been oozing through during the three hours. It was not rushing through during the three hours. It stood fairly the period of pressure during which the ordinary operations of opening the sea-cocks for the purpose of hardening up the tank were going on; but it did not stand the further pressure. I should have had, and have some doubt now, as to whether or not that is a defect in the condition of the vessel rendering it unfit for the services of the carriage of these goods, or unfit for the service of keeping the goods there in No. 2 hold, whilst the rest of the vessel was being loaded up, and before she went to sea. This is a matter I have the greatest doubt about. I suppose it a question of fact, but it is a question of fact to be determined by certain rules. The vessel has to be fit for everything that may reasonably be expected. A vessel has to go to sea not merely in a state in which she can make her voyage safely if she happens to have the good luck to have perfectly fine weather during the whole of the time, but she must go to sea in such a state as to resist ordinarily bad weather such as may be expected, and reasonably expected, during the voyage; she is not bound to be in a state to resist all the accidents that may happen to her. Now, this case seems to be quite on the line. I have been trying to get a guide upon it, and in one of the text-books I have found certain propositions.

The propositions are of great authority, but are not legal authority, because the author is alive. He has put it in this way: "A vessel must have that degree of fitness which an ordinary, careful, and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen, undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed the question to be put is: Would a prudent owner have required that it should be made

good before sending his ship to sea had he known of it. If he would, the ship was not seaworthy within the meaning of the undertaking": Carver on Carriage by Sea (3rd ed.), s. 18. Now, applying that to this case, I cannot help thinking that any prudent owner, if he had known that that joint was not good enough to resist a five or six hours' pressure in the pipe would have immediately said to his engineer, "Go and make good that joint at once," although it was just perhaps good enough to stand the three hours' pressure during which the tank was being hardened up, but that if that pressure went on a few hours longer it would give way and bring four feet of water into his stokehole. Therefore, it seems to me that I must hold that that was a defect, and if it was a defect on the day the damage happened it was a defect when the warranty took effect, and the goods had been put on board, because the joint had been made in the way in which it was made some three weeks before. It seems to me, therefore, that the breach of warranty is made out, and that, therefore, unless the true effect of this bill of lading, as combined with the Harter Act, is to limit or affect or alter the warranty that would otherwise be implied—unless that is the true construction of this bill of lading then it seems to me that the shipowner is liable. That being so, I think I may take the rest of the matter shortly, because I think it is quite clear that that is not the effect of this bill of lading. The conclusion I have come to, stating it shortly, is that if that defect had not existed, or if that had not been a matter that I must hold to be a breach of the warranty of seaworthiness, then I think that the shipowner would have had, under this bill of lading embodying the Harter Act, a sufficient immunity to protect him. I think that in substance the only things that could have been alleged as causing the damage would have been either perils of the sea or something happening in the management of the ship within the meaning of those words; I think also that there are words in the bill of lading itself, apart from the Harter Act, which would have protected him. Now the operation of embodying the Harter Act is peculiar no doubt. I see it was said by Lord Esher in the case of *Dobell & Co.* v. *The Steamship Rossmore Co.*, reported in [1895] 2 Q. B. D., at p. 408—a case where exactly the same thing had been done as in this case—that the effect appeared to be to insert provisions twice over, and that although it would do no harm it would be clumsy to the last degree. Without criticizing that I think I may say that in my view there are excellent reasons for putting in such a clause as this. The Harter Act applies to goods shipped to or from America, and the contract to ship them may be made at one end of the voyage, or it may be made at the other. There may be questions of the greatest possible difficulty arising, especially as the bills of lading may be indorsed to somebody else, and so on, questions of the greatest possible difficulty about which law, the law of one country or another country, is to govern, and I should think it would be only a businesslike arrangement by anyone shipping goods to or from America to prevent difficulty arising, as to whether the Harter Act applied, or whether it did not, to say in the bill of lading "We will be bound by the Harter Act." If they are bound by it because they are American subjects, and American law prevails with reference to it, they are doing something that is not necessary; but if it turns out that they would not have been bound by it because they were not American subjects, or because the contract was made elsewhere, or any other reason, then they have provided for those difficulties by saying, "We will be bound by it." It seems to me that is the sort of case the provisions embodying the Harter Act is to affect. There is a clause in this bill of lading in general terms, professing to relieve the shipowner from the consequences of any negligence in certain particular cases specified in the clause. Now the Harter Act in its first clause says that as to certain things specified in that Act you must not limit your liability for negligence, and if you do the stipulation if to be null and void. The next clause says that you must not limit your responsibility. It is equally to the same thing, and equally to the same matter. It seems to me that so far as regards those two clauses the effect of incorporating the Harter Act is very much as if the parties had said: "If we have in the general terms of our exemptions inadvertently, or otherwise, included anything which the Harter Act forbids, then we deem that part of our clause to be null and void; we do not mean to do that. We mean that clause to be null and void. If we have in the more extended exemption which we have put in included something that would be dealt with by the first or second section of the Harter Act, we do not mean that to apply." Therefore they cut down their own contract by that stipulation. Then, again, I think that the third clause of the Harter Act gives immunity for certain matters happening during the voyage. Speaking in general terms, it gives such immunity as had been commonly provided for in bills of lading, but it gives it upon special terms only, the special terms that it shall only be given if the shipowner has used due diligence to make his vessel seaworthy. That is a qualification upon that immunity, and it seems to me that, if an immunity had been given in the same words as these by the express words of the bill of lading, then when that bill of lading went on to incorporate the Harter Act it would make the immunity of the shipowner subject to that qualification. Those seem to me to be the two effects of incorporating the Harter Act, but I do not think either of those affect the present question, because they have nothing to do with the qualification of the warranty of seaworthiness. If in this case I had come to the conclusion that the defect in the lid of the valve chest was not a defect making a breach of the warranty of seaworthiness, then, of course, it would have been no defect, and no question would arise about the owners having done their best to make it seaworthy, because they would have made it already, and therefore the qualification upon the immunity given by the third section would not arise. Now I think "in the management of the vessel" upon the cases would apply to these things that are complained of during the period of loading. They are things that take place during the time that the shipowner has possession of the goods as carrier, and when he wants that immunity, as it seems to me, both by words in the bill of lading in this case and by the words of the Harter Act, he would have it. I do not think I need go through the words in either case to deal with that. I have intimated if it should be necessary what my opinion is. I do not think I need go through it, because that question of seaworthiness does not arise. I do not think anybody could possibly say the words of the Harter Act affect the warranty of seaworthiness; and if they could say it at all, I do not think they could say it after the case of *Dobell & Co.* v. *The Steamship Rossmore Co.* (*Limited*), because I think that is an authority. If they could not, the result seems to me in the present case, owing to the unfortunate fact—unfortunate for the shipowner—that that joint was not so effectively made as to resist the pressure under which it was subjected, that I must hold that that defect existed at the time the goods were put on board; that it was a breach of the warranty which the shipowner then entered into, and the legal

consequence is that he becomes liable for this damage.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Thomas Cooper & Co.*

Solicitors for the defendants, *W. H. Crump & Son.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — May 11, 12; June 5.

MELLOR *v.* WALMESLEY. (*a.*)

Foreshore—Land by the sea—Accretion—Seashore—Description of parcels—"Situate on seashore"—"Bounded on seashore"—Dimensions an essential part of description—Evidence—Level book founded on surveys made by deceased surveyor admissible.

A conveyance of land described as "situate on the seashore" and "bounded on the west by the seashore" does not, where the plans contained in the conveyance show a strip of land between a boundary satisfying the dimensions given in the parcels and the seashore, pass such strip. In such case there is an implied covenant by the grantor not to use the strip for any purpose that would prevent the grantee from having as free and effectual access to the sea over the strip as if it were actually seashore vested in the Crown.

A level book founded on surveys made by a deceased surveyor under contract with a local board is receivable in evidence as a declaration made in discharge of professional duty.

Decision of Swinfen Eady, J. (52 *W. R.* 665), *in substance, affirmed.*

This was the defendants' appeal from a judgment of Swinfen Eady, J., reported 52 W. R. 665.

The plaintiffs complained that the defendants had interfered with and obstructed their access and egress to or from the sea from or to their premises, and claimed (*inter alia*) a declaration that their premises were bounded on the west side thereof by the seashore, and that as owners of the said premises they were entitled to free access and egress to and from the sea from and to their premises. The defendants alleged that the interference was to hinder the plaintiffs from encroaching on the defendants' land; and the plaintiffs replied that the defendants were estopped from denying that at a certain date the plaintiffs' premises immediately adjoined and were bounded by the seashore. The premises in question were situated at Blundellsands, and were conveyed to the plaintiffs' predecessors in title in fee in the year 1864 by the predecessor in title of the defendants, and the question principally tried in the action was whether a piece of land intervening between the western wall of the plaintiffs' premises and the sea, belonged to the plaintiffs or the defendants. The conveyance to the plaintiffs' predecessor in title is as follows: "All that piece of land situate on the seashore at Blundellsands, in the township of Great Crosby, in the county of Lancaster, and measuring in front thereto ninety-three yards or thereabouts, on the eastern boundary ninety-three yards or thereabouts, and running in rear or depth backwards on the north and south sides thereof respectively seventy-seven yards or thereabouts, and containing in the whole 7,161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more or less, which same piece of land is bounded on or towards the south by other land of the said Nicholas Blundell, on or towards the east by an intended new road of fifteen yards in breadth, to be called Burbo Bank-road, on or towards the north by Blundellsands-road, and on or towards the west by the seashore, which said piece of land hereinbefore expressed to be hereby granted is more particularly delineated in the plan drawn on the back of these presents and therein marked with the letter A." The plan showed a rectangular piece of land with the exact dimensions given in the parcels, and also showed a small strip some ten feet in width intervening between the land and what was called "sea coast" on the plan. Since the date of this conveyance the sea gradually and by imperceptible degrees receded, and left uncovered by the sea a quantity of land on the west side of the premises as delineated on the plan.

Swinfen Eady, J., held that the accreted land belonged to the plaintiffs, and made the declaration asked for.

Levett, K.C., and *Leigh Clare*, for the appellants.

Neville, K.C., *Eve, K.C.*, and *Courthope Wilson*, for the respondents.

Cur. adv. vult.

June 6.—VAUGHAN WILLIAMS, L.J., after stating the facts as above, said: It is not disputed in this case that in the event of a gradual accretion, the land so gained goes to the person to whom the land belongs to which the accretion is adjacent. But the question in this case principally argued was what is the western boundary of the plaintiff's land in this conveyance. There was a great deal of argument as to the meaning of the word "seashore," by which the land conveyed is said to be bounded on the west; and it was said that the intention of the grantor, to be gathered from the language used in the deed, was to convey the land to the Burbo Bank-road on the east, and the seashore on the west, otherwise the western boundary would have been described not as the seashore, but as other land of the grantor. The defendants contended that a thick black line on the plan of the conveyance was the high water mark of ordinary spring tide, and that the line of high water at ordinary tide was 400 feet away. Swinfen Eady, J., says that the defendants were unable to prove the line of ordinary high water at ordinary spring tide. I cannot agree. I think that the rejected evidence came within the doctrine of *Price* v. *Earl of Torrington*, 1 Salk. 285, and, being admissible, sufficiently proved the line of high water at ordinary spring tide. The learned judge then goes on to say that, even if the defendants had proved this line, it would not have been of much assistance for explaining the plan and reconciling it with the parcels of the deed, as there was still the intervening strip of ground to explain, and then goes on: "I am of opinion that the deed contains an adequate and sufficient definition with convenient certainty of what was intended to pass by it—namely, all the land between Burbo Bank-road and the seashore in the strict and legal sense—that is to say, as limited by the line of the medium high tide between the springs and the neaps"; and then he says that where the deed contains such an adequate and sufficient definition, an erroneous statement as to dimensions or quantity or any inaccuracy in the plan will not vitiate that definition, and decides that by the two conveyances the grantee acquired all the land of the grantor between Burbo Bank-road and the seashore, that is the foreshore, and

(*a.*) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

that the western boundary of their land remains what it was on the day of the grant—namely, the seashore. I cannot, however, agree with the learned judge that the present case is one in which the undoubted rule, that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is then sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which had already been described or defined, but are part and parcel of that description or definition. The dimensions in this case, to use the words appearing on p. 247 of Sheppard's Touchstone, are an essential part of the description and not a cumulative description in a case in which there is in the first place a sufficient certainty and demonstration. But, although I think that that which was conveyed by the respective conveyances is that which is described by the dimensions, and do not think that the defendants are estopped from denying that the premises conveyed were bounded as a matter of conveyance on the west side by the seashore—*i.e.*, the foreshore—yet I do think that the predecessor in title of the defendants, having stated in the conveyance that the land conveyed is situate on the seashore and is bounded towards the west by the seashore, is estopped from saying that the whole of the land intervening between the western boundary as described by the dimensions and plan is anything else than seashore. I think that to allow the defendants so to say would be to allow them to derogate from the grant of their predecessor in title, and I think that the right of the plaintiffs might also be put in another way. I think that by reason of the words "on the seashore" and "bounded on the west by the seashore" the predecessor of the defendants impliedly covenanted that he would do nothing to prevent the grantees enjoying the piece of land and the house, which the evidence shows it was contemplated by all parties would be built on the plot conveyed, as a house facing on the sea, and having the seashore as a boundary. And I think the defendants ought to be restrained from doing anything on the land the subject of the accretion or the land to which it had accrued, which would prevent the plot in question, with the house on it, from being on the seashore, and bounded on the west by the seashore. In so far as the right of the plaintiffs is based on estoppel, it seems to me that this right is supported by the judgment in *Roberts* v. *Karr*, 1 Taunt. 495, wherein the land conveyed was described as abutting on a road, and the defendant did not claim any interest in the road on which he was said to have trespassed, but nevertheless he held a verdict, which he had obtained at the trial, on the ground that the plaintiff, having said in a lease granted by him that the land abutted on the road, could not be allowed to say that the land on which it abutted was not the road. This, I think, is sufficient to entitle the plaintiffs to an injunction. But I am inclined to think, having regard to the observations of the judges in *Birmingham Banking Co.* v. *Ross*, 36 W. R. 914. 38 Ch. D. 295, one might base the right of the plaintiffs on an implied covenant or obligation on the part of the predecessor of the defendants to do nothing to prevent the land conveyed from being land "on the seashore" and "bounded by the seashore." A declaration must be made in accordance with the second claim of the plaintiffs as above stated.

ROMER, L.J.—This case turns upon what is the true construction and effect of the deeds of conveyance from the defendants' predecessor in title to the predecessors in title of the plaintiffs. The grantor by these deeds granted the lands described in them as being "situate on the seashore" and having certain measurements "in front thereto" and as being bounded on the west (the frontage to the sea) not by any other land of the grantor but "by the seashore." But, on the construction of the deeds as a whole, as between the grantor and grantees, I come to the conclusion that the term "seashore" means that which belongs to the Crown, or those claiming through the Crown, with its special rights and obligations, and which is not subject to all the ordinary rights of tenure of the owner of dry land and presumably does not belong to the owner of land adjacent to the sea. I think that after those deeds were executed the grantor could not assert as against the grantees that he retained land which separated the lands conveyed from the sea. The term "seashore" is a phrase known to the law, and certainly as between the Crown and owners of land adjacent it means that which belongs to the Crown and which is often now described as the foreshore. In Chitty on the Prerogatives of the Crown it is stated at p. 207: "The king is also by prerogative the *primâ facie* owner of the shores (that is the land which lies between high and low water mark in ordinary tides)." And in *Attorney-General* v. *Chambers*, 2 W. R. 636, 4 De G. M. & G. 206, 216, Cranworth, L.C., dealing with the argument that the term seashore would include land covered by extraordinary tides, observed that "land covered by these extraordinary tides is not what is meant by the seashore." And in *Scratton* v. *Brown*, 4 B. & C. 485, 496, Bayley, J., said: "Then comes the word shore, which denotes that specific portion of the soil by which the sea is confined to certain limits," and at p. 498: "The Crown by a grant of the seashore would convey not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between those two termini." And in Hale, L.C.J.'s, treatise, De Jure Maris, it is said: "The shore is that ground that is between the high water and the low water mark. This doth *primâ facie* and of common law belong to the king both in the shore of the sea and the shore of the arms of the sea." It is true that later on it is said that "there seems to be three sorts of shores or *littora marina* according to the various tides," which he proceeds to mention, but I think he was there considering other systems of jurisprudence and not what is meant by seashore according to English law, and I may observe in passing that no one of these three sorts of shores would avail the appellants in the present case by enabling them to say that the grantor must be taken to have conveyed by reference to that particular sort of shore. In Wharton's Law Lexicon, sixth edition, the term "seashore" is defined as "the space of land between high and low water mark." And other dictionaries could be cited to the same effect. Certainly in the grants I have to consider there is nothing which would enable me to say that a different meaning should be given to the term "seashore," and from the conveyances as a whole I feel convinced that its meaning as between the grantor and grantees was what I have above stated. Indeed, how is it that the appellants seek to induce the court in the present case to construe the deeds in their favour? They cannot say that the parties at the time the deeds were executed knew that the lands conveyed did not run down to the foreshore. It is not suggested that by merely looking at this low-lying shore, where a small difference of tide would make a large difference in the amount of land covered by

the sea, and where admittedly at certain tides the sea covered even part of the lands conveyed, it could be ascertained that the land did not run down to the seashore in its strict sense. What the appellants seek to do is to prove that if a long course of careful observations and measurements were made the result would or might be to establish, if a question arose as between the Crown as owner of the foreshore and the owner of the land adjacent, that the foreshore did not come up to the west boundary of the lands conveyed to a substantial degree; and they then proceed, treating this as if it were a fact established at the date of the grants to the knowledge and within the contemplation of the parties to the deeds, to argue that the deeds must be construed on that footing. But it appears to me that this view is a fallacious one and that the respondents were quite right in refusing to embark into evidence on such a point, and in relying on their deeds. In my opinion the conclusion to be arrived at is that the grantor never contemplated that he had remaining immediately after the deeds were executed any lands or rights in lands to the west of the lands conveyed. The present contention on the part of the appellants is, to my mind, the result of an afterthought, when circumstances had changed.

Now the effect of the deeds being what I have above stated, it follows that the plaintiffs are entitled to relief in this action. As between the grantor and the grantees, the foreshore at the date of the deeds was fixed as coming up to the western boundary of the lands described in the grants. It appears that now the foreshore is not coming up to that western boundary, and that the land between that boundary and the foreshore is not claimed by the Crown as part of the foreshore, and it is this land which forms the subject of this action. In these circumstances the land in dispute must as between the grantor and grantees be held to be an accretion subsequent to the deeds, and accordingly to be land which has become the property of those claiming under the grantees. It cannot be an accretion to the grantor or those claiming under him, for after the deeds were executed he had as against the grantees no land there to which there could be accretion, or in respect of which he could claim any right to the land in dispute. I think, therefore, the appeal should be dismissed with costs. My brethren think there should be an alteration in the form of the judgment as drawn up. Although that is not my view, the alteration will, of course, be made; but I think that should make no difference in the question of costs, as the appellants have in substance failed.

STIRLING, L.J.—I agree with Swinfen Eady, J., and my brethren in thinking that *primâ facie* the word "seashore" in the plaintiffs' conveyances means that portion of the land adjacent to the sea which is ordinarily and *primâ facie* vested in the Crown, subject to the rights of the king's subjects of fishing and navigation. Regard being had to evidence which was held inadmissible by Swinfen Eady, J., but was admitted by this court, it must be taken that in fact there was between the western boundary of the land conveyed to the plaintiffs, as shown on the plans contained in the conveyances, and the seashore as then defined, a strip of land of considerable width. If the boundary had been a road or an inland river, this strip, if vested in the plaintiffs' predecessor in title, would *primâ facie* have passed by the conveyance, notwithstanding that the measurements of the plots would exclude it: *Beckett* v. *Corporation of Leeds*, 20 W. R. 454, L. R. 7 Ch. 421, and *Micklethwaite* v. *Newlay Bridge Co.*, 35 W. R. 71, 33 Ch. D. 133. But there is no case which decides that that rule applies to a conveyance of land bounded by a tidal river or by the seashore. Indeed, the case of *Attorney-General of the Straits Settlements* v. *Wemyss*, 13 App. Cas. 192, 36 W. R. Dig. 203, seems to point the other way. There the dispute arose between the Crown and a Crown lessee of land bounded by the sea. It was held in the colonial courts that the foreshore did not pass by the lease, and from this there was no appeal, nor was there any suggestion in the argument before the Privy Council that this part of the decision was wrong. What was held both in the colonial courts and by the Privy Council was that the lessee had as such a right to use the foreshore and the accretions to it for access to the sea. I am not satisfied, therefore, that the conveyances were effectual to pass the strip of land to the predecessors in title of the plaintiffs. I think, however, that, as between the original grantor and grantees, the grantor could not claim to use the strip which remained vested in him for any purpose which would prevent the grantees from having as free and effectual access to the sea over that strip as if it had been actual seashore vested in the Crown. The conveyances were made in order that the grantees might erect seashore residences on the plots conveyed, to the enjoyment of which free access to the sea, so far as the grantor could give it, would in ordinary course be expected by the grantees. The plots are described as bounded on the south by other land of the vendor, but on the west by the seashore. That appears to me to show that it was intended that the plots should have sea frontages, and that it was not the meaning of the parties to the deeds that the grantor should, as between himself and the grantees, be treated as retaining an interest in the land on the west which would interfere with the grantees' access to the sea. In my judgment, therefore, the grantor and the defendants as his successors in title are precluded from setting up as against the plaintiffs that the land to the west of the boundary shown in the plans on the conveyances is not "seashore" in the strict legal sense, so as to interfere with the plaintiffs' access to the sea. For this I think that the case of *Roberts* v. *Karr*, 1 Taunt. 495, followed and approved in *Espley* v. *Wilkes*, L. R. 7 Ex. 298, 20 W. R. Dig. 29, is an authority. I think, therefore, that relief ought to be given on the basis of the decision in *Attorney-General of the Straits Settlement* v. *Wemyss*, which I understand to mean that the plaintiffs are entitled to free and unrestricted access to the sea from every part of their frontages over every part of the strip of land now in question. I am unable, however, to see that the conveyances contain averments of that precise and certain character which would estop the defendants from claiming any legal interest in this strip of land.

Appeal dismissed in substance although the form of Swinfen Eady, J.'s, declaration was varied.

Solicitors for appellants, *Rowcliffe, Rawle, & Co.*, for *Weld*, Liverpool.

Solicitors for respondents, *Sharpe, Parkers*, for *Payne, Frodsham, & Bewlay*, Liverpool.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) March 31.

In re AMBLER.
WOODHEAD *v.* AMBLER. (*a.*)

Married woman—Executrix—Retainer—Loan by wife to husband—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

The conjoint operation of section 10 *of the Judicature Act,* 1875, *and section* 3 *of the Married Women's Property Act,* 1882, *does not operate to alter the right of retainer by an executrix. An executrix therefore is entitled in the course of administration of the insolvent estate of her husband to retain out of assets in her hands the amount of a debt due to her in respect of moneys lent out of her separate estate for the purposes of his business.*

This was an appeal from a decision of Farwell, J. The action was brought by creditors for the administration of the estate of James Ambler, who died on the 5th of June, 1901.

By his will he appointed his wife and his son John Ambler executrix and executor of his will.

The testator's estate was insolvent.

The master by his certificate allowed as a proper payment out of the personal estate the sum of £6,674 8s. 3d., which had been retained by the widow out of the assets in payment of a debt due to her from the testator in respect of advances made by her to him for the purposes of his business.

Some creditors who had liberty to attend the proceedings took out a summons to vary the certificate by disallowing this retainer.

Farwell, J., contrary to his own opinion, held that he was bound by the decision of North, J., in *In re May,* 38 W. R. 765, 45 Ch. D. 494, to allow the retainer, and he dismissed the summons.

The creditors appealed.

Neville, K.C., and *E. S. Ford,* for the appellants.—Farwell, J., felt himself bound by the decision of North, J., in *In re May, Crawford* v. *May,* 38 W. R. 765, 45 Ch. D. 494. But by section 3 of the Married Women's Property Act, 1882, a debt due to a wife is for purposes of administration postponed to the claims of all the other creditors. It follows, therefore, that, properly speaking, the widow never had in her hands any funds which she was entitled to retain as against the other creditors: *In re Whitaker, Whitaker* v. *Palmer,* 49 W. R. 106, [1901] 1 Ch. 9. *In re May* extended the principle of retainer, and it was really decided on the footing that section 3 of the Married Women's Property Act, 1882, was not extended to administration of insolvent estates by section 10 of the Judicature Act, 1875. But this view is inconsistent with the decision of the Court of Appeal in *In re Leng, Tarn* v. *Emmerson,* 43 W. R. 406, [1895] 1 Ch. 652. This is really an attempt to extend the right of retainer, and the courts have consistently opposed such extensions.

The following authorities were also cited in the course of the argument: *In re Baker,* 38 W. R. 417, 44 Ch. D. 262; *Lee* v. *Nuttall,* 27 W. R. 805, 12 Ch. D. 61; *In re Maggi,* 30 W. R. 729, 20 Ch. D. 545; *Talbot* v. *Frere,* 27 W. R. 148, 9 Ch. D. 560; *In re Hankey, Smith* v. *Hankey,* 47 W. R. 444, [1899] 1 Ch. 541; *In re Genese,* 34 W. R. 79, 16 Q. B. D. 700; *Slanning* v. *Style,* 3 P. Wms. 334; *Ex parte Wills, In re Whitmore,* 2 M. D. & D. 504; *Sander* v. *Heathfield,* 23 W. R. 331, L. R. 19 Eq. 21; *In re Clark,* 46 W. R. 678, [1898] 2 Q. B. 330.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Upjohn, K.C., and *Ashton Cross,* for the respondent, were not called upon.

VAUGHAN WILLIAMS, L.J.—I do not think that it would be right for us in this case to depart from what has, to my mind, been already decided by the Court of Appeal. The point in question was originally decided by North, J., in *In re May.* In that case a widow, who was the administratrix of her late husband, whose estate was insolvent, claimed to retain out of the assets coming to her hands as administratrix the amount of a loan which she had made to him out of her separate estate for the purpose of his business. North, J., allowed that claim. He said: "Now, what the widow claims to do is this: She is the legal personal representative of the deceased; she has got into her hands assets to a larger amount than the debt which is due to her; she is not seeking to prove for her debt, but is seeking to retain it out of the assets in her hands. That right she seeks to assert cannot be denied unless she is precluded by the two sections to which I have referred." (Section 3 of the Married Women's Property Act, 1882, and section 10 of the Judicature Act, 1875.) "But a right of retainer is not affected by the Judicature Act at all, as was decided in the case of *Lee* v. *Nuttall.*" That case was before the Married Women's Property Act, 1882. North, J., proceeds: "It is said that the point decided there was that an executor or administrator was not a secured creditor by reason of his having a right to retain. I do not think that was the only question decided. The decision went to the extent that the security did not apply to a right to retain. James, L.J., said (12 Ch. D., p. 65): 'The sole object of the section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt, and realize his security afterwards, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realizing or valuing his security. The security was never intended to apply to retainer by an executor.'" Undoubtedly that passage which was cited by North, J., from the judgment of James, L.J., is open to this observation, that the earlier part of it can no longer, having regard to the decision in *In re Maggi,* be considered as good law, but James, L.J., does say that the section was never intended to apply to retainer by an executor. The question that we have to decide here is whether the section is intended to apply to retainer by an executrix. Now, that question was discussed really by the Court of Appeal in the case of *In re Leng.* That case turned upon the combined effect of section 10 of the Judicature Act, 1875, and section 3 of the Married Women's Property Act, 1882, the question in that case being as to a right of proof of a married woman in the administration of her husband's estate, and, the court having arrived at the conclusion that there was no right of proof, Lindley, L.J., says (1895, 1 Ch. 657): "This conclusion"—that is, the conclusion that there was no right of proof—"is not inconsistent with *In re May,* which was not a case of proof, but of retainer by the wife as her husband's administratrix. The Legislature has not yet thought proper to alter the law of retainer, and section 3 of the Married Women's Property Act is not addressed to that subject." Then when Smith, L.J., comes to deal with that same point he says (1895, 1 Ch. 660): "In the first place, I should say that I know of no case which deals with the conjoint operation of section 10 of the Act of 1875 and section 3 of the Act of 1882, with the exception of *In re May,* which was not a case, as the learned judge himself pointed out, of the widow seeking to prove, but of the right of retainer by the widow, to which section 3 of the Act

of 1882 did not apply." Under these circumstances I do not think that we ought in this court to say that the conjoint operation of those two sections—section 10 of the Judicature Act, 1875, and section 3 of the Married Women's Property Act, 1882—does operate to affect or alter the right of retainer.

ROMER, L.J.—It is admitted with regard to the legal point that we have to decide that up to the passing of the Married Women's Property Act, 1882, there was the right of retainer by the executrix, the widow, in such a case as we have to deal with. The sole point is, therefore, whether section 3 of the Married Women's Property Act, 1882, took away that right of retainer. Now, section 3 of the Act of 1882 was certainly not on the face of it dealing with the question of the right of retainer at all; it dealt with the question of proof; and after section 3 was passed the right of retainer might well have existed while due effect is given to the provisions of section 3.

As was pointed out by my lord in the course of the argument, the only question is whether you can infer, either necessarily or clearly, that the Legislature by section 3 intended to take away that right of retainer which was then existent. Lindley, L.J., in *In re Leng*, said with regard to that very point that the Legislature had not thought proper yet to alter the law of retainer, and that section 3 of the Married Women's Property Act, 1882, is not addressed to that subject. A. L. Smith, L.J., in his judgment, says in effect the same thing, and Lord Halsbury concurred in the judgments which had been delivered by Lindley, L.J., and by A. L. Smith, L.J.

All I can say with regard to this appeal is that I am not prepared to differ from those statements as to the effect of section 3 made by those Lords Justices and by Lord Halsbury, and under those circumstances I think that this appeal must be dismissed, with the usual result as to costs.

STIRLING, L.J.—I have come to the same conclusion, but simply because I defer to the law as stated by the members of this court in the case of *In re Leng*.

Appeal dismissed.

Solicitors, *Johnson, Weatherall, & Sturt*, for *Wade, Bilborough, Tetley, & Co.*, Bradford; *Helliwell, Harby, & Evershed*, for *Jubb, Booth, & Helliwell*, Halifax.

High Court of Justice.

Chan. Div. Kekewich, J. — March 30; April 7; May 16.

In re ANDREW'S TRUST.
CARTER *v.* ANDREW. (*a.*)

Trust—Resulting trust—Fund raised by subscription for the education of certain children—Children attain full age—Unapplied surplus—No resulting trust for subscribers—Fund divided among children.

A fund was raised by subscription in 1889 *for the education of the children of the late Bishop of Jerusalem. In a letter written by the collector of the fund it was stated that "it was not intended for the exclusive use of any one of them in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education." All the children had now attained full age. The expenses of their education having been defrayed partly out of their father's estate and partly out of this fund, of which a balance remained unexpended, the children claimed that this balance should be divided among them in the proportion in which the shares of their father's estate had been diminished by payments for their education and maintenance.*

Held, that there was no resulting trust in favour of the subscribers, the term "education" being construed in the broadest sense and as only an indication of the motive of the gift, and that the division of the balance of the fund ought to be among all the children equally.

Adjourned summons.

The question for decision in this case was as to the disposition of a certain fund raised for the education of the children of the late Bishop of Jerusalem, all the children having now attained full age, whether there was a resulting trust in favour of the subscribers to the fund, or whether it should be divided among the children, and if so in what proportion.

The late Dr. Barclay, Bishop of Jerusalem, died on the 22nd of October, 1881, leaving his widow and seven children, the plaintiffs in the present action, all of whom at that time were infants.

By his will he devised his real estate in Ireland to his eldest son J. W. Barclay as tenant for life, and he gave all the residue of his real and personal estate to trustees in trust for his wife for life and after her death for all his children other than the said J. W. Barclay, with power to the trustees to apply the whole or such part as they should think fit of the income of the share of any child for the maintenance and education of such child. He appointed his wife, the Rev. W. W. Andrew, and the defendants A. A. Andrew and J. S. K. Moss, and the survivors or survivor of them, to be executors and trustees of his will.

The widow died on the 5th of March, 1882, and Rev. W. W. Andrew died on the 21st of November, 1889.

A short time previous to the death of the bishop a sum of £200 was subscribed by friends for the purpose of purchasing a seal for the Bishopric of Jerusalem, but such seal had not been purchased at the time the bishop died.

After the death of the bishop Canon Barrington raised by subscriptions among the friends of the late bishop a fund of about £700 for the education of the children, and the £200 raised for the purchase of the seal was, with the consent of the subscribers, added to the £700.

The money was paid into a bank in the names of the trustees of the bishop's will, with power to the defendant A. A. Andrew to draw upon it for the education of the children, and he withdrew from time to time certain sums for those purposes.

In August, 1889, Canon Barrington (who died in 1897) wrote a letter as to the objects for which the fund was raised, of which the following is an extract: "I beg to say with regard to the money which I collected from my friends for or towards the education of Bishop Barclay's children, that it was by no means intended for the exclusive use of any one of them in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education. It was paid into the London and County Branch Bank at Hertford, at which I gave instructions to answer the draft of Mr. Andrew, to whom I gave the authority personally. Whether he invested it in stock I do not know, feeling as I did that it would be wanted for current expenses, whether of Lucia or Joseph and the others in turn."

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

How much of the said sum was expended for education and maintenance of the children was not known, but in 1889 the money was invested in the purchase of seven shares in the London and County Banking Co. (Limited), and the dividends that have accrued amount to £460 4s. The value of the fund at the present time was about £1,140.

The eldest son did not participate in the residuary estate of his father, and the cost of his education and maintenance were defrayed out of the rents and profits of the Irish estate, and the defendant A. A. Andrew, who collected the rents, expended on that account £562 5s. 11d. in excess of the rents received, and he claimed to be recouped that amount out of the eldest son's share of this fund.

The expenses of the education and maintenance of the other children, with the exception of two who were adopted, were paid for to a very large extent by the trustees out of the children's expectant shares of their father's residuary estate. The total payments so made amounted to over £2,400.

A receiving order had been made against one of the sons and he had been adjudicated a bankrupt and a receiver of his estate appointed.

This originating summons was taken out by the seven children of the bishop against the two surviving trustees, A. A. Andrew and J. S. K. Moss, and a Mr. Hanbury Barclay, who was also made a defendant, as it was thought that he was an original subscriber to the fund, but afterwards the name of Mr. Robert Barclay was substituted as it was proved that the latter and not the former was a subscriber, but the affidavit verifying this was not filed at the first hearing.

The summons asked that the seven shares in the London and County Banking Co. (Limited) and the accumulated dividends thereon amounting to £460 should be divided among the plaintiffs in proportion to the amounts by which their respective fortunes under the will of their father had been diminished by payments for their respective education and maintenance, and in the alternative that it might be declared between whom and in what proportions the said shares and cash ought to be divided.

E. W. Martelli, for the plaintiffs.—The question in the present case is whether there is a resulting trust in favour of the subscribers in respect to a fund that was raised for the education of the plaintiffs when they were children or whether the fund should be divided among the children. The only evidence of the intention for which the fund was raised is contained in the letter of Canon Barrington, which says that it was subscribed for the education of all the children. The children claim the fund on the ground that the fund was subscribed for their benefit and to relieve their own small fortunes of the expenses of their education, and that as large sums which exceeded the value of the fund were paid for their education and maintenance out of their own fortunes they ought to be recouped out of this fund as far as it would go the amounts so expended. The purpose for which the fund was subscribed has not failed, as it can be used to replace so much of their own money as was used in their education. The case of *In re Trusts of the Abbott Fund*, 48 W. R. 541, [1900] 2 Ch. 326, which at first sight looks very similar to the present case, will be found when it is carefully looked at to be entirely different. The subscribers to the fund in the present case never intended to get their money back, they subscribed it for the benefit of the children of their deceased friend, the children are alive, and to use the fund as is suggested will still be for their benefit. The object for which the fund was raised not having failed, there is no resulting trust in favour of the subscribers.

A. J. Spencer, for A. A. Andrew, one of the two surviving trustees of the will and also of the fund.—My client has a claim as against the eldest son, who was not entitled to share in the residuary estate of the bishop. He was tenant for life of the Irish estate, of which Andrew received the rents, and advanced over £500 more than he received to pay for the boy's education and maintenance. Whatever share is given to the eldest son ought to be paid to Andrew, in order to recoup him for that outlay. He thought that the fund was subscribed for the benefit of the eldest son only, as he did not share in the residuary estate of his father, but cannot contend that now in the face of Canon Barrington's letter.

Howland Jackson, for J. S. K. Moss, the other trustee.—My client severed because Andrew set up a trust of the whole fund in favour of the eldest son, and also made a personal claim to be recouped out of the eldest son's share. My client always understood that the fund was for the benefit of all the children.

M. D. Warmington, for Robert Barclay, a subscriber to the fund.—I am instructed to support the present application; we do not want our money back. [KEKEWICH, J.—There ought to be someone to oppose this application on behalf of the subscribers, and I appoint you to represent the body of subscribers, provided that it is proved that Mr. Robert Barclay was an original subscriber.] According to the letter of Canon Barrington the money was subscribed for the education of the children, and so far as the money has not been so expended the trust for which it was subscribed has failed. Where there is a trust for a specific purpose and that trust fails or the money is not applied for that specific purpose there is a resulting trust of the balance to the settlor: *In re Sanderson's Trusts*, 5 W. R. 864, 3 K. & J. 497. The only other cases are cases where funds have been subscribed for friendly societies, and in those cases it has been held that the donors who subscribed for those objects had no right to have their money back again. But those cases have no application to the present case, where the money was subscribed for the education of the children. When the education of the children was completed the trust came to an end, as the purpose for which the fund was raised had been completely carried out. There is therefore a resulting trust of the balance in favour of the subscribers.

L. R. Ryland, for the trustee in bankruptcy of M. G. F. Barclay.—The fund ought to be divided among all the children equally.

E. W. Martelli, in reply.—The letter of the Canon ought not to be construed so strictly as is contended for. The expression "wanted for current expenses" shows that the objects for which the fund was raised cannot be confined to education. The fair construction of the letter is that the fund was for the education and maintenance of the children. The trustees having two funds to go to, the children ought not to be prejudiced because the trustees have applied the the bishop's residuary estate for the education and maintenance of the children rather than the fund that was raised for that specific purpose.

Cur. adv. vult.

KEKEWICH, J.—The material facts in the present case gathered from the affidavits are as follows: Bishop Barclay died on the 22nd of October, 1881, leaving seven infant children. A provision for these children was raised by some of his friends. The only evidence of the precise objects of that provision is found in a letter of Canon Barrington, the contents of which are proved by a copy. According to that letter (written in August, 1889), Canon Barrington himself collected the moneys subscribed, and he states

that they were collected "for or towards the education of Bishop Barclay's children, that it was by no means intended for the exclusive use of any one of them in particular nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education." How much money was expended on these objects is not known, but there still remains a sum invested in seven shares in the London and County Banking Co. (Limited), and there are also available the accumulated dividends on those shares. The court is asked to determine how these shares and dividends ought to be dealt with, all the children being still alive and, of course, of full age.

The summons is framed on the footing that the children are entitled to be recouped out of this fund the moneys spent on their maintenance and education out of what came to them under their father's will. They were entitled to some fortune under that will, and apparently it was in part applied in their maintenance and education. If the proposed plan were adopted each child would take, not an equal share of the fund, but such a share as would represent the amount expended on his or her education out of the father's estate. The children are all content that this should be done. If they are masters of the fund it can of course be done by agreement, but the court is asked to decide whether that is right or not, and it is necessary that the point should be decided.

The proposed mode of division is supported by reference to the judgment of Wood, V.C., in *In re Sanderson's Trust*, 5 W. R. 864, 3 K. & J. 497. There the property had been given by will "to pay and apply the whole or any part of the rents, issues, and profits for and towards the maintenance, attendance, and comfort" of John Sanderson, an imbecile, and as a matter fact all that was necessary for his maintenance, attendance, and comfort was supplied out of the income of the trust property, so that no such question arose as is here suggested. But in the course of the argument the Vice-Chancellor inquired whether John Sanderson had been maintained in any way out of his own property, and in his judgment he thus states his reason for this inquiry: "I think he had a clear right to have this fund applied for all purposes requisite for his maintenance, attendance, and comfort. If, therefore, he had been left to his own funds for his maintenance, attendance, and comfort, I apprehend there would have been a clear right on the part of his personal representatives to have that fund recouped. Part of the personal estate of the intestate whom they represent having been applied for his maintenance, attendance, and comfort, when another fund ought properly to have been applied for that purpose, they would have had a right to say, recoup the fund that has been so improperly applied out of the fund which was given for that specific purpose."

I should certainly be disposed to follow without hesitation the *dictum* of the Vice-Chancellor if I saw my way to apply it, but I do not see my way, because the equity which is thus asserted could only arise as against a stranger, and unless I first decided that apart from such equity the fund belonged to other persons, there would be no ground for it. Can the fund be said to belong to other persons? If there are any such they must be the original subscribers to the fund and their legal personal representatives. I have been referred by counsel for the applicants to *In re Abbott*, 48 W. R. 541, [1900] 2 Ch. 326, but it is absolutely different from the case now before the court. There a fund had been raised for the maintenance and support of two distressed ladies, and on the death of the survivor there was still money in the hands of the trustees. Stirling, J., held that there was a resulting trust of this balance for the subscribers. He did not think that the ladies ever became absolute owners of the fund, and probably no one reading the case is likely to differ from that conclusion. Here I am dealing with different facts, including the fact that the children are still alive, and I do not think myself that I am much guided, and certainly not in the slightest degree bound, by the authority of *In re Abbott*.

It seems to me that the guiding principle is to be found in several authorities examined by Wood, V.C., in the case to which reference has already been made, *In re Sanderson's Trust*, 3 K. & J. 497, and in the judgment of the Vice-Chancellor in that case. One passage at p. 503 may be usefully cited: "There are two classes of cases between which the general distinction is sufficiently clear although the precise line of demarcation is occasionally difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, the court always regards the gift as absolute and the purpose merely as the motive of the gift. and therefore holds that the gift takes effect as to the whole sum or the whole income as the case may be."

Here the only specified object was the education of the children. But I deem myself entitled to construe "education" in the broadest possible sense, and not to consider the purpose exhausted because the children have attained such ages that education in the vulgar sense is no longer necessary. Even if it be construed in the narrower sense it is, in Wood, V.C.'s, language, merely the motive of the gift, and the intention must be taken to have been to provide for the children in the manner (they all being then infants) most useful. Therefore I am prepared to hold that the shares and accumulated dividends belong to the children, and that there is no resulting trust in favour of the subscribers. The only remaining question is, in what proportions do they take? The letter states that the fund was not subscribed for equal division but was intended to defray the expenses of all as deemed necessary, and apparently the trustees of the fund exercised their discretion in dividing the money as far as it was divided at all. But there is no longer any room for discretion, and I think the only safe course is to hold that the children are entitled to what remains in equal shares. The trustee in bankruptcy, of course, taking the share of the son who is bankrupt.

The eldest son was entitled under his father's will to some Irish property. The rents of that property were applied by the defendant Alfred Andrew for the education and otherwise for the benefit of that eldest son. They were not sufficient for that purpose and the defendant claims that there remains due to him in respect of expenditure out of his own moneys the sum of £562 5s. 11d. I understand that there is no objection to his being paid this sum out of what will now be coming to the eldest son and the order may provide for that without my deciding whether he is or is not entitled to it as a matter of right.

Solicitors, *Gush, Phillips, Walters, & Williams; H. Lovibond; Minet, Harvie, May, & Co.; Stephenson, Harwood, Henderson, & Witt; Cameron, Kemm, & Co.*

Chan. Div. } June 21.
Buckley, J. }

GARNER v. WINGROVE. (a.)

Limitation Statutes—Possession—Disability—Claim of infant barred—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57).

Where the adverse possession of a trespasser commences as against an owner who is under no disability and is continued as against a subsequent owner who is an infant, the infancy of the subsequent owner does not arrest the operation of the statute, but the trespasser's title becomes absolute at the same date as it would have done had the ownership of the original owner continued.

Action.

This was an action brought by the trustees and beneficiaries under the will of Frederick Garner, deceased, to recover possession of certain freehold premises which had been conveyed by an indenture dated the 12th of March, 1891, to their testator.

By his will dated the 6th of July, 1892, Frederick Garner gave all the residue of his estate (including the land in question) to trustees in trust to divide the same equally between his two sons, F. W. H. Garner and S. H. Garner, upon their attaining the age of twenty-three years.

The testator died on the 7th of July, 1892.

His son F. W. H. Garner was born on the 8th of June, 1881, and his son S. H. Garner on the 12th of December, 1884.

The defendant pleaded the Real Property Limitation Acts, and that he had been in possession under a verbal tenancy at will since 1883, such tenancy having been granted by the predecessor in title of Frederick Garner. The creation of the tenancy in the year 1883 was not disputed.

Church, for the plaintiffs.—The defendant has not acquired a good title as against the sons of Frederick Garner. His possession since the date of the death of Frederick Garner must be deemed to be possession as bailiff for the two sons during their infancy and the statute does not run during the period, the operation of the statute being arrested until the persons against whom the time would otherwise run, cease to be under incapacity: Lewin (11th ed.), 1088; *Crowther* v. *Crowther*, 5 W. R. 237, 23 Beav. 305; *Quinton* v. *Frith*, Ir. R. 2 Eq. 396, 413.

He also referred to *Pascoe* v. *Swan*, 8 W. R. 130, 27 Beav. 508; *Wall* v. *Stanwick*, 35 W. R. 701, 34 Ch. D. 673; *In re Hobbs*, 36 W. R. 445, 36 Ch. D. 553; and *Howard* v. *Earl of Shrewsbury*, 22 W. R. 290, 17 Eq. 378, 398. [BUCKLEY, J.—Was there in any of these cases such a state of facts as this—namely, entry by C., a trespasser, during the life of A., and continuance of C.'s possession after A.'s death against his infant heir or devisee B.?] No; but the fact of the defendant having entered during the testator's lifetime is immaterial, because the infant's title does not commence until the testator's death. [*Buckmaster, K.C.*—There was such a case and it is directly against the plaintiffs' contention. The case is *Murray* v. *Watkins*, 62 L. T. 796, 38 W. R. Dig. 114.]

Buckmaster, K.C., and *Mark Romer*, for the defendant, were not called upon.

BUCKLEY, J.—The decision in *Crowther* v. *Crowther* was criticized and discussed by Sir George Jessel in *Howard* v. *Earl of Shrewsbury*, and Mr. Church has kindly read to me the observations of Sir George Jessel in that case upon *Crowther* v. *Crowther*. Those observations prompted the inquiry whether in any of these cases these facts occurred, that the trespasser took possession while the owner was under no disability, and continued to hold adversely to a subsequent owner who was under disability. Mr. Church said that none of the decisions did go to that, but those are the facts here. Possession was taken by the defendant in 1883, and he remained in possession against the then owner until 1891, and after that date against Frederick Garner until his death in 1892, from which date the possession has been continued against persons under disability. The decision of Chitty, J., in *Murray* v. *Watkins* is precisely in point. There the mother was, and continued until 1875, under no disability. She never had possession of the estate, and upon her death in 1882 the plaintiff became entitled as issue in tail to possession, and it seems to have been conceded in argument that as regards the mother she gained nothing by her subsequent disability; but it was argued on behalf of the child that, as he was under disability at his mother's death, he was entitled to set up that disability to prevent the statute further running. The judgment proceeded upon the construction of the Real Property Limitation Act, 1874, section 1 of which says that no person shall make any entry or distress or bring any suit to recover any land after twelve years from the time that the right shall have first accrued to the person through whom he claims, and that person was, in that case, the mother. The judgment was to the effect that you had to look to the time when the statute commenced to run, and that time is not interrupted by subsequent disability. I can only say that I adopt the reasoning of the learned judge in that case. I dismiss the action with costs.

Solicitors, *Prockter & Grimes; Francis T. Jones.*

(a.) Reported by H. H. KING, Esq., Barrister-at-Law.

Chan. Div. } June 2.
Warrington, J. }

SALOMON v. HOLE.

Practice—Motion to strike out defence—Motion for judgment in default of defence—Joinder of motions—Ord. 27, *r.* 11—*Ord.* 31, *r.* 21.

Where a plaintiff moves, under ord. 31, *r.* 21, *to have a defendant's defence struck out for non-compliance with an order to answer interrogatories, there is no objection to his joining with such motion a motion for judgment as upon his statement of claim in default of defence, but such motion for judgment must be set down and two separate orders should be made.*

In re Hartley, 91 *Law Times Journal*, 229, *discussed and followed.*

The plaintiff brought this action for the recovery of land agreed to be sold to him by the defendant, for a declaration that certain farming stock and implements upon the land were included in the sale, and for various accounts of a complex nature.

The statement of claim was delivered on the 22nd of December, 1904.

The defendant delivered up possession of the land on the 30th of December, but as to the other relief put in a defence delivered on the 31st of January, 1905, denying that the farming stock and implements in question were or had ever been his property, or that he had agreed to sell them.

The plaintiff took out a summons for interrogatories, and on the 4th of May, 1905, the defendant was ordered within four days to answer an interrogatory as to whether he had not kept the farming stock and

implements insured against fire. The defendant failed to comply with this order, and the plaintiff accordingly moved under ord. 31, r. 21, to have the defence struck out, and he joined with such motion (and in the same notice) a motion, as in default of defence, for such judgment as upon the statement of claim the court might consider him entitled to, and he scheduled minutes of the desired order. The motion for judgment was set down in the non-witness list, but owing to its complicated nature the case was not fit to be heard as a short cause.

A. C. Nesbitt, for the plaintiff.—If the plaintiff is entitled on the merits to have this defence struck out, which is a discretionary order, then he may obtain judgment at the same time as in default of defence, for the former order is not an order which requires service. *In re Hartley*, only reported 91 Law Times Journal, p. 229, clearly justifies that proposition, although in that case the only order made was to strike out the defence, because the motion for judgment had not been set down. The note as to that case in the Annual Practice, 1905, p. 340, is insufficient, and does not indicate what the decision really was.

WARRINGTON, J., after holding that upon the merits the plaintiff was entitled to have the defence struck out, considered that *In re Hartley* was in fact an authority for the course suggested, and that as the present case had been set down on motion for judgment, judgment could be given at the same time; but there would have to be two separate orders to make the procedure consistent.

His lordship accordingly made one order striking out the defence and another order (in effect) in the terms of the scheduled minutes.

Solicitors, *Dalston, Son, & Elliman.*

IN BANKRUPTCY.

K. B. Div. (Bigham, J.) May 8, 22.

In re HAMILTON, YOUNG, & CO.
Ex parte THE TRUSTEE. (*a.*)

Bankruptcy—Bill of sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

Letters of lien on goods in the actual possession of third parties, given by merchants to bankers as security for loans, come within the exceptions specified in section 4 *of the Bills of Sale Act*, 1878, *and therefore do not require registration.*

Special case stated by the judge of the county court at Manchester for the opinion of the High Court upon a question of law under section 97 of the Bankruptcy Act, 1883.

Messrs. Hamilton, Young, & Co., the debtors, were a mercantile firm in Manchester dealing in cloth. They were in the habit of shipping cloth to a firm called Ewing & Co., in Calcutta, and the course of business was for Hamilton, Young, & Co. to purchase grey cloth in Manchester, have it bleached, and dyed if necessary, then packed and shipped to Calcutta. When the goods were purchased they were sent to the bleachers, where they remained to the order of the debtors, and such of them as from time to time were required by the debtors for shipment to Ewing & Co. were delivered by the bleachers in accordance with the directions of the debtors. In order to obtain money to pay for the goods the debtors used to borrow from the National Bank of India (Limited), drawing cheques on the bank which were duly honoured, and at the same time giving as security letters of lien in the following terms: "We beg to advise having drawn a cheque on you for £——, which amount please place to the debit of our loan account No. 2 as a loan on the security of goods in the course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the undermentioned goods in the hands of —— (here followed list of goods and name of bleachers) as per their receipt enclosed. These goods when ready will be shipped to Calcutta, and the bills of lading duly indorsed will be handed to you, and we then undertake to repay the above advance either in cash or from the proceeds of our drafts on Messrs. Ewing & Co., Calcutta, to be negotiated by you and secured by the shipping documents representing the above-named goods. But in no case is the advance to extend beyond two months from the date hereof, unless by special arrangement, at the expiry of which we undertake to repay the same or any portion thereof then outstanding. Interest on this advance to be at the rate at 6 per cent. per annum. We undertake that the goods while in course of preparation for shipment shall be covered against fire risk under a general policy of assurance which we shall deposit with you."

With these letters of lien the debtors would send the receipts of the bleachers for the goods specified in the letter. As soon as the debtors had in their hands ready for shipment to the East goods of a value at least equal to the amount of one of the cheques thus drawn upon and honoured by the bank, they would invoice and ship the goods to Ewing & Co. in Calcutta, and hand to the bank a copy of the invoice and the bill of lading of the goods so shipped, together with a letter signed by them (called the shipment letter), and a trust receipt to be signed by Ewing & Co. in Calcutta, and also a letter of instructions to the bank as to the disposal of the moneys representing the value of the goods.

The shipment letter was as follows: "Having this day received from you an advance of £—— bearing interest at 6 per cent. per annum, we hereby hand you as collateral security for the due repayment of such advance and interest, bills of lading, invoices, and policies of insurance for —— packages per —— to Calcutta, as described at the foot hereof, which documents are to be handed to your Calcutta agency. Our agreement is as follows: Firstly, that on arrival of the documents in Calcutta they will be handed to Messrs. Ewing & Co. by your agents, who will receive in exchange a formal lien over them and the goods they represented, and an undertaking to provide for fire insurance. Secondly, that within six months after the date of the above advance, Messrs. Ewing & Co. will release the above documents referred to by delivering to your said agent a telegraphic transfer or demand draft on London for the equivalent amount of the said advance, together with interest at 6 per cent. per annum from the date hereof until approximate due date of arrival in London of such remittance."

In June and early in July, 1903, the debtors had given the bank letters of lien on goods belonging to them, which had been placed with bleachers and dyers, as security for advances amounting to about £5,000, and the bleachers' receipts had been sent with the letters of lien to the bank.

On the 13th of July there were goods to a large amount in the hands of the bleachers and dyers, and also in the warehouse of the debtors.

On the 14th of July the bank heard rumours as to

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

the solvency of the debtors and gave the bleachers and dyers notice claiming the goods in their hands, and also gave the debtors notice claiming the goods in their warehouse.

On the 24th of July the debtors committed an act of bankruptcy to which the title of the trustee related back, and on the 15th of August they were adjudged bankrupt on their own petition.

The question now referred to the High Court for decision was whether the trustee or the bank was entitled to the goods in the hands of the bleachers. The trustee contended that the letters of lien were bills of sale and required registration, and that the goods were in the order and disposition of the debtors at date of the commencement of the bankruptcy.

May 8.—*Hansell*, for the trustee, contended that the bills of lien were "declarations of trust without transfer" within the definition of a bill of sale in section 4 of the Bills of Sale Act, 1878, and that the goods were not pledged to the bank as in *Ex parte North-Western Bank* v. *Shee*, 21 W. R. 69, L. R. 15 Eq. 69, nor were the documents "transfers in the ordinary course of business": *Tennant* v. *Howatson*, 13 A. C. 489, 36 W. R. Dig. 206. He also contended that, the goods being still in the warehouses of the bleachers or the debtors, and not in the custody of the bank on the 24th of July, were within the order and disposition of the bankrupts at the date of the commencement of the bankruptcy.

Schiller, for the bank.—The goods were not in the order and disposition of the bankrupts under such circumstances that any reputation of ownership ever arose: *In re Watson & Co*, [1904] 2 K. B. 753. As to these documents being bills of sale, the Legislature never intended that this class of documents should be deemed to be bills of sale, otherwise a bank could not advance money on goods in the ordinary course of business unless on imported goods under the Bills of Sale Act, 1891. They are "documents used in the ordinary course of business as proof of the possession or control of goods" within the exceptions in section 4 of the Bills of Sale Act, 1878: *Merchant Banking Co.* v. *Spotten*, L. R. Ir. 11 Eq. 586.

Hansell, in reply, cited *Furber* v. *Cobb*, 35 W. R. 398, 18 Q. B. D. 494; *In re Ginger*, 46 W. R. 144, [1897] 2 Q. B. 461; and *Ex parte Parsons, In re Townsend*, 34 W. R. 329, 16 Q. B. D. 532.

Cur. adv. vult.

May 22.—BIGHAM, J.—The real question in this case is whether the document by which these merchants, the bankrupts, purported to give a charge in favour of the bank is one which required to be registered as a bill of sale. If it is, the question submitted to the court must be answered in favour of the trustee. The form of the document is set out in the special case. It is addressed by the bankrupts to the bank, and it states that the money borrowed by the bankrupts from the bank is a "loan on the security of goods in preparation for shipment to the East." It also states that as security for the loan the bankrupts hold the goods on the bank's account and under lien to the bank. The goods are then particularized; and, finally, there is a statement that the receipts of the bleachers, in whose actual possession the goods for the time being are, are enclosed in a letter of hypothecation. This document evidences a transaction of a most ordinary kind as between bankers and merchants. Such transactions happen by the score every day of the week in places of business like Manchester. What is the real effect of it? No doubt the physical possession of the goods is in the bleachers, but for whom do they hold them? I think that by the intention of all parties they hold them for the bank. Such is clearly the intention of the bank and of the merchants, and such also is the intention of the bleachers, for they know well that business is done as it was here—that their receipts are to be or may be used as the receipts were used in this case, and that they will be bound to hand the goods to the bank if required to do so. The document is therefore one which is accompanied by a transfer of possession of the goods. Thus the document comes within the exceptions mentioned in section 4 of the Bills of Sale Act, 1878. It is a "transfer of goods in the ordinary course of business of a trade or calling." The document may also be described as one which is "used in the ordinary course of business as proof of the control of goods," and as such it would come within the exceptions. It is not necessary to consider whether the document comes within the definition of the expression "bill of sale" as contained in the first clause of section 4 of the Act; the important question is whether it comes within the exceptions. I am clearly of opinion that it does. Of the authorities cited during the arguments it is sufficient to say that, so far as they are applicable to this case, they support the view I take.

Another point was taken on behalf of the trustee. It was said that the goods were in the order and disposition of the bankrupts at the commencement of the bankruptcy. That is a question of fact, and there can be no doubt as to the answer to be given to it. The goods were no doubt the goods of the bank in the sense that they had a charge on them; but the bank never consented to the goods being in the order and disposition of the bankrupts in their trade and business, and certainly did not do so in such circumstances that the bankrupts became the reputed owners of the goods. The reasoning of Vaughan Williams, L.J., in the case of *In re Watson*, [1904] 2 K. B. 753, applies and disposes of the contention. The questions submitted to the court must be answered in favour of the bank. The trustee must pay the bank's costs, and will take his own costs out of the estate.

Solicitors for the trustee, *Chester & Co.*, for *Bullock, Worthington, & Jackson*, Manchester.

Solicitors for the bank, *Sanderson & Co.*

Prob. Div. & Adm. Div. Admiralty. } Nov. 8, 18, 19; Dec. 12.

"THE OLE BULL." (a.)

Ship—Collision—Harwich Harbour—Compulsory pilotage.

The defendants' vessel was brought into Harwich Harbour and brought to anchorage in a proper place by a properly licensed pilot, the pilotage thus far being admittedly compulsory. The vessel while being brought from her anchorage to her berth, and still in charge of the pilot, did damage by colliding with the plaintiff's vessel. It appeared that there was a custom recognized by the Trinity House of giving the pilot further remuneration for berthing his vessel if he brought her on from an anchorage, and it was contended that it was manifest that the compulsory pilotage ceased at the anchorage.

The Court held that the compulsory pilotage did not cease when the vessel was brought to anchor, but was continuing at the time of the collision, and that the defendants were not liable.

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Special case.

Balloch, for the plaintiff, cited *The Servia and The Carinthia*, 46 W. R. 492, [1898] P. 36.

Bailhache, for the defendants, cited *The Rigborg Minde*, 8 P. D. 132; *The Mercedes de Larrinaga*, [1904] P. 215, 52 W. R. Dig. 166.

The facts are fully stated in the judgment.

GORELL BARNES, J., in giving judgment, said: This case is one in which there has been a statement of facts, in the nature of a special case, and raises a point as to compulsory pilotage in the port of Harwich. The plaintiff, Mr. T. J. Morgan, is the owner of the dredger, *The Sliedrecht II.*, and the defendants are the owners of the Norwegian steamship *Ole Bull*. On the 12th of September, 1903, *The Sliedrecht II.* was lying moored at or near the west side of the West Quay at Harwich. That quay is, I understand, to the westward of the railway terminus at Harwich, and it is shown on the chart that there is a kind of small inlet to the west of that quay. Upon the case as stated it appears "the foreshore to the west of the quay has been dredged out in the manner shown on the chart." *The Sliedrecht II.*, while lying moored in the place, was run into and damaged by the steamship *Ole Bull*, and at the time of that accident *The Ole Bull* was on a voyage from Apalachicola to Harwich with a cargo of sawn wood and deals. It is admitted, by paragraph 3 of the statement of facts, by the defendants "that if *The Ole Bull* was not compulsorily in charge of a pilot at the time when *The Sliedrecht II.* was so damaged the plaintiff is entitled to recover damages from the defendants in respect of the said collision." *The Ole Bull* appears to have been brought into the port of Harwich by a man named John Green, who was a pilot, and who was licensed, amongst other matters, to pilot into and out of Harwich Harbour. His certificate, according to the date on it, must have been granted to him prior to the time of this disaster. The date is the 14th of June, 1882. I do not know whether it is renewed from year to year, but this case is treated as one in which he holds the Trinity House licence to pilot into and out of Harwich Harbour. He "had boarded *The Ole Bull* about 8.30 a.m. on the 12th of September, near the Sunk Light, and took charge, and at 11.45 a.m. he brought *The Ole Bull* to an anchor in the Stour." That is northward, just a little, of the inlet into which she was to be moved, and is within the port of Harwich. According to the statement of facts, the said spot where she was anchored "is a usual and proper place for vessels to lie at anchor and to discharge cargo when unable to discharge at a quay." Then there follows this important statement: "The tide had not then flowed sufficiently to enable *The Ole Bull* to reach any quay berth at Harwich at which her cargo might be discharged. While *The Ole Bull* was at anchor there she was visited and cleared by the Customs authorities, and a boat was sent ashore for orders as to the place at which she was to discharge her cargo, which were given for the west side of the West Quay. At 1 p.m., the tide having flowed sufficiently, the anchor was under his (the pilot's) orders hove up, and he proceeded to navigate *The Ole Bull* to the place at Harwich where she was to be discharged, and in the course of such navigation, and while in the act of going alongside a berth at the said quay, one rope having been carried from the ship to the quay and made fast thereon, and while navigating over the part of the foreshore so dredged out as aforesaid, *The Ole Bull* fell against *The Sliedrecht II.* and did the damage complained of." Now, as I understand this case, or this statement of facts, the only question I have to determine is whether the pilotage is compulsory or not. I understand that if the pilotage is compulsory, then the defendants are not to be treated as responsible; whereas, if the pilotage is not compulsory, then the defendants are responsible. The point is a short one, and the main contention which the statement of facts raises is simply this: Whether the pilotage ceased to be compulsory when *The Ole Bull* came to an anchor, or whether it continued to be compulsory until she was moored to the quay. The plaintiffs say that the pilotage ceased to be compulsory as soon as the ship dropped her anchor; whereas the defendants say it continued to be compulsory until the vessel got to the quay. There were other points raised as to the precise wording of the Merchant Shipping Act, and so forth, but I think that is the real point in the case. The way in which the plaintiffs put the case is substantially this: They say that this pilotage is into or out of the port of Harwich—into is the point here—and the man who pilots gets a certain rate, set out in paragraph 8 of the statement of facts for piloting from sea or Orfordness to Harwich Harbour, and from the rolling grounds to Harwich Harbour, and that that rate covers what he has got to do to bring her to the anchorage; and that afterwards, if she moved from the anchorage to a berth for discharging at the quay, the ship has to pay, by usage, 10s. or £1, according to her tonnage, for the pilot's taking her from the anchorage to the quay berth and mooring her. The statement of facts contains, amongst other things, this paragraph: "A vessel may be so taken from such an anchorage to a berth and berthed by an unqualified pilot without infringing any regulations of the port or any orders which the harbour-master is legally empowered to give. Vessels which arrive in Harwich Harbour in charge of compulsory pilots are, in fact, frequently left by compulsory pilots at their anchorage and then taken from anchorage to a berth and berthed or so moored at Harwich by unlicensed persons." That is the way in which the plaintiffs present this matter. Shortly stated, they say that the ship was compulsorily piloted to the anchorage, and then the pilot's duties as the compulsory pilot ceased, and from the anchorage to the quay the pilot was voluntarily employed at a slight additional remuneration of 10s. or £1. The defendants say he was compulsorily employed right through, from first to last, until he got to the quay, and that temporary anchoring for the purpose of tide makes no difference. I thought at the time when this case was first presented to me that the facts—or perhaps I ought to to say the law as stated—the statement of the legal position of the parties, or those concerned in such matters as this—the pilots, for instance—were so worded as to state the law and to put the plaintiffs out of court, because paragraph 6 commences with this statement: "The said John Green might have been properly paid off and discharged when the vessel came to an anchor as aforesaid, but he remained on board." That, and other passages which it is not necessary to go through, taken together, led, to my mind, to the conclusion that as this case was drawn it was, in fact, stating that the compulsory pilotage legally determined at the anchorage, and that after that there was a voluntary agreement to proceed on. The matter being of some importance outside this particular case, because it affected generally the question of pilotage at the port of Harwich, the case was, on the application of Mr. Bailhache, adjourned in order that evidence might be given as to how this matter was dealt with and how the question arose. I think this case has now to be treated as if those statements of

legal effect were not in it—I mean one must judge of the case as to the law applicable to the facts partly upon the evidence given and partly upon the statement. Taking all those facts together I think there is nothing in this case to show that anything took place between the master and the pilot, if it were material at all, which had the effect of making a distinct new bargain between them. The pilot went on from the anchorage to the quay, and, whatever the legal position is, that must be determined, I think, apart from any special contract that was made between the parties. They seem to have gone on in what may be called the ordinary course of business. What does that ordinary course come to be? It seems to me that ordinary course leaves the matter open to decision as to what is the real legal obligation and duty of the two parties; that is to say, whether pilotage into Harwich means pilotage to the place where the ship is destined to be discharged, or means pilotage to any spot in the harbour where she may chance for temporary purposes to be brought to. I say that because, although the evidence given by Mr. Keigwin, and the other matters which have been partly shown by the papers and partly shown by the statement of fact, do show that as a matter of fact pilots have been paid their pilotage rate for proceeding to an anchorage, and have obtained a payment afterwards of some small sum for taking a vessel from an anchorage to the proper place of discharge, the impression which I have received from all the matters which have been placed before me is that the pilots have really succeeded in getting this extra payment because of the fact that they are delayed when they come to an anchorage, and have to waste time waiting till the ship can be moved into the place to which she is destined to be moved. They have succeeded in getting that sum—whether right or wrong in getting it, they have succeeded in getting it—I think the papers show that—and since the matter has been brought out more prominently there has been, as I understand, an alteration made by the Trinity House. The circular put before me is dated the 1st of March, 1904, and relates to the Harwich district, and it contains the rates from the sea, &c., to Harwich Harbour, and gives the figures. Then it contains a paragraph which says that, "in addition to the above rates the following charges for any of the undermentioned services shall be paid—namely, for removing a vessel from her moorings or at anchor to any part of the harbour and leaving her berthed in safety, or for piloting into Felixstowe Dock and berthing the vessel at the request of the master, for either of these services 10s. for vessels of 500 tons register and under, 15s. for vessels exceeding 500 tons and under 1,000 tons, and 20s. for vessels above that tonnage." So that substantially this circular in a sense authorized what has been going on for some time, apparently, namely, a rate charged into the harbour, and an extra charge if the vessel is removed from moorings or anchor to any part of the harbour and berthed in safety. To my mind, however, that really gives the go-by to the true question in the case, which is, what, according to law, is the duty of the pilot on the one hand, and the obligation of the shipowner on the other, with regard to the termination of the compulsory employment? What I mean is that even if there is an extra rate now to be paid, or an extra rate was in former times asked for and obtained, for taking the vessel from the spot at which she has anchored to the berth, that is not, to my mind, at all conclusive of what the compulsion is and when the compulsion ceased. The compulsion seems to me to turn upon the true construction of the Acts of Parliament, or rather the Acts coupled with the licence as to what is to be done. It is admitted, for the purpose of this case, that the pilotage is compulsory into and out of Harwich Harbour, and so the question comes to be, what is pilotage into Harwich Harbour? Does it mean that the ship is to be brought to any point in Harwich Harbour at which she is compelled to stop, and then the pilotage ceases to be compulsory? Or does it mean compulsory as long as she is still proceeding to the destination in the port to which she has to go? The point that is exactly to be decided is not, as far as I can ascertain, covered by any distinct authority, and the only observations which I can find which seem to me directly to bear upon it are observations which I myself made in the case of *The Mercedes de Larrinaga*. That case is reported in L. R. 1904 P. and the observations to which I refer will be found on pp. 230-232. Now, I think one might consider this case, first of all, from what would be the position if the vessel had been brought straight from the sea to the mooring berth, without any interruption at all. It seems to me that the pilotage would be compulsory from first to last. It would be pilotage into the harbour and pilotage to a point which was already fixed upon. Then the question is, can it make any difference whether the ship is anchored, compulsorily or temporarily, because of the state of the tide? I cannot see that it makes any difference at all. If it did it would be sufficient to anchor the ship at any spot within the limits of the harbour, and then say the pilotage ceased. I can see no difference between the two positions. It seems to me that what is pilotage into a harbour, where it is left general, must be determined by the place in that harbour to which the vessel is intended or destined to go, and if for any temporary purpose she is interrupted in getting there, because of tide, wind, fog, and so forth, she is none the less in itinerary to the place to which she has to go. I take the general view of this case which is presented by some of those Mersey cases which deal with inward bound ships and are practically on the same lines. Those cases are referred to in the judgment I gave in *The Servia* and *The Carinthia*. Therefore I do not think it would have made any difference if there had been any independent arrangement for payment from the anchorage to the berth; but there was not, in fact, any arrangement, and it was left open, on the footing of what was usually done in the port. I think, therefore, notwithstanding the fact that extra payment has been asked for and seems now to be regularly made, that it makes no difference with regard to the compulsion, but only fixes the rate of payment. The result, in my judgment, is that *The Ole Bull* was compulsorily in charge of a pilot at the time of the said collision, and I understand from the statement of facts that if the court shall be of that opinion judgment is to be pronounced for the defendants, with costs.

THE COURT ordered the defendants to pay the costs of the adjournment.

Solicitors for the plaintiff, *Rawle, Johnstone & Co.*, for *Ward & Hugh-Jones*, Harwich.

Solicitors for the defendants, *Thomas Cooper & Co.*

House of Lords.

From C.A. (England). April 14.

SOUTH WALES MINERS' FEDERATION AND OTHERS v. GLAMORGAN COAL CO. AND OTHERS. (a.)

*Trade union—Master and workman—Procuring breach of contract—Just cause or excuse—Malice—*Bonâ fide *advice.*

The absence of malice or sinister motives is not a legal justification for persons procuring a breach of contract by others.

The South Wales Miners' Federation directed the men to stop work, which they did, on certain days, and thereby occasioned loss to the employers. There was no personal animus *against the masters, but it was considered that the workmen would benefit by an ultimate advance in the price of coal.*

Held, that an action by the employers against the federation would lie.

Decision of the Court of Appeal (52 *W. R.* 165, [1903] 2 *K. B.* 545) *affirmed.*

This was an appeal from a judgment of the Court of Appeal (Romer and Stirling, L.JJ., Vaughan Williams, L.J., dissenting), which reversed that of Bigham, J.

The action was brought by the Glamorgan Coal Co. (Limited), the present respondents, and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of its executive council, to recover damages for wrongfully and maliciously procuring and inducing the workmen in the respondents' collieries to break their contracts of service with the respondents.

The defence denied the material allegations of the statement of claim, and pleaded that the acts complained of were done, if at all, with reasonable justification and excuse. The facts, as found by Bigham, J., are set out at length in the courts below and shortly in the judgment of Lord James of Hereford.

Isaacs, K.C., and *S. T. Evans, K.C.* (*Bailhache, Holman Gregory,* and *Clement Edwards* with them), for the appellants.—There may be a justification, as in the law of libel we have privileged communications. There is "just cause or excuse" in this case. Moral and social duties come into consideration: *Lumley* v. *Gye,* 1 W. R. 432, 2 E. & B. 216; *Allen* v. *Flood,* 46 W. R. 258, [1898] A. C. 1; *Quinn* v. *Leathem.* 50 W. R. 139, [1901] A. C. 495; *Bowen* v. *Hall,* 29 W. R. 367, 6 Q. B. D. 333. There is no evidence of malice in any sense here. There was no desire to injure the masters—none to gain an advantage for the men at their employers' cost. The intention was to restrict the output, and so prevent the price of coal from falling: *Mogul Steamship Co.* v. *M'Gregor, Gow, & Co.,* 37 W. R. 756, 23 Q. B. D. 596, 40 W. R. 337, [1892] A. C. 25. The present case is different from *Read* v. *Friendly Society of Operative Stonemasons,* 51 W. R. 115, [1902] 2 K. B. 732, which was a case of boycotting from a society. It was the duty of the council to advise the men.

Upjohn, K.C., and *Lush, K.C.* (*Trevor Lewis* with them), for the respondents.—*Lumley* v. *Gye* is still good law and has been often followed. In *Quinn* v. *Leathem* "interference with contractual relations" was declared unlawful. The action of the appellants was not confined to advice. The men were ordered to break their contracts. Annoyance and coercion by many may become actionable when such a result would not be produced by one. There was no "just cause or excuse." Lord Watson defines malice in *Allen* v. *Flood* to be "knowingly procuring an illegal act." Since *Taff Railway Co.* v. *Amalgamated Society of Railway Servants,* 50 W. R. 44, [1901] A. C. 426, the federation was responsible. The means taken were illegal, being an unjustifiable interference with "contractual relations."

Isaacs, K.C., in reply.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—I cannot think that in this case there is anything to be determined except the question of fact. I say so because the questions of law discussed are so well settled by authority, and authority in this House. To combine to procure a number of persons to break a contract is manifestly unlawful. This is found as a fact to have been done here, and is also found to have caused serious damage to the persons who were entitled to have these contracts performed. It is, further, a principle of the law, applicable even to the criminal law, that people are presumed to intend the reasonable consequences of their acts.

It is not, perhaps, necessary to have recourse to such a presumption where, as upon the facts stated, it is apparent that what they were doing must necessarily cause injury to the employers. We start, then, with the infliction of an unlawful injury upon the persons entitled to have the services of their workmen. It follows that this is an actionable wrong unless it can be justified.

Now it is sought to be justified, first, because it is said that the men were acting in their own interest, and that they were sincerely under the belief that the employers would themselves benefit by their collieries being interrupted in their work; but what sort of excuse is this for breaking a contract when the co-contractor refuses to allow the breach? It seems to me to be absurd to suppose that a benefit which he refuses to accept justified an intentional breach of contractual rights. It may, indeed, be urged in proof of the allegation that there was no ill-will against the employers. I assume this to be true, but I have no conception what can be meant by an excuse for breaking a contract because you really think it will not harm your co-contractor.

I absolutely refuse to discuss the cases widely apart from the question of what pecuniary advantage may be reaped from breaking a contract which have been suggested, where, upon moral or religious grounds, people may be justly advised to refuse to perform what they have agreed to do.

Some cases may be suggested when higher and deeper considerations may, in a moral point of view, justify the refusal to do what has been agreed to be done. Such cases may give rise to the consideration whether, in a moral or religious point of view, you are not bound to indemnify the person whom your refusal injures; but a court of law has only to decide whether there is a legal justification.

Again, I refuse to go into a discussion of the duty or the moral right to tender advice. The facts in this case show nothing in the nature of advice. Even if the supposed duty could be created by people who made them their official advisers who were to advise them even to break the law. But, as I have said, these are peremptory orders given by the official superiors of the body, and it has been found by the learned judges who tried the case that the body sued was responsible for the interference with the workmen. I think the appeal should be dismissed.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Lord MACNAGHTEN.—I agree in the motion which my noble and learned friend the Lord Chancellor proposes, and I also agree with him in thinking that the question before your lordships lies in a very narrow compass. It is not disputed now—it never was disputed seriously—that the union known as the South Wales Miners' Federation, acting by its executive, induced and procured a vast body of workmen, members of the union, who were at the time in the employment of the plaintiffs, to break their contracts of service, and thus the federation acting by its executive knowingly and intentionally inflicted pecuniary loss on the plaintiffs. It is not disputed that the federation committed an actionable wrong. It is no defence to say that there was no malice or ill-will against the masters on the part of the federation, or on the part of the workmen at any of the collieries thrown out of work by the action of the federation. It is settled now that malice in the sense of spite or ill-will is not the gist of such an action as that which the plaintiffs have instituted. Still less is it a defence to say that if the masters had only known their own interest they would have welcomed the interference of the federation.

It was argued—and that was the only argument—that although the thing done was *primâ facie* an actionable wrong, it was justifiable under the circumstances. That there may be a justification for that which in itself is an actionable wrong I do not for a moment doubt. And I do not think it would be difficult to give instances, putting aside altogether cases complicated by the introduction of moral considerations. But what is the alleged justification in the present case? It was said that the council—the executive of the federation—had a duty cast upon them to protect the interests of the members of the union, and that they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any sinister or indirect motive. The case was argued with equal candour and ability. But it seems to me that the argument may be disposed of by two simple questions. How was the duty created? What in fact was the alleged duty? The alleged duty was created by the members of the union themselves, who elected or appointed the officials of the union to guide and direct their action, and then it was contended that the body to whom the members of the union have thus committed their individual freedom of action are not responsible for what they do if they act according to their honest judgment in furtherance of what they consider to be the interest of their constituents. It seems to me that if that plea were admitted there would be an end of all responsibility. It would be idle to sue the workmen, the individual wrongdoers, even if it were practicable to do so. Their counsellors and protectors, the real authors of the mischief, would be safe from legal proceedings. The only other question is, What is the alleged duty set up by the federation? I do not think it can be better described than it was by Mr. Lush. It comes to this—it is the duty on all proper occasions, of which the federation or their officials are to be the sole judges, to counsel and procure a breach of duty.

I agree with Romer and Stirling, L.JJ., and I think the appeal must be dismissed.

Lord JAMES OF HEREFORD.—The nature of the issues raised in this case, and the pecuniary consequences at stake, require that the fullest consideration should be given to your lordships' judgment. At the same time, the facts to be dealt with are for the most part admitted, and, if not, are easily attainable, and in regard to the duty of applying principles of law to such ascertained facts your lordships have received great assistance from the able arguments of counsel at the bar of the House.

As the facts and circumstances affecting the case have already been fully dealt with, I need do no more than refer to them very briefly.

The action is brought by the plaintiffs, as owners of collieries, against the South Wales Miners' Federation and certain individual members of it, upon the following grounds set out in the statement of claim: "That the defendants, well knowing the terms and conditions of the contracts of service under which the workmen employed at the collieries of the plaintiffs were working, wrongfully and maliciously, by causing notice to be given to the workmen employed at the plaintiffs' collieries, procured and induced the said workmen to break their contracts of service with the plaintiffs, and in breach thereof to abstain without giving due notice from working at the said collieries on certain days . . . and the workmen employed at the said collieries did by reason of such procurement and inducement, and in breach of their contracts of service with their employers, abstain without due notice from working at the said collieries."

The defendants, in addition to denying the above allegations, amongst other argument alleged that they acted in the *bonâ fide* belief that the course of action advised by them would greatly benefit both the plaintiffs and defendants, and that they, the defendants, had reasonable justification and excuse for the course pursued by them.

The first question to be determined is, Did the defendants procure and induce the plaintiffs' workmen to break their contracts of service? I think it clear that this question must be answered in the affirmative. On the 5th of November, 1900, the following resolution was passed by the defendants' federation: "It was unanimously resolved to order a stop-day on Friday next, and that a conference be held on Monday next to decide upon our future action." On the same day a manifesto was issued by the federation addressed to the workmen, in which it is stated "we have unanimously resolved that a general holiday be taken throughout the coalfields by all colliery workmen on Friday, the 9th of November, 1900." The colliers carried out the resolution of the federation, and the stop-day took place. The employers protested and warned the workmen that if such stoppage of work was repeated legal remedy would be sought. In October, 1901, steps were taken by the federation to cause the workmen again to stop work. But the so-called *Taff Vale case* having been determined by your lordships in July, 1901, the danger of legal liability was apparent, and the federation, therefore, slightly disguised themselves as being the workmen's members of the sliding scale committee. But this disguise was scarcely maintained, and was not persisted in during the argument at the bar.

On the 15th of October, 1901, Mr. W. Brace, as vice-president of the defendants' federation, in a speech, said that in certain events "the executive council of the federation in whom power was vested by the whole workmen according to a conference resolution would unhesitatingly declare a series of stoppages with a view to regulate the supply according to the demand." On the 29th of October, 1901, the following resolution was passed by those who called themselves the workmen's representatives of the sliding scale joint committee: "It was unanimously resolved to issue instructions to the workmen to observe Thursday next as a general holiday at all the collieries throughout the South Wales coalfield." On the 23rd of October, the 29th of October, and the 4th of November, 1901, telegrams were sent on behalf of the

executive council to the representatives of the different branches in the following form: October 23: "Sliding scale committee has decided that all collieries must observe Friday and Saturday next as a general holiday." October 29: "Men must be idle Thursday next." November 4: "Stop next Wednesday." In addition to these communications evidence was given which justifies the certain conclusion that the defendants did more than advise the workmen upon the subject of these stop-days. No doubt there was, by the rules of the federation, a general duty cast upon it "to take into consideration the question of trade and wages, and to protect workmen generally, and to regulate the relation between them and employers," and these somewhat indefinite words might justify advice being given by the executive council to the workmen. Still there remains the question, Can it be lawful to advise the unlawfully breaking of a contract of service? But, be this as it may. I think it is established that both in 1900 and 1901 responsible officers of the federation did far more than give advice. They initiated, they directed, and they gave orders, so that it is correct to employ the legal term, and say that they induced and procured the workmen to break their contracts.

If it be that the defendants' acts amount to inducing and procuring, a great portion of the able arguments placed before your lordships on behalf of the appellants becomes of no avail. It is true that great difficulty arises when hypothetical cases are suggested of advice given under a great moral sense of right, or where great good would result from a contract being broken, or where the claims of relationship or guardianship demand an interference amounting to protection. Each of such cases must be determined as it arises, but upon the facts as I think they must be found in this case no such difficulties arise. In the action of the defendants going, as I have said, to the extent of inducing and procuring the commission of an unlawful act places them in a very different position to that occupied by a person whose duty it is to offer advice to one who needs to be guided or protected. If this view be correct, the allegation in the statement of claim that the defendants induced and procured the workmen to break their contracts is established. It is admitted that the workmen in so acting committed an unlawful act—that in consequence the employers sustained damage, and that the defendants had notice of such contracts and of the consequences of the breach. It yet remains to deal with the words "wrongfully and maliciously" as averred in the statement of claim. As to the word "wrongfully" I think no difficulty arises. If the breach of the contract of service by the workmen was an unlawful act—any one who induces and procures the workmen, without just cause and excuse, to break such contract also acts unlawfully, and thus the allegation that the act done was wrongfully done is established. But the word "maliciously" has also to be dealt with. The judgment of Bigham, J., proceeds on the ground that "to support an action for procuring a breach of contract it is essential to prove actual malice." I cannot concur in this view of the law. The word "maliciously" is often employed in criminal and civil pleadings without proof of actual malice apart from the commission of the act complained of being required. If A. utters a slander of B., even if he be a stranger to him, the averment that A. maliciously spoke such words of B. is established by simply proving the uttering of words taken to be false until the contrary be proved.

In such an action the word "maliciously" may be treated either as an unnecessary averment or as being proved by inference drawn from the proof of the act being wrongfully committed.

I think also that that the learned judge's judgment is not supported by the authorities to which he refers.

In *Bowen* v. *Hall* Brett, L.J., with the sanction of Lord Selborne, thus expressed his view: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may in the natural and probable consequence of it produce injury to another and which in the particular case does produce such an injury, an action on the case will lie."

In the *Mogul case* Bowen, L.J., also said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade is actionable if done without just cause or excuse."

And in *Quinn* v. *Leathem* Lord Macnaghten thus defined the law on the subject: "A violation of legal rights committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." It will be observed that none of these three very learned judges employ the word "maliciously" as being necessary in order to constitute a right of action.

But a further question has to be disposed of. At the trial, and at the bar of your lordship's house, the counsel for the appellants contended that their clients had good cause and excuse for the alleged unlawful act they had committed. That such justification—such "good cause and excuse"—may exist is, I think, a sound proposition. The above words of Lord Macnaghten and of Bowen, L.J., so declare. The facts upon which this attempted justification in this case is based are fully before your lordships and need not be recapitulated. I take the results of them to be that in one sense the defendants acted in good faith. They, I think, honestly believed that the stoppage of work they resolved upon would increase the price of coal and so benefit both the workmen and the employers. Towards their employers the defendants entertained no malice. At the same time they knew that the employers had given notice of their objection to any such stoppage of work. And so the federation not only advised, but resolved and ordered, that the workmen should break their contracts under conditions that would constitute an unlawful act in the men. As far as the defendants could exercise control the men were not allowed to make use of their own discretion. In order, therefore, to establish the existence of good cause and excuse, all the defendants can say is, "We, the federation, had the duty cast upon us to advise the workmen. We did advise them to commit an unlawful act—but in giving that advice we honestly believed that they would be in a better financial position than if they acted lawfully and fulfilled their contracts." Even if it be assumed that such allegations are correct in fact, I think no justification in law is established by them. The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act. During the arguments that have been addressed to your lordships, I do not think quite sufficient distinction was drawn between the intention and the motives of the defendants. Their intention clearly was that the workmen should break their contracts. The defendants' motives, no doubt, were that by so doing wages should be raised. But if in carrying out the intention the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the existence of a motive to secure a money benefit to the wrongdoers.

For these reasons I think the judgment of the Court of Appeal should be affirmed.

Lord Lindley.—I agree so entirely with the judgments of Romer and Stirling, L.JJ., that I should say no more were it not for the great importance of some of the arguments addressed to your lordships on this appeal, and which deserve notice.

It is useless to try and conceal the fact that an organised body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and is justified by this undeniable truth.

But the possession of great power, whether by one person or by many, is quite as consistent with its lawful as with its unlawful employment; and there is no legal presumption that it will be or has been unlawfully exercised in any particular case. Some illegal act must be proved to be threatened and intended, or to have been committed, before any court of justice in the United Kingdom can properly make such conduct the basis of any decision.

These remarks are as applicable to trade unions as to other less powerful organizations. Their power to intimidate and coerce is undoubted; its exercise is comparatively easy and probable; but it would be wrong on this account to treat their conduct as illegal in any particular case without proof of further facts which make it so. It is not incumbent on a trade union to rebut any presumption of illegality based only on their power to do wrong. Freedom necessarily involves such a power; but the mere fact of its existence does not justify any legal presumption that it will be abused.

In the case before your lordships there is proof that the members of the mining federation combined to break and did break their contracts with their employers by stopping work without proper notice and without proper leave. There is also proof that the officials of the federation assisted the men to do this by ordering them to stop work on particular days named by the officials. To break a contract is an unlawful act; or, in the language of Lord Watson in *Allen* v. *Flood*, "a breach of contract is itself a legal wrong." The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that, he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable, but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach.

The federation by its officials are clearly proved in this case to have been engaged in intentionally assisting in the concerted breach of a number of contracts entered into by workmen belonging to the federation. This is clearly unlawful according to *Lumley* v. *Gye* and *Quinn* v. *Leathem*, and the more recent case of *Read* v. *Friendly Society of Stonemasons*. Nor is it opposed to *Allen* v. *Flood* or the *Mogul Steamship Co.'s case*, where there was no unlawful act committed.

The appellants' counsel did not deny that in his view of the case the defendants' conduct required justification; and it was contended—first, that all which the officials did was to advise the men; and secondly, that the officials owed a duty to the men to advise and assist them as they did.

As regards advice, it is not necessary to consider when, if ever, mere advice to do an unlawful act is actionable when the advice is not libellous or slanderous. Nor is it necessary to consider those cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavouring to procure a breach of such contract. Nor is it necessary to consider what a parent or guardian may do to protect his child or ward. That there are cases in which it is not actionable to exhort a person to break a contract may be admitted; and it is very difficult to draw a sharp line separating all such cases from all others. But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity. A refusal to stop work as ordered would have been regarded as disloyal to the federation. This is plain from the speeches given in evidence on the trial; and in my opinion it is a very important element in the case which cannot be ignored.

As regards duty, the question immediately arises, Duty to do what? The defendants have to justify a particular line of conduct, which is wrongful, in aiding and abetting the men in doing what both the men and the officials knew was legally wrong. The constitution of the union may have rendered it the duty of the officials to advise the men what could be legally done to protect their own interests; but a legal duty to do what is illegal and known so to be is a contradiction in terms. A similar argument was urged without success in the case of *Read* v. *Friendly Society of Stonemasons* already referred to.

Then your lordships were invited to say that there was a moral or social duty on the part of the officials to do what they did, and that, as they acted *bonâ fide* in the interest of the men, and without any ill-will to the employers, their conduct was justifiable; and your lordships were asked to treat this case as if it were like a case of libel or slander on a privileged occasion. This contention was not based on authority, and its only merits are its novelty and ingenuity. The analogy is, in my opinion, misleading, and to give effect to this contention would be to legislate and introduce an entirely new law, and not to expound the law as it is at present. It would be to render many acts lawful which, as the law stands, are clearly unlawful.

I have purposely abstained from using the word "malice." Bearing in mind that malice may or may not be used to denote ill-will, and that in legal language presumptive or implied malice is distinguished from express malice, it conduces to clearness in discussing such cases as these to drop the word "malice" altogether and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act and to exclude all spite or ill-feeling, it is better to drop the word and so avoid all misunderstanding.

The appeal ought to be dismissed, with costs.

Appeal dismissed.

Solicitors for appellants, *Smith, Rundell, & Dods*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitors for respondents, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) May 3.

SHARP v. JOHNSON & CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Accident arising out of and in course of employment—Accident before commencement of work—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the applicant was employed on a building operation, and that each of the men employed on the work was supplied with a ticket which he had to deposit every morning at a ticket office on the premises within three minutes of the time for commencing work. To the knowledge of the employers a number of the men who lived at a distance, including the applicant, arrived each morning by a train which brought them to the works twenty minutes before the time for commencing work, and were in the habit, after depositing their tickets, of going to a mess-cabin provided by the employers on the works for the purpose of getting refreshment. It was necessary for them to travel by this train in order to arrive at the works in time. The applicant had arrived as usual twenty minutes before the time for commencing work, and was proceeding to deposit his ticket before going on to the mess-cabin when he accidentally fell into an excavation in the ground close to the ticket office.*

Held, that the accident arose out of and in the course of the applicant's employment within the meaning of section 1, *sub-section* 1, *of the Workmen's Compensation Act,* 1897.

Appeal from a decision of the judge of the Greenwich County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a painter who was employed by the respondents, a firm of builders, in the work of building some schools for the London County Council at Catford. He and about twenty others of the workmen employed on the same work lived in London and came to Catford each day by train. The time fixed for beginning work in the morning was 6.30. The workmen employed were paid by the hour. They were supplied with brass discs or tickets bearing numbers, and it was their duty to deposit these in the morning at a pigeon-hole at an office near the entrance to the premises and to take them out again at night. The pigeon-hole was not opened till 6.30, and the workmen were allowed three minutes from that time within which to deposit their tickets. The applicant and the other workmen who lived in London were in the habit of coming to their work by a train which arrived at Catford at 5.45 or 5.50. It was necessary for them to travel by this train in order to get to their work in time. They generally arrived at the works at 6.5 or 6 10. The applicant usually deposited his ticket on a ledge outside the pigeon-hole to be taken in by the timekeeper when the office was opened, and then went on to a mess-cabin on the premises, where he had some tea, and then waited till 6.30, when, on hearing a whistle blown, he went to his work. The mess-cabin was provided by the employers for the use of the workmen. A workman arriving at the works would have to pass the ticket office in order to reach the mess-cabin.

On the 30th of August, 1904, the applicant, who had then been engaged in this work for five weeks, arrived at the works in the usual way, about 6.5, and was proceeding to deposit his ticket on the ledge at the ticket office before going to the mess-cabin. He then saw that there was a hole or excavation in the ground about 5ft. or 6ft. deep between him and the ticket office. This hole, which he had never seen open before, was made for a stop-cock. As he appeared to be stumbling in stepping across the hole, the night watchman, who was standing by, offered to take his ticket and deposit it on the ledge for him. He was handing his ticket to the night watchman when some planking placed over the hole slipped from under him and he fell into the hole and sustained injuries. The evidence showed that the foreman painter was aware of the fact that the applicant and other men coming from London usually arrived some time before work began and deposited their tickets on the ledge at the ticket office in order that the timekeeper might find them when he arrived at 6.30, and then went to get refreshment.

The question was whether the accident arose in the course of the applicant's employment. The parties agreed the compensation, if any, should be £10. The county court judge found that the accident to the applicant, having happened before the time for the commencement of work had arrived, did not arise out of and in the course of his employment, and he therefore held that the applicant was not entitled to compensation. He stated that he accepted the evidence as to the knowledge of the foreman painter.

The applicant appealed.

Ruegg, K.C., and *Chester Jones*, for the appellant.

Walter Stewart, for the respondents.

The following cases were referred to: *Blovett* v. *Sawyer*, 52 W. R. 503, [1904] 1 K. B. 271; *Cross, Tetley, & Co.* v. *Catterall*, unreported; and *Benson* v. *Lancashire and Yorkshire Railway Co.*, 52 W. R. 243, [1904] 1 K. B. 242.

COLLINS, M.R.—The appellant in this case was a workman who was employed on a building contract which was being carried out at Catford. He had to come to his work in the morning from London by a train which enabled him to arrive at the spot twenty minutes before the time when it was his duty to be present for the purpose of beginning work. The time for beginning work was 6.30. The practice was for each workman to produce a ticket, which he deposited at a pigeon-hole, and which was evidence of the fact that he had arrived. There was a room on the premises at which the men could get refreshment, and in order to reach this room a man would have to pass the office where the pigeon-hole was. On the day in question the appellant found himself on the premises twenty minutes before the time when it was necessary for him to begin work or to deposit his ticket. He had been engaged on this work for some weeks, and he had come each day by the same train. The fact that the appellant and others were in the habit of arriving some time before work begun was known to the foreman painter—that is to say, to the foreman of that part of the work in which the appellant was engaged, and obviously it must have been well known to the employers, as a large body of workmen were in the habit of coming by that train. The appellant went in the direction of the ticket office with the object of depositing his ticket and then proceeding to the mess-room to get some tea. The night watchman, seeing him stumbling over some planks to reach the ticket office, offered to take his ticket and deposit it for him, and he was handing it over when accidentally a plank slipped and the appellant fell into a hole under the plank. The only point which

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

now has to be considered is whether the fact that this accident happened twenty minutes before the time when the man had to begin his work prevented it being in the course of his employment. The county court judge found that the accident did not arise in the course of his employment. I have felt some difficulty as to whether this was not a conclusion of fact, in support of which there was some evidence, and whether we are not therefore bound by it as a finding of fact of the county court judge. But when we come to criticize the decision, it seems to me that it rests on a misdirection on a point of law, and that, when the mistake in law is eliminated, there is really no controversy, but it becomes clear that the accident did happen in the course of the man's employment. The proposition of law which seems to me to be involved in the decision is that a workman's employment cannot be said to have begun until his actual work has begun. It is, however, clear from the cases that a reasonable margin must be allowed to enable a workman to get to his place of work on the premises where the work is being carried on. If during that interval he is engaged on anything for the benefit of his employer as well as himself, that is in the course of his employment. In the unreported case of *Cross, Tetley, & Co.* v. *Catterall* the House of Lords held that an accident which happened to a miner while he was going over a bridge erected by his employers for the convenience of their workmen on his way to a lamp-cabin to get his lamp was an accident arising in the course of his employment. Lord Halsbury, L.C., there said that it was not correct to say that the employment of a miner did not begin till he struck coal with his pick. The time of beginning actual work, therefore, is not the true test of the time when employment begins. If the county court judge was wrong in trying the case by that standard, this court is at liberty to look to see what the facts were. Having regard to the fact that it was necessary for the appellant to get to the works twenty minutes before the time for the commencement of work, and that the employers had provided a place for refreshment which the workmen were in the habit of using in the interval, I am of opinion that this accident happened in the course of the appellant's employment. There seems to me not to be any difficulty in this case, as we are not differing from the learned county court judge on a point of fact, but are correcting a misconception in point of law. The appeal will therefore be allowed, and the award will be for the agreed amount.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors for the appellant, *Shaen, Roscoe, Massey, & Co.*

Solicitors for the respondents, *Ponsford & Devenish.*

From Chan. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) April 3, 4, 5.

KING & CO. *v.* GILLARD & CO. (*a.*)

Practice— Costs — Successful defendant — Exercise of judicial discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*R. S. C.*, 1883, *ord.* 65, *r.* 1.

Misrepresentations on matters concerning the public, but which do not in any way concern a plaintiff or the right in respect of which he sues, are not grounds upon which a judge in the exercise of judicial discretion can deprive a successful defendant of costs. Should a defendant be deprived of costs on such grounds he may appeal.

This was an appeal from an order of Kekewich, J.

The plaintiffs were the manufacturers and sellers of desiccated soups, and the defendants in the same line of business. The plaintiffs claimed an injunction restraining the defendants from selling any desiccated soup in packets that were only a colourable imitation of theirs, and bore labels containing statements as to awards and medals gained for other preparations made by the defendants. Kekewich, J., found as a fact that the packets sold by the defendants were not calculated to deceive, and that no deception had been proved, and the action was dismissed, but without costs, because in his opinion the defendants had not acted honestly in referring on their labels to medals and awards not gained for desiccated soups, as the inference was that they had been.

The defendants appealed from the order depriving them of costs on the ground that in the circumstances the judge had no discretion to deprive them of costs.

Edmunds, K.C., and *W. E. Vernon*, for the appellants.

Moulton, K.C., Stewart-Smith, K.C., and *Waggett*, for the respondents.

VAUGHAN WILLIAMS, L.J.—Under a strict construction of the statement on the defendants' labels it was inaccurate to say that the defendants had obtained any awards or medals for desiccated soups, but that inaccuracy should not affect the judgment of the court. I do not think the facts are such that we should impute to the defendants dishonesty in the sense of meaning anything untrue. But if the statement were not true it would not be right to deprive a successful defendant of costs because of a wrong done to the public in no way connected with the injury to the plaintiffs. When a plaintiff has been guilty of a fraud upon the public in the course of establishing his claim, he should not be allowed relief because his conduct has involved a fraud upon the public. The court, however, should not deprive a successful defendant of costs because he has done some wrong to the public; in order to be deprived of costs he must have done some wrong in the course of the transaction complained of by the plaintiff. The defendant's appeal will be allowed and the action dismissed with costs.

ROMER, L.J.—The action should have been dismissed with costs. Kekewich, J., deprived the defendants of costs to which they were entitled. He might have so done on a ground which would authorize him to say that he had exercised his judicial discretion in the matter. In that case no appeal as to costs would lie. But he has not done so, for the ground of his order is that the defendants had been guilty of misrepresentation in respect to a collateral matter having nothing to do with the plaintiffs' claim. The plaintiffs entirely failed. A defendant must not be deprived of costs because of a collateral injury to the public not concerning the rights in respect of which the plaintiffs sue. That is not a ground upon which a judge can exercise judicial discretion as to costs.

STIRLING, L.J., concurred. This case is within the decision in *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756. The ground on which the judge deprived the defendants of costs was not open to him.

Solicitors, *H. W. Christmas; Neish, Howell, & Haldane.*

(*a.*) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

From Chan. Div. (Vaughan Williams and Stirling, L.JJ., and Barnes, P.) March 13.

In re MORDAN.
LEGG *v.* MORDAN. (*a.*)

Will—Investment by trustees—Purchase of leasehold ground-rents—Power to invest on freehold or leasehold ground-rents—Construction—Breach of trust.

A testator bequeathed the residue of his estate to his trustees upon trust to invest the same on Government securities, "or upon freehold ground-rents, or upon leasehold ground-rents not having less than sixty years unexpired, and held direct from the freeholder." The trustees were authorized to receive "the dividends, rents, and annual income thereof," and to divide and pay the same unto and equally between the testator's two daughters for and during their lives. On the death of either of them the corpus of her share was to go to her issue.

Held, that the trustees were authorized by the above clause to invest the residue in the purchase of freehold ground-rents or of leasehold ground-rents of the specified character.

Decision of Kekewich, J., *reversed.*

Appeal from a decision of Kekewich, J.

Francis Mordan died on the 27th of March, 1868, leaving the plaintiff residuary legatee under his will.

The defendants were Percy Charles Mordan and Clara Mordan, executors of Augustus Mordan, who was one of the executors and trustees of the testator's will.

The other executor and trustee was George Lockyer, who retired from the trust in May, 1885, when the other defendant, Walter Henry Mills, was appointed by a deed dated the 16th of May, 1885, a trustee in his place.

By his will dated the 7th of December, 1867, the testator Francis Mordan, after making various bequests, bequeathed all the residue and remainder of his estate and effects to his executors and trustees, "upon trust to invest the same at their sole discretion on Government securities of Great Britain, or upon freehold ground-rents, or upon leasehold ground-rents not having less than sixty years unexpired and held direct from the freeholder, and as to such leaseholds with or without going into the lessor's title as at the sole discretion of my said trustees they may see fit and be advised." The trustees were to receive the dividends, rents, and annual income thereof, and to divide and pay the same unto and equally between the testator's two daughters Ursula and Ellen Mordan for and during the term of their natural lives. On the death of either of the daughters leaving issue the *corpus* of her share was to go to her issue.

The daughter Ellen Mordan married, and died on the 19th of March, 1901, leaving the plaintiff, her only child, her surviving.

The trustees had invested a considerable part of the testator's residuary estate in the purchase of leasehold ground-rents in accordance with the provisions of the will before the appointment of the defendant Mills as a trustee.

Plaintiff by her statement of claim claimed, amongst other things, a declaration that these purchases were not authorized by the testator's will, and a declaration that the defendants, the executors of Augustus Mordan, ought to make good out of his estate all losses occasioned by any breaches of trust committed by him in the administration of the estate of the testator Francis Mordan, or the execution of the trusts of his will, including in particular losses occasioned by the purchase of the leasehold ground-rents.

Kekewich, J., on the trial of the action made a declaration that, upon the true construction of the will the trustees were not authorized to invest the residuary estate of the testator or any part thereof in the purchase of freehold ground-rents or of leasehold ground-rents, and granted the relief asked for.

The executors of Augustus Mordan appealed.

Eve, K.C., and *Daniel Jones*, for the appellants.

T. L. Wilkinson, for the surviving trustee.

Stewart-Smith, K.C., and *T. Ribton*, for the plaintiff.

VAUGHAN WILLIAMS, L.J.—The question is whether under the terms of this will the purchase of leasehold ground-rents which has been made by the trustees was authorized. In my judgment it was authorized. It was argued that we ought to give a very limited meaning to those words, but I do not think that we ought to put on them the limited construction which has been suggested. The whole argument comes to this: looking at the consequences which might result from such an investment, it is improbable that, if the testator had considered all those consequences, he could have intended to authorize such an investment to be made. I do not think that any of those considerations are sufficient to justify us in restricting the natural meaning of the words. Indeed, I go further. In my opinion, even if the words are capable of the limited construction which has been suggested, yet having regard to the other words which deal with the distribution of "the dividends, rents, and annual income" by the trustees, the natural inference is that the testator intended that the words which give the authority to invest should have that wider effect which I think they ought to have. If the words had been intended to have the more limited operation, one would have expected the words in the trust for division to have been "dividends, interest, and annual income."

In my judgment we ought not to read the words in question as if they had been "to invest . . , upon the security of freehold ground-rents or leasehold ground-rents." The appeal must be allowed.

STIRLING, L.J.—The trust is to invest "on Government securities, or upon freehold ground-rents, or upon leasehold ground-rents" of the character specified. Are the words "on Government securities" limited to investment on the security of Consols or other Government securities? Clearly not. It is admitted that the trustees are at liberty to purchase Consols. But it is said that the words "on freehold ground-rents or on leasehold ground-rents" mean "on the security of freehold ground-rents or leasehold ground-rents." But the words "the security of" are not found in the clause. It appears to me that, if the authority to invest on Government securities would justify a purchase of Consols or other Government security, the authority to invest on freehold or leasehold ground-rents must equally justify a purchase of freehold or leasehold ground-rents. In my opinion, the words are too wide to admit of the restricted construction which has been suggested.

BARNES, P.—I agree.

Solicitors, *Boyce & Son; A. F. Church & Son; Woodbridge & Sons.*

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. } March 31; April 1.
Farwell, J. }

In re PRICE.
PRICE *v.* NEWTON. (*a.*)

Will — Construction — "Ready money" — "Pecuniary investments" — Money in bank on deposit.

Money which is on deposit at a bank, and which is subject to more than twenty-four hours notice of withdrawal is not a "pecuniary investment" in its popular meaning, and therefore will not, in ordinary circumstances, pass under a gift of "ready money" contained in a will, nor, without special circumstances, under the words "pecuniary investments."

Adjourned summons.

By his will dated the 30th of June, 1888, William Evan Price, the testator, gave to his brother "all his life assurance policies, ready money, and book debts," subject to the payment of his debts, funeral and testamentary expenses, and certain legacies given by his will and any codicil he should execute. He made the above bequest primarily liable for the payment of the above-mentioned debts. And the testator after making certain other bequests, gave to his said brother and the plaintiffs "all his mortgages, debentures, and other securities for money, shares, stocks, and pecuniary investments," subject to certain debts and other legacies, making this bequest secondarily liable for such debts, upon certain trusts therein mentioned. He further left the residue of his real and personal estate to the plaintiffs, his executors.

The brother having died, the testator executed a codicil making certain alterations which are not material.

The testator died on the 16th of December, 1904.

At the date of his death he had a sum of £5,750 standing to his credit on a deposit account at the Torrington branch of the National Provincial Bank of England, subject to ten days' notice of withdrawal. He had several children, and the plaintiffs were two of his nephews.

The summons raised the question whether the £5,750 passed under the gift of "ready money" to the brother or under the gift of "pecuniary investment" or under the residuary gift of personalty in the will.

Upjohn, K.C., and *Metcalfe*, for the plaintiff.—"Ready money" will pass money on a current account, and therefore would pass to the plaintiffs, who are entitled to the residue. But this money is on deposit at a bank, is withdrawable at ten days' notice, and is not strictly "ready money." [They cited *In re Rayner, Rayner* v. *Rayner*, 52 W. R. 273, [1904] 1 Ch. 176, on the question of "pecuniary investments."] It rather equals a marketable security. They are *ejusdem generis* with what has gone before —that is, the debentures.

They cited *In re Wheeler, Hankinson* v. *Hayter*, 52 W. R. 586, [1904] 2 Ch. 66, which is founded on *Mayne* v. *Mayne*, [1897] 1 Ir. R. 324, 45 W. R. Dig. 176; *Hopkins* v. *Abbott*, 23 W. R. 227, L. R. 19 Eq. 222; Annual Practice, 1905, vol. 2, pp. 278, 308, 310.

Jenkins, K.C., and *H. Wright*, for defendants, daughters of testator's brother.

[FARWELL, J., referred to *Wilks* v. *Groom*, 4 W. R. 697, 3 Drew. 584; and *Perpetual Executors and Trustees Association of Australia* v. *Swan*, [1898] A. C. 763, 47 W. R. Dig. 204.

J. A. Simon, for another defendant, a nephew of testator, referred to Lewin on Trusts (11th ed.), p. 327, and *Cann* v. *Cann*, 33 W. R. 40, 51 L. T. 770.

FARWELL, J.—The testator was a solicitor, and he was a very old man when he made his will. I can obtain no assistance here from the usual intrinsic circumstances, or from putting myself in his arm-chair, because unfortunately the subject-matter of this particular dispute was not in existence at the time that he made his will. Nor is there any assistance to be derived from the inclination of the court to avoid intestacy, because it is not a case between testacy and intestacy, but between two gifts in the same will. Nor is there any assistance to be derived from the man's natural desire to provide for persons having a claim on him as compared with strangers, because it is a case between the children of his brother, the sons and daughters. I simply have the will as altered by the codicil. [His lordship here stated the will as set out above, and continued:] In 1897 the testator, having a large sum on current account, placed some of it on deposit with his bankers subject to ten days' notice of withdrawal. The total amount so standing on deposit amounted at his death to £5,750. The question is, Is that sum a "pecuniary investment," so that it passes under the specific gift in favour of the brother's sons and daughters? In my opinion it is not a pecuniary investment, but falls into residue. I think no one, in ordinary parlance, speaking of money which he puts on deposit account at his bankers at a short call like this—ten days—taking the usual banker's interest, which is 1 per cent. below bank rate, would treat himself as making an investment, or as investing in a mode which could be intended by him as an investment to be continued after his death by his trustees "in its present state of investment" within the meaning of those words. It is a little difficult to dogmatize about matters of this sort, and I quite feel the force of the observation that people do use the words "invest" and "investments" in very odd collocations. On the other hand, the rules of court distinguish between money on deposit and money invested; and certainly Kindersley, V.C., in *Wilks* v. *Groom*, when speaking of the cases in which a trustee is not liable for not investing moneys in his hands, distinguished between cases where he does not improperly omit to invest, where he does not mix the money with other moneys, and where he deposits the money with bankers on a separate account. In the same way in *Perpetual Executors and Trustees Association of Australia* v. *Swan*, Lord Macnaghten, in dealing with a colonial statute authorising money belonging to a trustee money to be placed with bankers on deposit on certain conditions, made a statement on p. 769 which I take to be a general statement applying to ordinary business men as to colonial legislators. He says: "The framers of the Act knew perfectly well the difference between depositing moneys with a bank and investing moneys on security." The distinction, to my mind, is really plain. The money which is deposited with your bankers awaits investment; the fact that it earns interest does not make it an investment. It is immaterial that it produces interest by being put on deposit. I think there is great force in the observation of counsel for the plaintiffs, that the fact that it earns interest cannot make it an investment, because it is quite within recent times—there may be some banks which do it even now—that banks have allowed interest on current accounts if they exceed a certain amount. The result is that in my opinion this sum falls into residue.

Solicitors, *Kendall, Price, & Francis; Harwood & Pusey; E. B. Titley*, Bath.

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

Chan. Div.
Warrington, J. } May 3.

In re APPLETON, FRENCH, & SCRAFTON (LIMITED). (*a*.)

Company—Winding up—Examination of directors—Allegations of misfeasance—Representation by solicitors and counsel—Jurisdiction as to costs of examination—Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 5—*Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 115.

The examination of officers of a company in liquidation under section 115 *of the Companies Act,* 1862, *is "a proceeding in the Supreme Court" within section* 5 *of the Judicature Act,* 1890; *and therefore the costs of the attendance of the witnesses, and of their being represented by solicitors and counsel, are within the discretion of the court, and may, if the court thinks fit, be ordered to be paid by the parties at whose instance the examination is heard.*

Summons.

This was an application by certain directors of a company, against whom a misfeasance summons had issued, asking that they might be allowed, in addition to their costs of the misfeasance summons, which had been allowed, the costs incurred by them on their examination under section 115 of the Companies Act, 1862.

In August, 1899, the respondents to the summons, Robert and Henry Adams (Limited), creditors of the company (which had gone into liquidation), and J. T. Wilson, a shareholder in the company, with other persons, issued a summons upon which an order was made in February, 1900, that the applicants to that summons might examine certain persons mentioned, among whom were the two directors, John W. Watson and Arthur Appleton, the applicants of the present summons, under section 115 of the Act of 1862, and that the applicants to that summons might have liberty to apply for leave to take proceedings under section 10 of the Companies (Winding-up) Act, 1890, after such examination was concluded as they might be advised.

Upon a summons issued subsequently by the applicants to the last summons (the present respondents), the present applicants attended for examination on three days in November, 1900, and their examination was made with reference to alleged acts of misfeasance, and to claims made against them for misfeasance amounting to more than £50,000. They were on these occasions represented by solicitors and counsel.

In July, 1902, a further summons was issued by the present respondents against Messrs. Appleton and J. W. Watson and others asking that the respondents to that summons might be declared liable to contribute the above-mentioned sums to the assets of the company as compensation for their misfeasance.

This summons was in July, 1904, dismissed with costs, but the costs of the present applicants at their examination were not dealt with.

Messrs. Appleton and Watson thereupon took out the present summons asking that the respondents might pay them their costs incurred in connection with their examination in November, 1900, and being represented thereat by their solicitors and counsel.

C. H. Sargant, for the applicants.—The court has a discretion to allow these costs under section 5 of the Judicature Act, 1890, as the examination was a proceeding in the Supreme Court. I admit that the jurisdiction of the court as to costs was not enlarged by R. S. C., 1883, ord. 65, r. 1: *In re Mills' Estate,* 35 W. R. 65, 34 Ch. D. 24. But the Judicature Act, 1890, was passed to give that result. The observations of the Lords Justices in *Ex parte Waddell, In re Lutscher,* 26 W. R. 9, 6 Ch. D. 328, show that they would have probably allowed costs in a case such as this, where proceedings were intended to be taken against the persons examined.

Martelli, for the respondents.—Section 115 provides for a tender of the "reasonable expenses" of a witness who refuses to attend. These expenses do not include fees to counsel, which are by implication excluded. *In re Grey's Brewery Co.,* 32 W. R. 381, 25 Ch. D. 400, decides that this examination is not a proceeding in a court of justice because it is an examination of a private character. If the directors examined were entitled to their costs of being represented by solicitors and counsel, why should not every witness be allowed the same. If officers of a company examined under section 115 are allowed such costs people will not dare to summon them, and the object of this provision of the Companies Act will be defeated. An examination under this section is similar to that held under the Bankruptcy Acts, where a witness is not allowed fees for being represented by solicitors or counsel: *Ex parte Waddell, In re Lutscher.*

WARRINGTON, J.—As regards the jurisdiction of the court to allow these costs, it seems to me that the only question I have to decide is whether the examination of the applicants was "a proceeding in the Supreme Court" within the meaning of section 5 of the Judicature Act, 1890. The examination took place under section 115 of the Companies Act, 1862, which provides that in the winding up of a company the court may summon certain persons before it for examination, and provides for enforcing the order against any person who refuses to come after tender of a reasonable sum for his expenses. That section contains no other provision as to the costs of the persons examined. And there is no express statutory provision as to how these costs are to be dealt with. Now, in my opinion the summons of August, 1899, the order of February, 1900, and the summons issued consequent upon that order, and the examination of the witnesses were all proceedings in the Supreme Court. It seems to me that they come within the express terms of section 5 of the Judicature Act, 1890, and that it is impossible to describe them in any other way. But it is said that in deciding in this manner I shall be going contrary to the case of *In re Grey's Brewery Co.* I think not. All that was decided there was that an examination of witnesses before an examiner under section 115 was not a proceeding before the judge within rule 9 of the General Order of November, 1862. It was not decided that the examination was not a proceeding in the Supreme Court. I think that it is such a proceeding. The next question is, ought I to exercise the discretion given me by section 5 of the Judicature Act, 1890, and determine that these costs or any part of them should be paid by the respondents. Now, I wish to say in the strongest terms that my decision is not to be a precedent for any other case. I deprecate any such result. I am deciding this case only. The examination of the applicants was held for the purpose of establishing, if possible, a case for proceedings which were not only contemplated against the applicants, but for taking which liberty was asked by the summons upon which the order for the examination was made. I quite see that an ordinary witness examined under section 115, as in the case of a bankruptcy, would not be allowed his costs of appearing by solicitors and counsel being paid out of the assets of the company. I have been referred to *Ex parte Waddell.* I do not intend to act contrary to the

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

judgments in that case. But there the learned Lords Justices were careful to guard themselves against being supposed to decide a case like that now before me. James, L.J., said: "This is not the case of a man who is charged with having property in his possession belonging to a bankrupt, and is summoned to give evidence respecting it. In such a case it might possibly be said that there was a litigation between him and the trustee, and that he was entitled to be protected by counsel." And Cotton, L.J., said: "Really the only question is, to what a witness, not being a person against whom any allegation is made with regard to the bankrupt's property, or against whom any proceeding is intended to be taken, but who is examined as a mere witness . . . is entitled as his reasonable expenses." I have here the very case to which the Lords Justices alluded. I think that I should be exercising my discretion wrongly if I did not visit upon the respondents the costs which they have occasioned to the applicants. I order the respondents to pay to the applicants the costs asked for in the summons.

Solicitors. *Crump, Sprott, & Co.*, for *Archer & Co.*, Stockton-on-Tees; *Jackson & Elwell*, for *James Inskip & Co.*, Bristol.

K. B. Div. (Kennedy, J.) March 30, 31; May 15.

COWES URBAN DISTRICT COUNCIL AND EAST COWES URBAN DISTRICT COUNCIL *v.* SOUTHAMPTON, ISLE OF WIGHT, AND SOUTH OF ENGLAND ROYAL STEAM MAIL PACKET CO. (LIMITED). (*a.*)

Ferry—Demise by Crown of ancient ferry rights across a river from vill to vill—Extent of such rights—Disturbance—Rapid development of neighbourhood—Rival service of steamboats—New traffic—Cowes Ferry Act, 1901 (1 *Ed.* 7, *c. lxxxviii.*).

The plaintiffs claimed an injunction and damages in respect of an alleged wrongful interference with their rights of ancient ferry and passage across the river separating East and West Cowes, which, in 1901, *the Crown demised to them. The defendants denied the plaintiffs' exclusive right of ferry or that they had interfered with it, and alleged that they carried a kind of traffic different to that carried or intended to be carried by the plaintiffs' ferry.*

Held, that as the traffic carried by the defendants might on the evidence fairly be treated as new traffic which had recently sprung up owing to the rapid development of the neighbourhood and other causes, and as the traffic of the ancient ferry was not a diminishing but an increasing and progressive traffic, the plaintiffs were not entitled to an injunction.

Held, further, that on the construction of the lease the right of ferry demised was only a right of ferry from one terminus to another, and was not therefore an exclusive right of ferry from vill to vill.

Quære, *whether East and West Cowes did not comprise too great an area to constitute "vills" between which the Crown could grant an exclusive right ef ferry.*

Further consideration of an action tried by Kennedy, J., at Winchester Assizes, in which the plaintiffs claimed an injunction to restrain the defendants from interfering with their right of ferry across the River Medina, between Cowes and East Cowes, in the Isle of Wight.

The plaintiffs claimed the exclusive ferry rights, alleging that they had been granted to them under a demise from the Crown dated the 13th of August, 1901, and submitted that the defendants, a steamboat company running services of steamboats between the Isle of Wight and the mainland, and having a pontoon at West Cowes and another at East Cowes, were wrongfully interfering with their rights of ferry by running launches between their pontoons in or near the line of ferry and carrying traffic, whereby the plaintiffs suffered loss.

The defendants by their pleadings denied the plaintiffs' exclusive right of ferry, or that the defendants had been guilty of any actionable interference with any right that the plaintiffs possessed, or that the plaintiffs had suffered any damage thereby. They said that the plaintiffs had merely been demised a right of ferry from one terminus to another—a highway ferry, which was distinguishable in law from a ferry from vill to vill; and, further, that both East and West Cowes respectively comprised too great an area to constitute a vill between which the Crown could grant an exclusive right of ferry. Moreover, the two termini of the defendants' service of steam launches were 230 and 870 yards respectively distant from the termini of the plaintiffs' ferry. They submitted that their ferry accommodated a new and distinctly different traffic from that which was worked by the old ferry, and was necessary for the convenience of the public. In 1867 the defendants purchased the pontoon at East Cowes, and commenced to run a steam launch to and from West Cowes to East Cowes in April of that year, and ever since that date they have regularly maintained a service of steam launches between the pontoons at West and East Cowes.

Foote, K.C., Clavell Salter, K.C., and *J. A. Sim*, for the plaintiffs.

C. A. Russell, K.C., H. J. H. Mackay, and *S. E. Emanuel*, for the defendants.

The facts and arguments sufficiently appear from the judgment.

The following cases were referred to: *Newton v. Cubitt*, 12 C. B. N. S. 32; *Hopkins v. Great Northern Railway*, 2 Q. B. D. 224, 25 W. R. Dig. 113; *Churchman v. Tunstal*, Hard. 162; *Payne v. Partridge*, 1 Salk. 12; *Peter v. Kendal*, 6 B. & C. 703; *Tripp v. Frank*, 4 T. R. 666; *Pim v. Curell*, 6 M. & W. 234; *Giles v. Groves*, 9 C. B. 26; *Hussey v. Field*, 2 Cr. M. & R. 432; *Mathews v. Peache*, 4 W. R. 22, 5 E. & B. 546; *Londonderry Bridge Commissioners v. M'Keown*, 27 L. R. Ir. 86, and on appeal 464; and on the rights and duties of a ferryman a passage from Blackstone's Com. (21st ed.), vol. 3, p. 218, 2 Rolle Abr. 140, was cited.

Cur. adv. vult.

May 15.—KENNEDY, J., read the following judgment: The plaintiffs in this action claim an injunction and damages in respect of an alleged wrongful interference on the part of the defendants with their right of ferry or passage across the River Medina, between East Cowes and West Cowes, in the Isle of Wight. The defendants deny the right, as claimed by the plaintiffs, and further deny that they have been guilty of any actionable interference with any right which the plaintiffs possess. I have to consider, in the first place, what the right of the plaintiffs is. Their title rests upon an indenture of lease, dated the 13th of August, 1901, made between the King's Most Excellent Majesty of the first part, John Francis Fortescue Horner, the Commissioner of Woods in charge of the Land Revenues of the Crown in the county of Hants, of the second part, and the plaintiffs of the third part. That indenture was made under the authority of the Cowes Ferry Act, 1901 (1 Ed. 7, c. lxxxviii.), which was

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

according to its title, "An Act to empower the Urban District Councils of Cowes and East Cowes to take on lease the existing Royal ferry across the River Medina between their respective districts and to work and manage the same and for other purposes." The indenture recites that his Majesty is entitled in right of his Crown to an ancient ferry across the River Medina between East Cowes and West Cowes; that there have been constructed upon such parts of the foreshore of the River Medina belonging to his Majesty in right of his Crown as are coloured red in the plan annexed to the indenture certain piers and landing-places; and that an agreement for the grant to the plaintiffs of a lease from the Crown of such foreshore, piers, and landing-places has been made between the Commissioner of Woods and the plaintiffs. The indenture then proceeds: "In pursuance of the said agreement, and in consideration of the yearly rent hereinafter reserved and of the covenants hereinafter contained, the said John Francis Fortescue Horner . . . doth demise and lease unto the said councils their successors and assigns all that ferry or right of passage across the River Medina between East Cowes and West Cowes in the Isle of Wight. . . . And also all those pieces of foreshore on each side of the said river, with the piers, hards, or landing-places erected or constructed thereon for the embarking and landing of passengers, animals, carriages, conveyances, and goods conveyed across the said ferry, which said pieces of foreshore are delineated and coloured red on the plan annexed to these presents." It appeared from the evidence adduced before me that the rights of the ferry, whatever may be their legal extent, have never in fact been exercised except between one point on the western and one point on the eastern bank of the Medina, although the points have not been in former times precisely the points at which the ferry is now worked. Before 1860 the ferry was worked by row boats, which plied between what were known as the Old Ferry Steps, a little to the northward of the present ferry stages. The ferry was, up to that time, managed by persons appointed by the governor of the island. Between 1860 and 1901, during which period the Cowes Ferry Co. (Limited) and the defendants successively had been lessees of the ferry, a floating steam-bridge and suitable landing-stages and accessory buildings had been set up or acquired by the lessees on the present site of the ferry, where the work of the ferry has since 1901 been conducted by the plaintiffs by means of the steam-bridge and also of rowing boats or barges. The plaintiffs contend that the demise and lease to them under the indenture of 1901 is a demise and lease of an exclusive right of ferry between any point on the east bank of the Medina and any point on the west bank of the Medina between East Cowes and West Cowes; and, therefore, that the defendants, who, as it will be necessary hereafter to explain more fully, have been and now are carrying passengers across the Medina in steam launches between points both of which are situated to the northward of the plaintiffs' steam-bridge, have thereby been guilty of an infringement of the plaintiffs' legal right. It is convenient to deal first with this broad contention.

Now, there is sufficient authority for the proposition that there may be a franchise of ferry "from vill to vill," as well as from highway to highway. "A ferry," said Coleridge, J., in *Matthews* v. *Peache*, 5 E. & B., p. 557, "may be granted in more or less extensive terms. If Doust could show a legal grant of the right of exercising a ferry from any landing place in the Isle of Dogs to any landing place in Greenwich, that, whether convenient or not, would be the extent of the ferry. That, however, would impose upon the owner of the franchise the obligation of keeping boats enough to carry passengers from all those points, and of maintaining such boats in repair." In the earlier case of *Hussey* v. *Field*, 2 Cr. M. & R., at p. 442, Lord Abinger, C.B., pronouncing the judgment of the Court of Exchequer, defined a ferry in these terms: "A public ferry, then, is a public highway, of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. The right of the grantee is in the one case an exclusive right of carrying from town to town; and in the other of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side." And in the leading case of *Newton* v. *Cubitt*, 12 C. B. N. S. 32, Willes, J., delivering the judgment of the Court of Common Pleas, which on appeal was adopted simply by the Exchequer Chamber in regard to the nature of a ferry, used this language (p. 58): "A ferry exists in respect of persons using a right of way, where the line of way is across water. There must be a line of way on land coming to a landing-place on the water's edge, or, where the ferry is from or to a vill, from or to one or more landing-places in the vill."

The first contention in the argument of the plaintiffs' counsel in this action is that West Cowes should be treated as a "vill" and East Cowes as a "vill," and that they have acquired a monopoly of ferriage across the Medina throughout the whole length of the River Medina so far as the banks of that river are within either district, and to construe the words "The Royal Ferry" in the Act of Parliament and the words "An ancient ferry" in the first recital of the indenture of lease to mean an exclusive right of this large extent. In my judgment this contention ought not to succeed. I feel considerable doubt as to whether either East or West Cowes, if treated as including the extensive area on either bank of the Medina, which the plaintiffs' contention requires, is a "vill" within the meaning of that legal term, as used in the judgments which I have cited: see Jacobs's Law Dictionary "vill," and Coke Littleton, 115*b*. I am inclined to think, looking at the maps which were put in evidence, that the area is on each side of the Medina rather a district than a "vill" and that it may justly be inferred from the observations of Maule, J., in reference to Mr. Cresswell's argument in *Pim* v. *Curell*, 6 M. & W. 21, and the language of Willes, J., in *Newton* v. *Cubitt*, 12 C. B. N. S., at p. 58, that the Crown could not make a valid grant of a monopoly of ferriage throughout such a district. Be this however as it may, it appears to me that the language of the indenture which I have quoted ought naturally to be construed in the more restricted sense for which the defendants contend—namely, as giving to the plaintiffs the right of ferry at the point where the steam-bridge now is. I can see nothing to modify or alter my view as to the meaning of this language in other portions of the indenture, and the portions of the Act of Parliament to which Mr. Clavell Salter properly called my attention. The actual user makes for the same view. There is no evidence of any royal right of ferry ever having been exercised except between one point on the West Cowes and one point on the East Cowes, bank of the Medina, substantially, although, as I have already stated, in reference to the position of the Old Ferry stairs or steps, not precisely where the ferry is now and was at the date of the indenture of lease. I think that this wording of the lease is perfectly appropriate to the demise of such a ferry, as it has always been in actual use.

I now come to the consideration of the second contention of the plaintiffs. This is that the plaintiffs,

even if their ferry rights are as limited as I hold them to be, are entitled to recover in this action against the defendants because the defendants have been guilty of an unlawful disturbance of their rights, by reason, to borrow the language of Willes, J., in *Newton* v. *Cubitt*, of the proximity of the new passage across the water to the ancient ferry. The facts material to the consideration of this contention are these: The defendants have a landing-place on the West Cowes bank at a distance of 875 yards to the northward from the plaintiffs' landing-place on the same bank. They have a landing-place on the East Cowes side, which is 230 yards to the northward of the plaintiffs' landing-place on the East Cowes bank. The East Cowes landing-place is the private property of the defendants; the public has a right to access to the river along a small portion of the defendants' landing-place on the western bank. The defendants own a number of steamers which carry passengers to and from places on the mainland, from and to the West Cowes landing-place, and also to the Victoria Pier, to which I shall have to refer later. For the use in the first instance of their own passengers, whether going thence to East Cowes or going from East Cowes by the defendants' steamers to the mainland, the defendants have now, and at the time of the passing of the Cowes Ferry Act, 1901, had a service of steam launches plying between the termini which I have described. This cross-river traffic was begun many years before 1901, at a time when the defendants were also working the ancient ferry as assignees of the Cowes Ferry Co. From the first, however, the defendants did not limit the use of the launches to persons who had come to Cowes or were intending to leave Cowes for the mainland by the defendants' steamers. From the commencement on payment of a fare of one penny anyone could cross the river on the defendants' steam launch. As the defendants' West Cowes pier was half a mile nearer the seaside and more fashionable part of West Cowes than the steam-bridge, it offers greater convenience to persons residing in or visiting that portion of the district, and the eastern landing-place is somewhat more convenient in point of distance for persons living in or visiting Osborne and the northern part of East Cowes. Again, the West Cowes railway terminus is near the defendants' West Cowes landing-stage, and as arrangements are established for the carriage of luggage between the two places a passenger for East Cowes, arriving at the terminus, who would otherwise have to go about half a mile with his luggage to the plaintiffs' steam-bridge, naturally prefers the defendants' steam launch. But undoubtedly the largest supply of passengers, other than those who travel or intend to travel by the defendants' steamers who use the steam launches is contributed by the summer visitors, who in recent years have been brought to Cowes in very large numbers by excursion steamers not owned by the defendants, especially since the erection, I think in March, 1902, but at all events between 1900 and 1902, somewhat to the north of the defendants' West Cowes landing-place, of the Victoria Pier, where these steamers, as well as some of the defendants' steamers, discharge their passengers. In the year 1904 24,833 persons landed from steamers at this pier, of whom between one-fourth and one-fifth were brought there by the defendants' vessels. This passenger traffic has evidently increased greatly, and has been stimulated, I was informed by the witnesses, especially by the opening of Osborne to visitors, and the establishment of the Royal Naval College at Osborne has also added to the number of those to whom the defendants' ferry is a great convenience. Lastly, it has been utilized by the Post Office in order to effect a material saving in time in regard to the transmission and delivery of some of both local and mainland mails. In order to accommodate the cross-river traffic to which all the above-named sources contribute, the defendants run their steam launch between their landing-places in the Medina according to a published time-table, which is framed principally so as to provide suitably for their own arriving and outgoing steamers. But the railway time-tables, as I understand, are also considered, and in August and September, 1904, an additional launch ran half-hourly between noon and 6.30 p.m. Until this launch was advertised the plaintiffs had raised no objection to the defendants' ferry, and the service of this additional launch was discontinued after September, 1904. The condition of the plaintiffs' steam-bridge ferry appears to be this: Its traffic, which includes vehicles as well as foot passengers, has been throughout progressive; on some few occasions there has been even that which one witness called a "glut" of traffic, owing, I gather, to a special press of vehicles. Generally, as I infer from the evidence, the steam-bridge, with its accessory tow boats, provides in an adequate manner for the wants of persons coming to the ferry, and it could, I should suppose, have carried some, perhaps very many, of the defendants' ferry passengers across the Medina if they had disregarded their own convenience and gone out of their way to follow the steam-bridge route. In this state of things ought I to hold that the defendants have been guilty of an actionable disturbance of the plaintiffs' right of ferry, and that the plaintiffs are entitled to the remedy which they seek in this action by obtaining an injunction in respect of the carriage of passengers across the Medina or, at all events, according to the concession which the plaintiffs' counsel stated at the hearing of the argument that his clients were willing to make, an injunction as to the carriage of all passengers except those who may be described as "through" passengers—that is to say, persons who are carried across the Medina as part of a continuous transit between East Cowes and the mainland, the rest of which has been performed, or is to be performed, on board one of the defendants' steamers? So far as legal principle is involved in finding the right answer to this question, there is nothing to be gained from the cases beyond what appears in the judgment in *Newton* v. *Cubitt*, which I have already cited, and the judgment in *Hopkins* v. *Great Northern Railway Co.* In the earlier case Willes, J., said: "The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable it is not easy to decide. It seems reasonable to infer that if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway." In the latter case Mellish, L.J., delivering the judgment of the Court of Appeal (Lord Coleridge, C.J., Mellish, L.J., and Brett and Amphlett, JJ.A.), said on pp. 231 and 232: "They" (the authorities) "establish that although it has been laid down in a very early case—'If I have a ferry by prescription, and another erects another ferry on the same river near to it by which my ferry is injured, that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I shall be grieviously amerced'; and there are other authorities to the same effect. Yet is does not necessarily follow, as a matter of law, that because a new ferry diverts some of the traffic from an old ferry it is actionable, and it may be that no action can be maintained in respect of the new ferry, if it has been

set up *bonâ fide* for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry." Applying the principles which I understand to be laid down by these judgments to the facts of the present case, I am of opinion that my judgment in this action must be for the defendants. Their line of ferry is at neither terminus identical with the plaintiffs' ancient ferry, differing in this respect, I may point out, from all the cases up to and including *Newton* v. *Cubitt* which have been brought to my notice. It is at the western, the more important end, nearly half a mile distant from the ancient ferry. I have as regards local circumstances credible, and indeed strong, evidence adduced before me that, apart from the advent of the railway to West Cowes and the position of the terminus on that side, and apart from the establishment of the Royal Naval College and the opening of Osborne to visitors on the other side, there has grown up and now exists in West Cowes, to the west and north of the defendants' ferry, a number of residents and visitors who could not without considerable inconvenience lose the advantage of that ferry, such persons as before its commencement used occasionally at least to hire watermen's boats in order to cross the Medina on account of the inconvenience and delay which would be involved in going southward for half a mile to the line of the ancient ferry.

I find that there has been in recent years a considerable change of circumstances and a new condition created by the growing development of excursion traffic and the building of the Victoria Pier, which places annually thousands of visitors upon the shore of the Medina near to the defendants' ferry and at such a distance from the line of the ancient ferry that to those of them who wish to go by that ferry to East Cowes it would necessarily involve considerable inconvenience and waste of time, and in some cases at least a waste of money also. I find that the traffic from all these sources passing over the Medina by the defendants' steam launches may fairly be treated as a new traffic, for the traffic on the ancient ferry is at the same time, if I understand the evidence right, not diminishing, but an increasing and progressive traffic. I give my judgment for the defendants.

Solicitors for the plaintiffs, *Clerkson, Greenwells, & Co.*, for *Damant & Co., Cowes.*

Solicitors for the defendants, *Sandford & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 7.

MOERING AND ANOTHER *v.* LONDON AND NORTH-WESTERN RAILWAY CO. (*a.*)

Railway—Carriage of goods—Intent to avoid payment of "tolls"—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 98, 99.

By sections 98 *and* 99 *of the Railways Clauses Act,* 1845, *the owner of goods passing or being upon the railway is bound on demand to give an account, and if he gives a false account with intent to avoid the payment of any tolls in respect thereof he is liable to a penalty.*

Held, that under the above sections no express demand is necessary where there is evidence that there was an implied demand, that it is not necessary that the goods should be on the railway at the time the demand is made, and that the sections apply to cases where the railway company themselves are acting as carriers.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Case stated.

These informations were preferred by the respondents under the Railways Clauses Act, 1845, ss. 98 and 99, charging the appellants for that they, on the 7th of July, 1904, at Broad-street Goods Station, being the persons having the care of certain goods—to wit, leather goods, brushes, toys—passing upon and being on the London and North-Western Railway, did unlawfully give to the respondents' collector of tolls a false account of the said goods, with intent thereby to avoid payment of the tolls in respect of the said goods contrary to the statute.

Upon the hearing of the information the following facts were proved or admitted: The appellants had for many years carried on business as carriers, and as agents for importers of goods from the Continent, and had for many years sent goods for conveyance by the respondents' railway.

The practice of the parties in these transactions is as follows: The appellants made out consignment notes containing (*inter alia*) the description of the goods sent, and delivered the notes by their carmen to the respondents' servant at the goods station where the goods were received for conveyance. Unless consignment notes duly filled up were sent the respondents declined to receive the goods sent for conveyance, and this fact was well known to the appellants. The rates charged by the respondents for conveyance of goods varied in amount according to the nature of the goods conveyed, as the appellants knew. On many prior occasions on which the respondents had complained of goods being misdescribed in consignment notes, the appellants had paid on demand a higher rate, or the difference had been mutually arranged between the parties.

On the 7th of July, 1904, the appellants' carman delivered at Broad-street Station three cases containing goods for conveyance by the respondents' railway to Birmingham, and at the same time the carman handed to a servant of the respondents three consignment notes, on all of which, under the article, there was entered the word hardware. The consignment notes were not signed by the appellants. The goods in the three cases were in fact respectively leather goods, brushes, and toys, and the appellants in describing the goods on the consignment notes as hardware intended to avoid payment of the rates which the respondents were entitled to charge for the carriage of leather goods, brushes, and toys, which rates exceeded the rate for hardware, and the appellants so described the goods in order to secure their conveyance at a lower rate per ton than if they had been described according to their true description, and the appellants thus gave a false account of their goods.

The respondents had a credit account with the appellants, and in the ordinary course of business the amount due from the appellants for the conveyance of the cases to Birmingham was entered in the respondents' books in accordance with the consignment notes as if the cases had contained hardware, and an account of the entries and charge was afterwards delivered to the appellants. The three cases were in the ordinary course conveyed to Birmingham; it was then discovered by the respondents that none of the cases contained hardware.

On behalf of the appellants it was contended that under sections 98 and 99 of the Railway Clauses Act, 1845, the appellants were not liable to any penalty unless the respondents had first, in accordance with the sections, made a demand upon the assignor for an account of the goods, and that the respondents in the present case had made no such demand, and that the informations should therefore be dismissed.

On behalf of the respondents it was contended (1) that as regards the offences alleged in the informations it was not necessary for the railway company to make any such demand, and (2) that, if any such demand was necessary, the fact (in accordance with the well-known practice, and well known to the appellants) that the goods would not have been received by the respondents unless a consignment note containing the necessary particulars had been handed to the respondents with them constituted a sufficient demand within the meaning of the section. The magistrate was of opinion that it was necessary that a demand should be made for the amount and that no specific demand had been made in either of the three cases, but he was further of opinion that the demand was satisfied by the general requirements, according to the ordinary course of business, that the consignors should hand to the respondents the consignment notes stating, among other particulars, what the cases contained, and that the delivery by the appellants and the taking by the respondents of the consignment notes under the circumstances mentioned showed that a demand had been made by the respondents sufficient to comply with the requirements of the statute, and he convicted the appellants.

The questions of law for the opinion of the court were (1) whether it was necessary for the respondents to prove that they had made a demand for the account of goods delivered to the respondents; and (2) if a demand was necessary, whether in the circumstances the magistrate was right in holding that the respondents had made a demand for the amount sufficient to comply with the requirements of sections 98 and 99.

By section 98 of the Railway Clauses Act, 1845, "Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall on demand give to the collector of the tolls at the places where he attends for the purpose of receiving goods or collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by such carriage, of the point on the railway on which such carriage or goods have set or are about to set out, and at what point the same are intended to be unloaded or taken off the railway; and if the goods conveyed by any such carriage, or brought by carriage as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls."

By section 99: "If any such owner or other such person shall fail to give such account, or to produce his waybill or bill of lading to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload or take off any part of his lading or goods at any other place than shall be mentioned in such account with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company a sum not exceeding ten pounds for every ton of goods, or for any parcel not exceeding one hundredweight, and so in proportion for any less quantity of goods than one ton or for any parcel exceeding one hundredweight (as the case may be) which shall be upon any such carriage, and such penalty shall be in addition to the toll to which such goods may be liable."

Danckwerts, K.C. (*Kays* with him).—There was no demand here. It is admitted there was no express demand, and the alleged implied demand was not made when the goods came on the railway as required by section 98. Further, sections 98 and 99 do not apply to cases where the railway company itself carries the goods. The word "toll" in the section means a payment for goods carried by the railway company in a truck belonging to the owner of the goods. That was the meaning placed upon the word "tolls" in section 97 in *Wallis* v. *London and South-Western Railway*, 18 W. R. 337, (1870) L. R. 5 Ex. 62, and the word bears the same meaning here.

He also cited *Brown* v. *Great Western Railway Co.*, 30 W. R. 214, 9 Q. B. D. 744.

Shearman, K.C., and *Grain*, for the respondents, were not called upon to argue.

Lord ALVERSTONE, L.C.J.—I have no doubt whatever that the decision of the magistrate in this case was right. The appellants being the persons having the care of goods knowingly gave a false account to the railway company for the purpose of getting the goods carried at a lower rate. I doubt whether it is necessary to prove any demand for an account in a case in which a false account has been actually tendered, but in the present case the magistrate has found as a fact that the goods would not have been received by the railway company unless the consignment note had been delivered with them. There was, therefore, what is really an implied demand, and I agree with the view taken by the magistrate that that was a sufficient demand to satisfy the requirements of sections 98 and 99. For reasons which I will state in a moment it is not, in my opinion, necessary that the goods shall be on the railway at the time when the false account is given.

It was further contended on behalf of the appellants that the conviction was wrong on the ground that the word "tolls" in sections 98 and 99 is used in what may be called its limited meaning and does not apply to cases where goods are to be carried by the railway company as carriers. These two sections form part of a group of sections, Nos. 86 to 107, and no doubt in some of the sections the word "tolls" is used in the limited sense while in others a more extended meaning must be given to the word, and I refer also to the interpretation clause (section 3) which shows that the word "tolls" may be used in the wider sense as including any rate or charge payable for goods conveyed on the railway. I agree also with Mr. Danckwerts that "rates and charges" is the technical expression which was ordinarily used before 1845 and since with regard to the carriage of goods by a railway company. The question which we have to consider is whether the word "tolls" in sections 98 and 99 applies only to the case of persons using a railway for the carriage of their goods in their own wagons or trucks or of one railway company running their trucks over the lines of another company under running powers or by agreement. It would be curious if these sections were thus limited, but that, of course, would be no answer if the point is made good. What are the words of section 98? "Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall on demand give to the collector of tolls at the places where he attends for the purpose of receiving goods." I pause there to point out that if the word "tolls" is to have the limited meaning contended for, the man who collects the tolls never does receive the goods at all. He might possibly in some cases be said to receive the truck containing the goods, but even that would be giving the words a somewhat strained construction; but in a case where one railway company runs its own engine and trucks over the lines of another company under the running power clause it is not true to say that the collector of tolls receives even the truck. Therefore it is quite

plain to my mind that the opening words of section 98 contemplate a case in which the person going to collect the money receives goods which are brought for the purpose of their being carried by the railway company. But the other words of the section confirm this view. The owner of the goods is to give "an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage." I quite agree that the words "conveyed by any such carriage" are mainly applicable to the case of a person bringing a truckload of what is called mixed consignments of goods. But when one comes to the concluding words of the section the meaning of the earlier words is made still more clear. They are "and if the goods conveyed by any such carriage or brought for conveyance as aforesaid be liable to the payment of different tolls then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls." That, in my opinion, clearly points to the position of a person who brings goods for conveyance which are liable to different tolls, meaning thereby different rates of charge. A point was taken by Mr. Danckwerts that under these words all the information that the railway company are entitled to demand by the account is the number or quantity of the goods; that there is no obligation to give a description of the character of the goods, and that therefore the false description of these goods in the consignment notes was mere surplusage. In my opinion that is not the meaning of the words. If the consignment was a mixed parcel, a statement that there were so many barrels and so many cases without specifying the contents would not inform the company whether the goods were liable "to each or any of such tolls." Therefore not only the number or quantity, but also the character of the goods must be stated, though, of course, this would apply to tolls in the narrower sense, because tolls vary according to the character of the goods as well as rates and charges. In my opinion section 98, when construed fairly and reasonably, is one of the sections in this group in which the word "tolls" is not used in the narrower sense contended for by Mr. Danckwerts, though there are no doubt some sections in which the word is used in that sense only—for example, section 94, the milestone clause; and the same thing must be said of section 97, having regard to the decision in *Wallis* v. *London and South-Western Railway Co.* But I wish to add with regard to that case, that though it is binding authority on us in this court with regard to section 97, I do not think the decision has any application to section 98, and if the same point were to come up for decision in the Court of Appeal the question will have to be considered whether the decision in *Wallis's case* was right. I have dealt with this argument as to the meaning of the word "tolls" in section 98, though the point was not taken before the magistrate; but as the question is one of law which arises on the facts stated in the case we should, if the point had been a good one, have given effect to it. In my opinion this appeal must be dismissed.

KENNEDY, J.—I am of the same opinion, and I confess that, with all deference to the interesting and ingenious argument which we have heard, this seems to me to be a very clear case. The subject of the proceedings against the appellants was the dishonest sending of goods by rail under a misdescription, the object being to pay a less sum for the carriage of the goods than would have had to be paid if the goods had been correctly described. The point which was raised at the hearing, as appears from the case, was that whereas sections 98 and 99, which create the offence, require that there shall be a demand for the account, the prosecution had failed to prove that there had been any demand which the magistrate was entitled to treat as satisfying the requirements of the statute. The magistrate held that a demand was necessary and that in the circumstances of the case there had been a sufficient demand because according to the usage of business well known to the appellants the railway company required the production of an account similar to that which is here impeached before the goods would be accepted for carriage. With regard to the question as to the necessity for a demand I have no doubt that where proceedings are taken against a person for failing to give an account it would then be necessary to prove a previous demand because it would be most unreasonable and unjust that the mere failure to deliver an account should render a person liable to a penalty if there had been no request for it. But section 99 goes on to say "or if he gives a false account," and speaking for myself I am not prepared to say that where a false account is in fact delivered the offence is not complete without proof of a previous demand; it seems to me unreasonable to say that there must be an express demand if the necessity or indeed the opportunity for it is taken away by the act of the person bringing the goods to the railway company, as it is when without waiting to be asked for an account he says in effect, "Here is the account required by law." To say that in that case if the account proves to be false the absence of a demand would prevent a man from becoming liable to a penalty under section 99 is to my mind to give an unreasonable construction to the section and one not warranted by its language.

With regard to section 98 it seems to me that it would have been difficult to find words which more aptly apply to the circumstances of this case. This section speaks of the collector of tolls attending at a place for the purpose of receiving goods, of the goods brought for conveyance, and refers to the possibility of the goods being liable to pay different tolls. The interpretation clause says that the expression "tolls" shall include rates and charges, and although there may be some sections in which the word is used in a narrow sense, I think that these expressions found in section 98 are just as applicable to the case of goods which are to be conveyed by the railway company as carriers as to the case of the sender using his own trucks for the purpose of conveying the goods. I think that it is impossible to say that the account referred to in sections 98 and 99 is required only for the proper adjustment of tolls proper, it is equally required in the case of the payment of rates and charges for the carriage of goods by the railway company. For these reasons I am of opinion that the conviction in this case was right.

RIDLEY, J.—I am of the same opinion. With regard to the finding of the magistrate that a demand was necessary I am not satisfied that in the events which happened in this case, where the appellants have given a false account, it was necessary to prove a specific demand. I am not prepared to say that I agree with the decision of the magistrates on that point. On the other points I agree with the judgments which have been given, and I do not think that I can usefully go over the ground again.

Appeal dismissed.

Solicitors for appellants, *Goldberg, Barrett, & Newall.*

Solicitors for respondents, *C. de J. Andrewes.*

Prob. Div. & Adm. Div. Divorce. } May 20.

SHEPPARD v. SHEPPARD. (a.)

Divorce—Costs, wife's—Summary Jurisdiction (Married Women) Act, 1895—Matrimonial Causes Act, 1857, s. 26—Practice.

The Court held that the decision in In re Wingfield & Blew, [1904] 2 *Ch.* 665, *did not affect the question of providing a wife with adequate means for fighting a case in the Divorce Court in accordance with its usual practice.*

This was a summons adjourned into court for further argument.

The petitioner, Elizabeth Sheppard, obtained a separation order from the Brentford justices under the Summary Jurisdiction (Married Women) Act, 1895, £2 per week being ordered for her maintenance. That order was made on the 16th of July, 1902.

In March, 1904, she filed a petition for dissolution.

The hearing of the case was postponed through the exigencies of the business of the court, and a sum of approximately £90 had been incurred above and beyond the amount which had been secured.

On the 10th of April a summons was taken out for further security, but the registrar refused to make the order on the ground that the decision in *In re Wingfield & Blew*, [1904] 2 Ch. 665, governed the present application.

Kemp, K.C., and *Faussett*, for the petitioner.

C. E. Jones, for the respondent.

BARNES, P., in delivering a considered judgment, said that this was a case, in which Mr. Registrar Pritchard had refused to tax costs and to order further security for the wife. That decision had been appealed from, and he (the learned President), in chambers, had ordered that the costs should be taxed and further security given. He had given leave to have the matter adjourned for rehearing in court, as he had thought it of sufficient moment to consider it there. In reviewing the evidence, the President observed that on the 1st of November, 1904, an order had been made by which the respondent was to pay the petitioner's solicitors £22 14s. 2d. and to secure £30. The case had come into the daily cause list, but, owing to the exigencies of the business of the court, it had to stand over. The security not being adequate to bring the suit to trial this term, an application had been made to the registrar, who, feeling bound by the decision in *In re Wingfield & Blew*, [1904] 2 Ch. 665, refused the order. The registrar's decision having been appealed from, the point made in the husband's favour was the language employed in section 26 of the Matrimonial Causes Act, 1857, and the decision in *In re Wingfield & Blew*. The 26th section is as follows: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use; provided also that nothing shall prevent the wife from joining, or at any time during such separation, in the exercise of any joint power given to herself and her husband." And the head-note in *In re Wingfield & Blew* is: "Section 26 of the Matrimonial Causes Act, 1887, absolutely puts an end to the right of a wife who has obtained a decree of judicial separation to pledge her husband's credit or to contract on his behalf during the continuance of the judicial separation, except where alimony has been decreed and has not been fully paid. Consequently, so long as the husband duly pays the alimony which he has been ordered to pay, the wife has no power to pledge his credit for necessaries which the alimony could not have been reasonably supposed to cover, as where the wife has been put to expense by the misconduct of the husband, and the principle of *Turner* v. *Rookes*, (1839) 10 Ad. & E. 47, 50 R. R. 320, no longer applies." It was argued on behalf of the husband in the present case that his wife, having a separation order, was a *feme sole* and could not obtain help from him to further litigation brought about by his misconduct. Warrington, J., had held in *In re Wingfield & Blew* that the husband was liable for the costs as between solicitor and client in the second divorce suit. His decision had, however, been reversed by the Court of Appeal, whose judgment amounted to this—that when a wife was placed in the position of a *feme sole* she could not pledge her husband's credit so long as he duly paid her what had been ordered, and that the extra costs which she had incurred in the second divorce suit had not been incurred on her husband's credit. It had been argued in this case that therefore no security for the wife's costs could be ordered by this court. There were two points to consider—(1) whether *In re Wingfield & Blew* decided the present question, and that was a point of law; and (2) whether the proviso in the 26th section had been complied with—which was a question of fact. In his opinion the decision in the Court of Appeal did not govern the question now before the court. It was immaterial whether the suit was by a husband or a wife; in either case it was the practice of this court that a wife, unless she had separate estate of her own, should be placed in a position to fight her own case; otherwise she might be the victim of a miscarriage of justice. It had been further argued on behalf of the husband that the practice of the court was no longer applicable since the decision of the Court of Appeal. But that decision did not really touch the question of providing a wife with adequate means of fighting her suit, which was a question for the discretion of this court. It was impossible to do justice in cases of this kind unless the wife was in possession of funds with which to fight her case and unless the court had the power to say that the wife should be so provided. But the practice of this court went further. For in cases of nullity brought by the wife by reason of her husband's bigamous marriage—cases in which a decree of this court had no operative effect, but was merely a record, and where in strictness there was no necessity for a suit of nullity at all, although a decree was perhaps of great convenience—this court would order security for the wife, who in law was no wife and had no common law authority to pledge her husband's authority. He did not believe that the Court of Appeal, in deciding *In re Wingfield & Blew*, had the slightest intention to overrule the practice of the court. If that practice was to be overruled it would be a very serious matter. For in many of these cases of separation orders the order had been granted to the wife by reason of the husband's cruelty. In nearly all the cases the wife was in very poor circumstances and possessed of no money but what she had to live upon. The husband, having committed the adultery, placed her in a

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

position to sue for a dissolution of her marriage; it would be a very serious matter if she could not be secured, and it was not his view of the law. But, further, *In re Wingfield & Blew* only dealt with solicitor and client and not with party and party costs, and in his judgment that case did not touch the present one. He felt completely bound by the decision of the Court of Appeal. The language of the section was very strongly worded, although he did not know whether the second point—the proviso in the section—had been brought to the notice of that court. Here the affidavits put in showed that the husband had been continually in default. He had been summoned some ten or twelve times for non-payment, and at the date of the institution of the suit he was three weeks in arrear. The order, in fact, had not been complied with, and he had no doubt that it had become inoperative. He found, both on law and on fact, that the matter must go back to the registrar to be considered whether further security should be ordered, and that the bill be taxed up to the trial. Leave to appeal would be granted provided the sum of fifteen guineas were brought into court within a fortnight. The appeal was not to delay the trial of the suit.

Solicitor for petitioner, *Charles Robinson.*

Solicitor for respondents, *C. C. Sharman.*

House of Lords.

From C. A. (England). April 14.

HOULDER LINE (LIMITED) *v.* GRIFFIN. (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Seaman—Ship in dock—Factory Act, 1895 (58 *&* 59 *Vict. c.* 37), *s.* 23, *sub-section* 1 (*v.*) (b)—*Workmen's Compensation Act,* 1897 (60 *&* 61 *Vict. c.* 37), *ss.* 1 *and* 7.

A sailor working as such on a ship afloat within a dock is not a workman entitled to the benefit of the Workmen's Compensation Act, 1897.

Decision of the Court of Appeal (52 *W. R.* 323, [1904] 1 *K. B.* 510) *reversed* (Lord James of Hereford *dissenting*).

Raine *v.* Jobson, 49 *W. R.* 705, [1901] *A. C.* 404, *distinguished.*

Appeal from the decision of the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.J., Mathew, L.J., dissenting).

The agreed statement of facts was substantially as follows:

The applicant, Elizabeth Ann Griffin, is the widow and administratrix of Edward Latimer Griffin, deceased. The deceased was an able seaman, and on the 21st of November, 1902, he signed articles at Liverpool to serve on board the respondents' steamship *Royston Grange* as an able seaman upon a voyage from Liverpool, where the ship was then lying, to the River Plate and back to this country. The deceased duly joined the ship pursuant to the articles on or about the 22nd of November, 1902, and sailed in her from Liverpool to Newport, Monmouth, at which port the vessel called to take in her bunker coal for the voyage. The vessel arrived in the Alexandra Dock, Newport, on the 24th of November, 1902, and at midnight on the 28th of November she had finished receiving her bunker coals, and was moved out to the buoys in the docks preparatory to proceeding to sea on the following morning. Whilst engaged clearing up the No. 5 hold on the said 29th of November, 1902, a piece of dunnage wood known as a "tom," and used for the purpose of supporting a deck beam when heavy weights were stowed above, was knocked down by a fellow-servant of the deceased, and fell across his ankle and instep, causing a fracture of the ankle and instep which necessitated an operation.

The voyage upon which the deceased signed articles ended upon the vessel's arrival in London on the 3rd of March, 1903.

At the hearing of the arbitration, the judge of the City of London Court decided that the deceased was a seaman and engaged on a seaman's work at the time of the accident, and therefore not a workman entitled to the benefit of the Act. The majority of the Court of Appeal reversed this decision.

Carver, K.C., and *Dawson Miller,* for the appellants, referred to *Wrigley* v. *Whittaker & Sons,* 50 W. R. 656, [1902] A. C. 299, and *Francis* v. *Turner Brothers,* 48 W. R. 228, [1900] 1 Q. B. 478. The deceased was engaged in ordinary seaman's work on a ship, and the Act does not apply. The test is the character of the act, and the shipowner was not occupier of the dock in the sense intended by the Act.

Robson, K.C., and *G. A. Scott,* for the respondent.

They cited *Raine* v. *Jobson,* 49 W. R. 705, [1901] A. C. 404; *Cattermole* v. *Atlantic Transport Co.,* 50 W. R. 129, [1902] 1 K. B. 204; *Bartell* v. *Gray,* 50 W. R. 310, [1902] 1 K. B. 225; *Merrill* v. *Wilson, Sons, & Co.,* 49 W. R. 161, [1901] 1 K. B. 35.

Carver, K.C., replied.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—An accident causing death happened to a sailor while on board his ship while he was engaged in his ordinary work as a sailor, and the shipowner is sought to be made liable as an "undertaker," because the ship was afloat in a dock waiting to go to sea.

The employment of a sailor is not one of the employments to which the Act applies, but it is argued that because the injured man was on board a ship which was floating in a dock the shipowner was the occupier of a dock, and as such was an undertaker within section 7 of the Workmen's Compensation Act.

I do not think that the shipowner was in any intelligible sense the occupier of the dock because his vessel was in the water surrounded by the structure of the dock.

Although the extraordinary jumble whereby a ship becomes a factory and becomes a dock because it is a factory, and so the shipowner becomes an undertaker, seems to me to be a *reductio ad absurdum,* it appears to have prevailed, and induced the Court of Appeal to reverse the judgment of the county court judge.

I cannot agree with that judgment. I entirely agree with Mathew, L.J., who dissented. It appears to me that the court was misled by the case of *Raine* v. *Jobson*; but in that case the persons sought to be made responsible, and held to be responsible, were persons who had hired the dock for the purpose of repairing a vessel; and, whether there was a vessel in it or not, they were liable if a workman met with an accident in that dock while engaged in working there. The court there proceeded upon the assumption that the then defendants were in the use and occupation of a dock which they had hired, and the fact that there was the wooden structure of a ship in it being repaired did not prevent the application of

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the section which rendered the occupiers of a dock the occupiers of a factory within the meaning of the Act. If in that case the then defendants had the actual use and occupation of the dock, as they clearly had, it was impossible to deny that they were "the undertakers." This is a totally different case, and does not come within the meaning of that decision.

I move your lordships that the judgment be reversed, and the decision of the county court judge restored.

Lord MACNAGHTEN.—The question in this case is whether, under the Workmen's Compensation Act, 1897, an employer is liable to pay compensation in the case of a seaman who meets with personal injury by accident arising out of and in the course of his employment while serving afloat and engaged in the ordinary duties of his calling, if at the time when the accident occurs his ship happens to be in a dock. The majority of the Court of Appeal (Mathew, L.J. dissenting) have held that in such a case the liability of the employer is to be found in the Act.

The facts which have given rise to the present question and the ground of the decision of the Court of Appeal are stated concisely by the Master of the Rolls in the case of *Owens* v. *Campbell* (*Limited*), 52 W. R. 481, [1904] 2 K. B. 60. "The ship," said his lordship, "was in a dock, and a seaman belonging to her was employed, as part of his ordinary duty, in clearing out a hold for the reception of cargo, and he met with an accident while so employed which resulted in his death. A majority of this court decided, on the authority of *Raine* v. *Jobson*, that the fact that the deceased was a seaman did not exclude him from the operation of the Act, and that the case fell within its provisions." With all deference to the Court of Appeal, I cannot help thinking that they have somewhat misapprehended the decision of this House in *Raine* v. *Jobson*, and so have been led to misconstrue the Act of 1897. The question is not, I think, whether seamen are excluded from the Act—whether, as the Master of the Rolls puts it in this case, there is "a special exclusion of sailors"—but rather whether seamen are within the contemplation of the Act at all. Nobody ever supposed that the Act was intended to apply to seamen as seamen. Seamen belong to a wholly different class from the class of men intended to be protected by the Act. They work under different conditions—they are the care of a different department—they are the subject of special legislation. A ship has so little in common with the places to which the Act of 1897 extends that one cannot doubt that ships and sailors would have been specially mentioned if the Act had been intended to include or affect them.

The case before your lordships really depends on the question whether the employment in which the injured man was engaged was an "employment to which" the "Act applies." The Act applies "only to employment by the undertakers as . . . defined on, in, or about" certain specified places, among which is included "a factory." "Factory" includes "any dock . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." As defined in the Act "undertakers . . . means . . . in the case of a factory . . . the occupier thereof within the meaning of the Factory and Workshops Acts, 1878 to 1895." The Factory Act, 1895, declares that "the person having the actual use or occupation of a dock . . . or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory." Now it seems to me to be pretty clear, upon the true construction of these somewhat singular provisions so curiously pieced together, that the shipowner in the present case was not the occupier of the dock where his ship was lying afloat, or of any premises within the same or forming part thereof. It is, I think, plain that by the expression "dock" in the Factory Act, 1895, is meant the solid structure and body of the dock, not the water space within its limits. A corresponding meaning must be given to the word "premises." I do not think that a ship lying in a dock, whether afloat or not, can be included in the description of "premises within the same or forming part thereof." It follows, therefore, in my opinion, that the employment in which the injured person was engaged at the time of the accident was not an employment to which the Act of 1897 applies. The case of *Raine* v. *Jobson* seems to me to be a different case altogether. There the vessel was not lying in the water space of the dock. It had been removed to and placed in a dry dock, in a berth in a dock, of which the persons sought to be made liable had the actual use and occupation. I am therefore of opinion that the decision of the Court of Appeal must be reversed and the judgment of the county court judge restored.

Lord JAMES OF HEREFORD.—In this case a seaman serving on board a merchant ship was, whilst discharging his ordinary duty as a seaman, so injured that his death ensued. The ship was lying afloat in a dock, but the work in which the respondent was engaged was ship's work and not dock work. The widow of the injured man seeks in this action to make the shipowners liable for the injury so sustained. Now, as the Workmen's Compensation Act of 1897 does not include sailors on ships by name within its provisions, the liability has to be found by virtue of other words.

The plaintiff's case is that the seaman was employed on, in, or about "a factory" within the meaning of sub-section 4 of section 7 of the Workmen's Compensation Act, and that contention is thus worked out: By operation of section 7, sub-section 2, of the Workmen's Compensation Act, every dock to which any provision of the Factory Act is applied by the Factory and Workshop Act of 1895 is a factory. By section 23, sub-section 1, of the Factory and Workshop Act of 1895 certain provisions of the Factory Acts are to have effect as if every dock, wharf, &c., were included in the word "factory," and so for the purposes of the Act of 1897 every dock becomes a factory. It is also contended that, the ship being in the dock, the owners of the ship employing the deceased man were occupiers of a portion of the dock, and, being so, they became undertakers within the Act.

The case of *Raine* v. *Jobson*—an authority binding on your lordships—goes far to establish these propositions. That case seems to differ from the one under consideration in one respect only. In *Raine* v. *Jobson* the dock used was a dry dock, wherein a ship was being repaired. In the present case the vessel was moored in an open part of the dock. But the vessels in both cases were occupying a portion of a dock, for the use of which payment was made. Doubtless it appears a somewhat strange result to find that by owning a vessel lying in a dock the shipowner becomes the occupier of a factory. But it is the peculiarity of method employed in the legislative enactments we are dealing with that has produced so startling a result.

But finding the law as it is laid down by the Lord Chancellor in *Raine* v. *Jobson*, and also in the case of *Merrill* v. *Wilson*, I feel constrained to find that, whilst the deceased man was in fact working on board a ship moored in a dock, he was by legal construction employed in a factory, of which the shipowner was at

the time a part occupier, who thus becomes liable as "an undertaker." I therefore think that the decision of the majority of the Court of Appeal was correct.

Lord LINDLEY.—The seaman whose death has given rise to this action was doing ordinary seaman's work in a steamship. The ship had come into a wet dock for coal; she had loaded it, and had cast off to go out of dock to sea. Owing to the state of the tide she had to wait afloat in the dock, and she was moored to a buoy for convenience until the dock gates should open and she could get out. The accident happened whilst she was so moored. The seaman was cleaning out the hold, and a heavy piece of wood fell upon him and injured him so severely that he died.

It is contended that the Workmen's Compensation Act, 1897, renders the shipowners liable to make compensation for this accident. The county court judge held that the Act did not apply to the case. The Court of Appeal differed from him (Mathew, L.J., dissenting). Hence this appeal.

The sections of the Act which are material are sections 1 and 7, and the question on which the case turns is, Was the seaman engaged in any employment to which the Act applies? The employments to which it applies are enumerated in section 7, and the words are: "This Act shall apply only to the employment by undertakers as hereafter defined on or in or about a railway, factory, mine, quarry, or engineering work," and certain buildings. If this were all, it would be plain that the employment in which the seaman was engaged was not within the Act. But the section goes on to give a statutory meaning to the words "factory," "undertaker," and "workman."

The definition of "workman" has reference to an employment to which the Act applies, and is of very little assistance. "Factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. "Undertakers" is defined not generally, but with reference to railways, factories, quarries, laundries, mines, engineering works, and buildings. With reference to a factory, "undertaker" means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895.

The Factory and Workshop Acts, 1878 to 1891, do not mention docks; but by section 7 of the Workmen's Compensation Act a factory, as defined in the Act of 1878 (41 Vict. c. 16), s. 93, is to include any dock to which any of the provisions of the Acts, 1878 to 1891, is applied by the Act of 1895. The only section of this Act which mentions docks is section 23. This section makes some of the provisions of the earlier Acts applicable to docks as if they were included in the word "factory." It is in this way only that docks are brought within the operation of the Workmen's Compensation Act.

It is contended that section 7 of the Workmen's Compensation Act in effect enacts that for the purposes of that Act a dock is under all circumstances to be treated as a factory, that a ship in a dock is in a factory, and that the owner of a ship in a dock is the occupier of a factory. I cannot adopt this view of the section. This House has already decided in *Wrigley* v. *Whittaker* that factory in section 7 means the factory of the employer. So far as a dock is concerned, the meaning of section 7 appears to be that employment in a dock is an employment to which the Act applies, provided the employer is an undertaker within the meaning of the Act. But who is the undertaker when the employment is that of a seaman doing his ordinary work in a ship afloat in a dock and waiting to go to sea? The Act does not appear to me to make the shipowner an undertaker in such a case. If this is the result, the employment of the seaman in this case is not within the Act; and this, I am of opinion, is the true effect of sections 1 and 7 when applied to ships and seamen employed by shipowners to do ordinary seamen's work.

It is to be noticed that ships and seamen are nowhere mentioned in the Act, and it is well known that the Act was never intended to apply to them when at sea. It is only in consequence of the definition of factory and of undertaker that ships and seamen can be brought within the provisions of the Act.

To treat the owner of a ship afloat in a dock and waiting to get out to sea as the occupier of a factory, and therefore an undertaker within the meaning of the Act, appears to me opposed to all good sense, and not to be rendered obligatory by section 7.

In *Raine* v. *Jobson* the Act was held to apply to a workman employed to clean and repair a ship in a dry dock which had been hired by ship repairers for the purpose of repairing her. The undertakers there were the repairers, and the dry dock was held to be a factory within the meaning of the Act, and it was occupied and used as such by the undertakers. But neither that decision nor any other goes anything like the length to which the Court of Appeal has gone on the present occasion.

Stuart v. *Nixon*, 49 W. R. 636, [1901] A. C. 79, was a case between stevedores and a casual labourer employed by them in a dock.

In *Merrill* v. *Wilson, Sons, & Co. (Limited)* shipowners were held liable for injury to a workman—that is, a landsman—employed by them to unload their ship at a wharf in a dock.

In *Owens* v. *Campbell (Limited)* owners of a steamship were not held liable for an accident to a fireman when attending to the boilers. The ship was moored to a pontoon outside a dock, and was taking passengers on board previous to starting on her voyage. This is the most recent case on the subject, and was decided by the Court of Appeal after it had decided the case now before the House. I confess I have great difficulty in reconciling the two decisions.

Taking section 1 and section 7 together, both locality and nature of employment are important. To bring the present case within the Act the plaintiff must prove—first, employment by the defendant; and secondly, that the defendant is an undertaker—that is, that the employment was on, in, or about a factory (in the statutory sense) of the defendant.

The defendant here was not an undertaker; he was not employing the plaintiff in a factory of which he was the occupier within the meaning of the Act.

In my opinion the appeal ought to be allowed.

Appeal allowed.

Solicitors for the appellants, *W. A. Crump & Son.*

Solicitors for the respondent, *Burn & Berridge.*

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) May 10.

STEEL v. CAMMELL, LAIRD, & CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Disease—Lead poisoning—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

Lead poisoning caused by continual handling of white and red lead in the work of caulking ships held not to be an injury by accident within the Workmen's Compensation Act, 1897.

Appeal by the employers from an award of the judge of the Birkenhead County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was a workman who had been working as a caulker in the service of the employers, a shipbuilding company, for two years before the injury in respect of which he claimed compensation. His work involved the use of red and white lead, chiefly in connection with watertight shoes—*i.e.*, angular pieces of iron used to put in between the plates of ships. His business was to smear the spaces into which the shoes went with either red lead or white lead.

On the 19th of December, 1904, he was working on a torpedo-boat and was using white lead, when he was suddenly seized with cramp in the hands. He was afterwards found to be suffering from paralysis from lead poisoning, and he became incapacitated for work. He had been working in contact with lead during the whole of the two years that he had been in the service of the employers, but he had never before felt any ill effects from it.

The only question in the arbitration was whether the injury which he was suffering was caused by accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, s. 1, sub-section 1.

The medical evidence was to the following effect: That the poisoning was such as might have been expected as a result of the applicant's work; that it might have been caused by his eating his food without having removed the lead from his hands or by absorption of the poison through the pores of the skin or by inhalation; that only a small number of cases of this description occurred among the large number of persons working with red or white lead; that an accumulation of lead poison in the system sometimes produced colic, sometimes paralysis, and sometimes disease of the kidneys; that it was impossible to trace the poisoning to any particular day; that the development of lead poisoning was a gradual process and generally took a considerable time; that in the present case it was the result of a number of small doses; that the symptoms pointed to the applicant's being saturated with lead; and that the seizure with cramp on the 19th of December was the explosion of the mischief which had accumulated previously in his system.

The county court judge found that the injury was caused by accident arising out of and in the course of the applicant's employment, and made an award in his favour.

The employers appealed.

C. A. Russell, K.C., and *G. D. Keogh*, for the employers.—A gradual accumulation of poison in the system is not an accident within the Workmen's Compensation Act. Section 2, sub-section 1, requires that notice of the accident should be given "as soon as practicable after the happening thereof," and that the claim for compensation should be made within six months from "the occurrence of the accident causing the injury." Sub-section 2 requires that the notice should state the cause of the injury and "the date at which it was sustained." Those provisions show that an injury by accident within the Workmen's Compensation Act is something to which a date can be assigned. They are not applicable to a case of paralysis resulting from a long-continued process. This case is different from *Brintons (Limited)* v. *Turvey*, 21 T. L. R. 444, in which the House of Lords held that anthrax contracted by a worker in wool was an accident. A single bacillus attacking a receptive part of the body might produce anthrax, and the fact that the man was so attacked was an accident. The paralysis from which the applicant in this case was suffering was the result of a number of small doses of lead, and absorption of lead was not an accident, but the inevitable result of the work in which he was engaged. Neither is this case affected by *Fenton* v. *Thorley & Co. (Limited)*, 52 W. R. 81, [1903] A. C. 443, in which the House of Lords held that a man who had ruptured himself by an act of over-exertion in his work had suffered an injury by accident within the Act.

Tobin, K.C., and *Greaves Lord*, for the applicant.—The effect of the judgments of the House of Lords in *Fenton* v. *Thorley & Co. (Limited)* is to extend the meaning of the word "accident" in this Act very widely, so that now almost anything that happens by ill-luck may be considered an accident. In this case there were a succession of accidents. Each taking of the poison into the system, whether through the lungs by inhalation, or through the skin by absorption, or through the mouth by eating particles of lead with food, was an accident. The date of the last of the series could be approximately fixed. Lead poisoning is not the inevitable result of the work in which the applicant was employed. Only a few of those who are engaged in it suffer any injury at all. It is a risk incidental to the employment of each, whether he will be one to suffer.

COLLINS, M.R.—This is an appeal from a decision of the judge of the Birkenhead County Court, who has held that paralysis resulting to a workman whose daily task involved the handling of red and white lead is an injury by accident within the meaning of the Workmen's Compensation Act. A number of cases have been decided as to the meaning of "accident," and attempts have been made, based on a *dictum* of Lord Halsbury, L C., to lay down a rule on this question applicable to the Workmen's Compensation Act. That *dictum* occurs in a case dealing with another subject-matter—viz., perils of the sea: *Hamilton, Fraser, & Co.* v. *Pandorf & Co.*, 36 W. R. 369, 12 App. Cas. 518. It is as follows: "I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.' In that view it was comparatively easy to decide whether the fortuitous or unexpected element occurred in any particular case. And this court, treating an accident under the Workmen's Compensation Act as being necessarily something fortuitous and unexpected, followed some decisions in insurance cases in which the question to be determined had been whether a particular injury had arisen from accident or from some inherent defect. The typical instance of this class of case was that of a man being seized with a fit and falling into water and losing his life by drowning. The courts, seeking for a fortuitous element, separated the fact of the inherent predisposition to weakness from the

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

happening of something which produced the ultimate injury, and they found the fortuitous element in the fact that the predisposition to weakness affected the man at a time when he was near enough to water to fall into it. These cases seemed to us to afford a working principle. But we are now told in *Fenton* v. *Thorley & Co. (Limited)*, 52 W. R. 81, [1903] A. C. 443, that it was a mistake to apply that principle. There Lord Macnaghten makes the following observations as to the meaning of "accident": "To the expression as used by Lord Halsbury in the passage in which it occurs no possible objection can be taken; but it is, I think, to be regretted that the word 'fortuitous' should have been applied to the term 'injury by accident' in the Workmen's Compensation Act. If it means exactly the same thing as 'accidental,' the use of the word is superfluous. If it introduces the element of haphazard (if I may use the expression), an element which is not necessarily involved in the word 'accidental," its use, I venture to think, is misleading, and not warranted by anything in the Act." We therefore have now to approach the attempt to find a meaning of the word "accident" from which the element of haphazard is taken out. I do not find that easy to do, and it does not seem to be facilitated by a further description of "accident" which occurs later in Lord Macnaghten's judgment. He says: "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." It appears, then, that an "accident must be a mishap from which the element of haphazard has been eliminated, and the word must be treated as being used in the ordinary and popular sense. The result seems to be that we are put in the position of the man in the street for the purpose of deciding whether the facts of any particular case disclose an accident. I think, therefore, that I ought, without giving reasons, to say whether on the facts of this case I find that the injury arose out of an accident or not. Here the injury was that of lead poisoning, and it was brought about by the applicant being saturated with lead in consequence of being in continuance contact with it. According to the evidence of the medical witnesses it may have been taken into his system by inhalation, or through the mouth with his food, or it may have been by absorption through the skin. In any case the poisoning must have been caused by long exposure to the influence of lead, it must have been gradual, not sudden. In my opinion it is clear from section 2, sub-section 2, of the Act that an accident must be something of which the date can be fixed. It is impossible in this case to fix the date of that from which the injury arose. It is suggested that this was not a case of a single accident, but a series of accidents, each particular accident having happened by one or other of the three processes of inhalation, taking into the mouth with food, and absorption. That, however, does not meet the difficulty; the Act speaks expressly of the date at which the injury was sustained. Being in the position of the man in the street, I come to the conclusion that in the circumstances of this case that which caused the injury cannot be described as an accident. I therefore differ from the learned county court judge, and in my opinion the appeal must be allowed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors for the employers, *Rawle, Johnstone, & Co.*, for *Stone, Fletcher, Hull, & Stone*, Liverpool.

Solicitors for the applicant, *Helder, Roberts, & Co.*, for *J. A. Behn*, Liverpool.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — May 5.

CHALLIS v. LONDON AND SOUTH-WESTERN RAILWAY CO. (a.)

Master and servant—Employer's liability—Accident—Compensation—Accident arising out of and in the course of employment—Engine-driver injured by stone thrown at train—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

An engine-driver while driving an engine belonging to the respondent railway company was injured by a stone intentionally dropped on the train by a boy from a bridge over the line.

Held, that this was an "accident," and that as the risk of being injured by stone-throwing was one that could reasonably be considered as incidental to the ordinary employment of an engine-driver, the accident arose "out of" his employment within section 1 (*i.*) *of the Workmen's Compensation Act*, 1897, *and the company were liable, although the accident was caused by the mischievous or tortious act of a stranger.*

Armitage *v.* Lancashire and Yorkshire Railway Co., [1902] 2 *K. B.* 178, 50 *W. R. Dig.* 112, *considered and explained.*

This was an appeal by the applicants from a decision of his Honour Judge Gye, sitting at the Basingstoke County Court, in proceedings instituted to obtain compensation under the Workmen's Compensation Act, 1897.

The applicants were the widow and children of an engine-driver in the employment of the respondent railway company, who was alleged to have died from injury by accident arising out of and in the course of his employment.

The deceased man on the 7th of November, 1903, was driving the engine of an express train from Basingstoke to Waterloo, and as the train, then running at a high rate of speed, was passing under Merton-road bridge something fell from the bridge and broke the glass in one of the eye-glasses in the "cab" in the front of the engine, and he was struck in the face by some pieces of the shattered glass and was seriously cut about and suffered a severe shock.

On the 7th of March, 1904, he died from meningitis, and the present proceedings were then instituted.

The county court judge found that the injury was caused by a stone having been intentionally dropped by some boys from the bridge on to the engine, but he held that as the act was a wilful and intentional act the injury could not be said to have been caused by accident "arising out of" the employment within the meaning of section 1 (i) of the Act. On this ground ,and without deciding whether the death was caused by the injury, which was disputed, the county court judge made an award in favour of the respondents.

The applicants appealed.

Ruegg, K.C. (*Compston* with him), for the applicants.—The risk of being injured by stone-throwing is well recognized by railway companies, and is made a criminal offence by various Acts of Parliament—for instance, by the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 33. It is a risk incidental, therefore, to the employment of an engine-driver, and assuming that the accident is found to be the cause of the man's death in this case, the applicants are entitled to recover compensation. Being a "risk" incidental to the employment, the principle laid down in *Armitage* v. *Lancashire and Yorkshire Railway Co.*, [1902] 2

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. 178, 50 W. R. Dig. 112, does not apply. The *ratio decidendi* there was that what happened to the boy was outside the scope of his employment. That cannot be said to be the case here. The judge held on the facts that this was not an accident arising "out of" the employment, and refused to hear medical evidence as to whether the man's death from meningitis was induced by the shock. The test whether an injury was caused by accident or not is not whether the act that caused the injury was wilfully and intentionally done. Therefore here the county court judge has misdirected himself on a point of law. [He was stopped.]

C. A. Russell, K.C., and *J. A. Simon*, for the respondents.—The company is not reponsible for an accident caused by a tortious or even criminal act of a stranger. *Armitage* v. *Lancashire and Yorkshire Railway Co.* decided that the employer was not liable for an accident caused by the wrongful act of a third party which had no connection with the employment of the applicant for compensation. That decision governs this case.

Falconer v. *London and Glasgow Engineering Co. (Limited)*, 3 Fraser (5th series) 564, was also referred to.

COLLINS, M.R.—This is an application for compensation brought by the dependants of a deceased engine-driver under the following circumstances: [His lordship then stated the facts and, continuing, said:] The learned judge has not decided whether the death occurred by the accident or not, but has held as a matter of law that the particular occurrence was not an accident within the meaning of the Act. His finding being limited to a proposition of law—namely, that the circumstance was not in point of law an accident, leaves this court at large to say whether or not, if the learned judge was wrong in that, the particular occurrence was an accident which arose out of and in the course of the man's employment. The learned judge has found that inasmuch as in his view the stone was wilfully dropped as a piece of mischief, it was an intentional act, and, if the boys had had the slightest conception of the full import of what they were doing, a wicked act, and could in no sense, therefore, be termed an "accident."

In my judgment the learned judge was wrong in that view. There was nothing in the circumstances, if it was a wilful act on the part of the boy who threw the stone, to prevent it being an accident from the standpoint of the person who suffered from it. Therefore the point really to be decided is, this being an accident, can it be said to have arisen out of and in the course of the employment of the man? That was the point which alone Mr. Russell argued. He did not contend that it was not an accident. We should not be justified in approaching a case of this kind except from the standpoint of common sense and knowledge that a train in motion is an object of attraction for boys, and that it is a very usual incident of passing trains that boys throw stones at them. We cannot ignore that risk when we have to consider what are the risks incident to the employment of an engine-driver. It seems to me, one of the risks of an engine-driver is that he or his train may be object of attraction for missiles coming from boys or others, and projected deliberately or accidentally; but if it is a risk within the ordinary scope of his employment, then it is one for which the master is responsible. The word risk is not in the Act, but the Act says "accidents arising out of and in the course of his employment," and that necessarily involves the consideration of what the risks of that employment are.

There seems to be nothing opposed to this view in any of the cases decided. In fact, the case of *Armitage* v. *Lancashire and Yorkshire Railway Co.*, where an accident happened to a workman through the tortious act of a fellow-workman, which had no relation to their employment, seems to me distinctly in favour of the proposition I am laying down. Each member of the court dealt with the case of the particular risk being one which the person in the scope of his employment would have to submit to. We were of opinion that the accident there was not one which the Act made the employer responsible for. In the similar case of *Falconer* v. *London and Glasgow Engineering Co.*, 3 Fraser (5th series) 564, the Lord Justice Clerk said: "The object of the statute was to secure compensation to workmen who were engaged in occupations which exposed the employees to danger from which other occupations were free. But it was against accidents incidental to the special employment that the benefit of the statute was given. Again, Lord Trayner says on p. 567: "But if some servants leave their work and indulge in horseplay to the injury of a fellow servant, that does not infer liability on the employer. It cannot be said to be incidental to his business or one of the hazards attached to it." Hence it seems to me that it is incidental to the business, and is one of the hazards attached to it. In that case Lord Moncrieff thought that the horseplay of workmen was one of the hazards that they must be taken to be subjected to in the employment. In that he differed from the rest of the court, but all the court concurred in regarding the particular risks to which the person engaged in the employment was subjected as the determining factor in a case as to whether an accident can be said to arise out of the scope of the employment.

In my opinion, therefore, as far as the learned judge's decision is concerned, he was wrong in holding that it was not an accident, and that it did not arise out of and in the scope of his employment. On these facts I think that, as a matter of law, this was an accident arising out of the employment of the deceased man. The question, however, still remains to be decided whether the death was the result of the accident. The learned judge has left that undetermined, and that will have to be decided before the case can be finally disposed of.

MATHEW, L.J.—I confess I have failed to understand the judgment of the learned judge in the court below notwithstanding the able argument that we have heard on behalf of the railway company. This, in common language, was an accident which arose out of the man's employment. That is the language of the Act of Parliament. Why are we not to give it its fair and clear meaning? No one could entertain a doubt that the injury to the engine-driver was an injury incidental to his employment, if that phraseology be adopted instead of the other, or an injury arising out of the employment, if you follow the words of the Act.

Now, what is the result of the argument offered on the part of the railway company? That you should read a proviso into the Act of Parliament, and that the proviso should be that it should not be deemed to be an accident if it was due to the act of some third person. I see no reason whatever for supposing that the Legislature had any such intention. It is all the same to the unhappy engine-driver where the stone comes from. He was in an employment where he ran the risk of encountering a missile as happened in this case. The accident to him was what the Act intends he should be indemnified for, and it appears to me to be no answer to say that he is not entitled to be indemnified because a third person acting mischievously brought about the injury which he has suffered.

I am clearly of opinion, therefore, that this case must go back for a new trial.

COZENS-HARDY, L.J.—I am of the same opinion. I do not think that the case for the railway company could possibly be put better or more forcibly than it was put before us by Mr. Simon. His main contention was this: That you cannot anticipate the commission of a criminal offence by outsiders as one of the risks which ought to be guarded against by the employer. Now, so far I agree that I should be very sorry to say that an accident due to a stone thrown by a stranger would be within the Act in every employment, but I am not prepared to disregard, and I think it would be altogether absurd for us to disregard, that which is common knowledge, that the offence of stone-throwing from bridges and other places on railways by boys is a frequent occurrence. The risk is one which, as it seems to me, is reasonably incidental to the employment of an engine-driver, although it might not have been incidental to the employment of other men in other situations.

On that ground I think the learned judge was wrong in saying that it was not and could not be an accident, because it was due to the tortious act of an outsider. When *Armitage's case* is looked at, so far from it being an authority in favour of the railway company, it seems to me to be an authority against them.

Case remitted; the costs of the first trial and of this appeal to be paid by the railway company to the applicants in any event.

Solicitors for the applicants, *Edmonds & Co.*, for *Ford & Warren*, Leeds.

Solicitor for the respondents, *W. Bishop*.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) May 5.

BACK v. DICK, KERR, & CO. (LIMITED). (a.)

Master and servant — Employers' liability — Accident —Compensation—Engineering work—Work ancillary to engineering operations—Unloading rails at station where they were to be stored—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Contractors had entered into a contract to take up the rails of certain existing horse-tramways in a town and to replace them by new ones for a new tramway to be worked by electric power. The new rails were brought to the town by railway, and by arrangement between the railway company and the contractors they were stored in the railway company's yard until they were required for the purposes of the new tramway. The applicant was employed by the contractors in unloading and stacking in the station yard rails which had come in by train, and while thus employed met with an accident. At that time the only work commenced under the contract was the taking up of the old tramway rails in a street at a distance of about 700 yards from the station yard.

Held, that the workman was not entitled to compensation, because at the time of the accident he was not employed on or in or about an "engineering work" within the meaning of that term as used in section 7 of the Workmen's Compensation Act, 1897, *since those words point to employment within the physical area of the engineering work actually being carried out, and do not refer to the labour bestowed on such work, but to the locality where such labour is being bestowed.*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Appeal by the employers from an award of compensation made by Judge Lush-Wilson, K.C., sitting at the Exeter County Court.

The applicant for compensation was a workman employed by Messrs. Dick, Kerr, & Co. (Limited), a firm of contractors, who had contracted with the corporation of Exeter to take up the rails of the existing horse-tramways which ran through several streets in the city and to lay down rails for new tramways to be worked by electric power.

One of these tramlines ran along the street leading from St. David's Station at Exeter to the Clock Tower and thence along Queen's-street.

The new rails to be laid down under the contract were brought by the London and South-Western Railway to a yard at their Queen-street Station, which abutted on and had a gateway opening into Queen-street.

Some of the rails were taken from there to side depôts belonging to contractors, where they were stored, and the rest were, by an arrangement between the employers and the railway company, stacked and stored in Queen-street Station-yard when unloaded from the railway trucks. The rails stored in the yard were taken direct from there to be laid in the street. There was no provision in the contract where the rails were to be stored.

The applicant was engaged unloading rails and stacking them in the station-yard when he met with an accident.

At that time the only work commenced under the contract was the taking up of the old tramway rails in the street on the St. David's Station side of the Clock Tower, about 700 yards away from the place where the accident happened.

The workman claimed compensation under the Workmen's Compensation Act, 1897, on the ground that at the time of the accident he was employed on or in or about an "engineering work," and it was admitted by the employers that a "tramway" was a "railway," and therefore the construction or alteration of it came within the definition of "engineering work" in section 7, sub-section 2: see *Fletcher* v. *London United Tramways*, 50 W. R. 597, [1902] 2 K. B. 269.

It was contended, however, for the employers, that according to the authorities the expression "engineering work" as used in the section imported some definite locality where such work was being executed, and that the railway yard where the rails were stored could not be considered as included in that area; and therefore the applicant was not, when the accident happened, employed on or in or about "an engineering work" within the meaning of the section.

The county court judge, in giving judgment, said: "I have come to the conclusion that it would be impossible to limit the meaning of the words 'engineering work' to the extent contended for on behalf the employers, and that although the word 'work' imports definite locality as meaning the thing on which the labour is bestowed, I think the words 'on or in or about engineering work" must include any portion of the selected area upon which the essential operations were conducted. I find that the site upon which the rails were stacked in the yard was on, in, or about the engineering work, and I award compensation to the applicant."

The employers appealed from that award.

Shakespeare, for the employers.—At the time of the accident the applicant was employed "on or in or about engineering work." The word "about" signifies physical contiguity (*Fenn* v. *Miller*, 48 W. R. 369, [1900] 1 Q. B. 788), and the expression

engineering work imports a definite locality where the work is being executed: *Chambers* v. *Whitehaven Harbour Commissioners*, 47 W. R. 533, [1899] 2 Q. B. 132; *Pattison* v. *White & Co.*, (1904) 20 Times L. R. 775. It is impossible to contend that a railway yard nearly half a mile distant from the place where the engineering work is being carried on comes within the physical area of that work, in the sense that work at the yard is work "about" the engineering work. In so holding the county court judge misdirected himself as to the principle to be applied to the case, and this appeal should on that ground be allowed.

H. C. Gutteridge, for the applicant.—It has been found by the county court judge that as the yard was used for the storage of these rails, which were to be used for the engineering work, the yard was part of the selected area within which the operations essential to that work were being carried on by the contractors, and was really part of the locality of that work regarded as a physical entity. Where this question has been considered in the case of a "factory" different considerations apply, as in the case of *Fenn* v. *Miller*, because the boundaries of a factory are capable of more or less exact limitation, which is not the case in an engineering work such as the construction of a railway. Storing the rails was a necessary operation incidental to the engineering work being carried out.

Coles v. *Anderson*, (1905) 21 Times L. R. 204; *Atkinson* v. *Lumb*, 51 W. R. 516, [1903] 1 K. B. 861; *Lord* v. *Turner*, 5 Minton Senhouse W. C. C. 87; *Ferguson* v. *Barclay*, (1902) 5 Fraser 105; *Anderson* v. *Lochgelly Iron and Coal Co.*, (1904) 42 Sc. L. R. 147, were referred to.

COLLINS, M.R., after stating the facts, said the question was whether the applicant was, at the time when the accident happened, employed on or in or about an "engineering work." That depends upon what is the meaning of the term "an engineering work," as defined by decisions on the subject given by this court which have been referred to during the argument. The result of those decisions appears clearly to be that "engineering work" does not, in the Workmen's Compensation Act, 1897, mean the labour bestowed on such work, but the locality where such labour is being bestowed. It indicates a physical area on, or in, or about which the workman must be employed. In the present case the physical area of the engineering work which was actually being carried on was about 700 yards from the scene of the accident; and unless it can be said that the yard belonging to the railway company was part of the physical area of the engineering work, the case cannot be brought within the Act. No doubt the workman was employed on work on which the undertakers were engaged, but in my opinion he cannot be deemed to have been employed on or in or about "an engineering work" in the sense in which that expression is used by the Act unless the place where the accident happened can be said to have been part of the physical area of that engineering work. The learned county court judge has drawn the inference that the yard was part of the physical area, because he said that "although the word 'work' imports definite locality as meaning the thing on which the labour is bestowed, I think the words 'on or in or about an engineering work' must include any portion of the selected area upon which the essential operations were conducted. I cannot agree with the test so applied by the county court judge. It is not correct, in my judgment, to say that any piece of land on which any incidental, though perhaps essential, work is done is as a matter of law part of the physical area of the engineering work. It seems to me that the learned judge has arrived at that conclusion through a misdirection of himself in point of law; and that the spot at which the accident happened being 700 yards away from the engineering work being then carried on, the accident could not be said to have happened in a part of the locality of the engineering work.

For these reasons I think the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. The county court judge arrived at his conclusion by finding that the spot at which the accident happened was part of the area of the engineering work upon which the undertakers were engaged. I cannot agree with that view. It was no part of the contract that the rails should be stacked in the railway yard so as to enable the contractors to carry out the engineering operations. The stacking of the rails at that place formed no part of the engineering work which the contractors had undertaken to execute. I therefore do not think the accident can be said to have occurred on or in or about an engineering work within the meaning of the Act.

COZENS-HARDY, L.J.—I agree. Notwithstanding the very clear argument put forward on behalf of the applicant, we should, if we were to affirm the decision of the county court judge, be extending the operation of the Act beyond the reasonable meaning of its language. The workman here was simply employed in unloading and storing materials to be afterwards used for the purpose of the contract work. It would be impossible to suppose that the yard was thereby constituted a part of the area of the engineering work, which was in fact being carried on 700 yards away. If that were so, then it would follow that, if materials for an engineering work were stored in any place, as, for instance, if sleepers for the new tramway had been brought by the Great Western Railway and stored at their station or had been brought by water and were stacked in a timber merchant's yard at Exeter, or at the local yard where they were made, the yard in any of those cases would come within the area of the engineering work. I do not think that the learned county court judge sufficiently bore in mind the interpretation given to the term "engineering work" by this court in previous cases.

Appeal allowed.

Solicitors for the applicant, *Baylis, Pearce, & Co.*, for *Dunn & Baker*, Exeter.

Solicitors for the employers, *William Hurd & Son*, for *Ford, Harris, & Ford*, Exeter.

High Court of Justice.

Chan. Div. } May 5.
Kekewich, J. }

In re MARY KIDDLE.
GENT *v.* KIDDLE. (*a.*)

Will — Construction — Illegitimate child — Gift to "grandchildren."

A testatrix by her will appointed her son, G. K., and a son-in-law to be her trustees and executors. She gave and devised her residuary estate "unto and equally to be divided between all my grandchildren." G. K. was an illegitimate son of the testatrix.

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

Held, that the children of G. K. took under the gift to "grandchildren."

Adjourned summons.

Mary Kiddle by her will appointed "my son George Kiddle and my son-in-law George Lockyer Gent" to be her trustees and executors. After sundry pecuniary bequests, she gave and devised her residuary estate unto and equally to be divided "between all my grandchildren." George Kiddle was an illegitimate son of the testatrix. She had other children who were legitimate.

This was an application by the executors of George Lockyer Gent, the last surviving trustee and executor of the will, to determine the question (*inter alia*) whether the children of George Kiddle took under the gift to grandchildren.

Kerly, for the executors of George Lockyer Gent.

Freeman, for the children of George Kiddle.

Draper, for other grandchildren of the testatrix.—The old rules must be regarded and no further step taken without hesitation. It would be a further step to hold that the children of an illegitimate son should take under a bequest to "all my grandchildren": *In re Hall, Branston* v. *Weightman*, 35 W. R. 797, 35 Ch. D. 551; *In re Jodrell, Jodrell* v. *Seale*, 38 W. R. 267, 721, 44 Ch. D. 590; *In re Wood, Wood* v. *Wood*, 50 W. R. 102, 695, [1902] 2 Ch. D. 542; and *In re Parker, Parker* v. *Osborne*, 45 W. R. 536, [1897] 2 Ch. D. 208.

KEKEWICH, J., in giving judgment said: The testatrix recognized George Kiddle as her son in fact, though he was not in law. The gift to take as a class of grandchildren must therefore include his children.

Solicitors for all parties, *Reed & Reed*, for *Reed & Co.*, Bridgwater.

Chan. Div. Warrington, J. } Feb. 28; March 2.

ELLIS v. ELLIS. (*a*.)

Will appointing executor—Suppression of will—Letters of administration—Grant of—Revocation of grant—Acts of administrator.

A grant of letters of administration obtained by suppressing a will which appointed an executor is void ab initio, *and all dispositions of the assets by the supposed administrator are void also, except acts done in a due course of administration.*

Abram v. Cunningham, (1677) 2 *Lev.* 182, *and* Graysbrook v. Fox, (1564) 1 *Plowd.* 275, *examined and applied.*

The main question for decision in this case was the position of an administrator and the result of his dealings with the assets when the grant of letters of administration had been revoked by the subsequent probate of a will appointing an executor.

The action was for foreclosure and was tried with witnesses, and in the course of the trial the validity of certain payments made by an alleged administrator became material as an acknowledgment which would prevent the Statute of Limitations being successfully raised as a bar to the plaintiff's claim.

The material facts were as follows: George Ellis, the father, prior to his death in August, 1892, deposited with the defendant William Ellis, by way of equitable mortgage, the lease of his house, 13, Upper Charlton-street, Marylebone, to secure £100 then advanced by the defendant with interest to George Ellis, the father.

On the 21st of August, 1892, George Ellis, the father, died, and on his death the defendant William Ellis demanded of George Ellis, a son of the deceased, payment of the £100 debt, threatening foreclosure if it was not paid.

On the 20th of October, 1892, George Ellis, the son, borrowed from his uncle James Ellis £100, and the same day paid it, together with a sum of £3 for interest, to the defendant William Ellis, receiving from him the lease. He then gave to James Ellis a promissory note for £100, and deposited the lease with him. The promissory note contained a reference to the fact that the lease was deposited as collateral security.

On the 9th of November, 1892, letters of administration of the estate of George Ellis, the father, were granted to George Ellis, the son, on the assumption that the father had died intestate. But there was in fact a will, and George Ellis, the son, knew of it, though he stated at the trial that he thought it was not properly attested. The will appointed an executor, and bequeathed the house to a sole beneficiary. The court found on the evidence that the above-mentioned payments were the only acts of administration done by George Ellis, the son.

On the 23rd of November, 1892, an action was commenced against George Ellis, the son, for revocation of the grant of administration and to obtain probate of the will.

In June, 1893, judgment was given for the plaintiffs in that action, the will was proved, probate was granted to the executor, the letters of administration were revoked, and George Ellis, the son, was ordered to pay the costs of the action. He had not paid these, nor was it shown that he had fully accounted for rents and other moneys received while he was administrator.

In 1896 James Ellis made a claim against the sole beneficiary under the will of George Ellis, the father, for payment of the £100 advanced to George Ellis, the son, but his claim was repudiated.

In July, 1902, the leasehold house was sold to the defendant William Ellis, the original mortgagee, by the beneficiary under the will, and at the time of this sale it was stated that George Ellis, the son, asserted that the lease was lost, and an agreement under seal, dated the 12th of July, 1902, was accordingly entered into by the vendor and purchaser to provide for the indemnity of the purchaser against any adverse claim in this respect.

In August, 1903, James Ellis died, having by his will appointed the plaintiffs his executors.

On the 19th of October, 1904, this action was commenced by the executors of James Ellis, who had retained possession of the said lease, against William Ellis, claiming a declaration that the plaintiffs were entitled as equitable mortgagees to a charge for £100 and interest on the premises comprised in the said lease by virtue of the deposit thereof with the defendant and the subsequent transfer thereof to the testator James Ellis; an account of what was due on the security; and in default of payment by the defendants foreclosure or sale.

The defendants denied that the plaintiffs were mortgagees, and claimed the benefit of the Real Property Limitation Act, 1874, and of 3 & 4 Will. 4, c. 27, and all other Statutes of Limitations.

Norton, K.C., and *Ashton Cross*, for the plaintiffs.—Although administration was not granted until the 9th of November, 1892, still the title of an administrator, when letters of administration are granted, relates back to the time of the death, therefore the

(*a*.) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

borrowing of money for the purposes of the estate and the payment of interest on the 20th of October, 1892, must be taken as acts done by George Ellis, the son, in his capacity of administrator: *Foster* v. *Bates*, (1843) 12 M. & W. 226, 233, 67 R. R. 311, 317; *Welchman* v. *Sturgis*, (1849) 13 Q. B. 552; and *In the Goods of Pryse*, [1904] P. 301, 52 W. R. Dig. 140. The subsequent grant of letters of administration ratified the acts done by George Ellis, the son, in October, 1892, and made them the acts of the administrator: *Hill* v. *Curtis*, 14 W. R. 125, (1865) L. R. 1 Eq. 90; and *Ex parte Phillips*, (1886) 18 Q. B. D. 116.

H. Terrell, K.C., and *Manning*, for the defendant.—A grant of letters of administration obtained by the suppression of a will which appoints an executor is void *ab initio*, and all dispositions of and dealings with the assets by the supposed administrator are void also: *Abram* v. *Cunningham*; *Woolley* v. *Clark*, (1822) 5 B. & Ald. 744, 24 R. R. 546; Williams on Executors (10th ed.), p. 461. In *Boxall* v. *Boxall*, 32 W. R. 896, (1884) 27 Ch. D. 220, no executor was appointed, and on that ground *Abram* v. *Cunningham* was distinguished; but the veracity of the decision was recognized.

Norton, K.C., in reply.—Even if the letters of administration in this case were void *ab initio*, still the acts done by the supposed administrator in a due course of administration are good: *Graysbrook* v. *Fox*; *Parker* v. *Kett*, (1702) 1 Ld. Raym. 658, 661; Williams on Executors (10th ed.), p. 462.

WARRINGTON, J., after reciting the facts, said: If the letters of administration had remained unrevoked, then, I think, they would have related back to the death of George Ellis, the father, and the pledge of the house by the administrator for the purpose of securing money borrowed for the payment of the debt would have been valid, the statute would not have run, and the plaintiffs would have been entitled to succeed: see *Foster* v. *Bates*. But, unfortunately for the plaintiffs, there was in existence a will by which an executor was appointed; that will was duly proved, and the administration was duly revoked. Under those circumstances I think it is clear law that the grant of letters of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them, and no power of dealing with them. This was determined in *Abram* v. *Cunningham*. In that case a testator, David Cunningham, being possessed of certain leaseholds as executor, died on the 15th of September, 1665, leaving a will whereby he appointed executors, who of course became executors of the original testator. On the 21st of October, 1671, administration *de bonis non* of the original testator was granted to a creditor, the ordinary having notice of the will. On the 1st of March, 1672, the administrator sold the leaseholds to the plaintiff for £1,000. On the 13th of February, 1673, the surviving executor of the will of David Cunningham having renounced probate, the administration granted to the creditor was revoked and administration of the estate of the original testator was granted to the defendant. The question was whether the plaintiff or the defendant had the better title, and it was decided in favour of defendant. The grounds of the decision appear in the argument for the defendant, and are—that if there are in fact executors, the ordinary has no power to grant administration, the property is vested in the executors, and the letters of administration and the dealings by the administrator under them were simply void. This is recognized as good law by Kay, J., in *Boxall* v. *Boxall*, and in the last edition of Williams on Executors, p. 461. But it is contended by the plaintiffs that there is an exception to the general rule of acts done in the due course of administration, and that such acts are not void. For this reliance is placed on several authorities, and in particular on a *dictum* in the case of *Graysbrook* v. *Fox*. The head-note of that case is as follows: "A. makes his will and appoints an executor, and dies, the ordinary, without taking notice of the will, commits administration to J. S. Before the executor has proved the will the administrator sells the goods of the deceased, and the executor afterwards proves the will and brings detinue for the goods against the vendee, and adjudged that he should recover, for the probate supersedes the administration *ab initio*, and the sale made under it." So far, it is to be observed, the decision is the same as that in *Abram* v. *Cunningham*; the head-note then goes on: "But otherwise, if it be averred that the sale was made to discharge the funeral expenses or debts which the administrator or executor was compellable to pay for, then such sale shall be indefeasible for ever." The last part of that head-note appears to be founded upon a *dictum* of Walsh, J., p. 282, and which is as follows: "But Walsh said, if the defendant here had averred that the administrator had aliened the goods to him for a certain sum, and had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor would be forced to do, then the sale for such purposes should not be avoided, but should remain indefeasible; and the reason is because by the commission of the administration to him by the ordinary, who was ignorant of the testament, he has a colour of authority, though it is not a rightful one, and he that has the right suffers no disadvantage although he be bound by the act of the administrator, for it is no more than he himself was compellable to do, and the administrator having done that which the executor himself was obliged to do, his act shall be allowed good, because the executor himself is thereby freed and excused from the trouble of doing it. And so, inasmuch as the administrator was compellable to do it (for if he was sued for a thing which ought to be done, he could not disable or discharge himself for the time), it is reasonable and no detriment to anyone that the thing done should remain stable and firm without impeachment." The essence of that statement appears to me to be that the act in question was one which the administrator was compellable to do.

But in this case, though as between the real and the supposed legal personal representative the payment of the debt may well be treated as proper, so as to entitle the latter to credit, the mortgage stands on a different footing. This was essentially a voluntary act, no title was in fact conferred by it; and on the authorities I have cited I hold it to have been simply void.

The plaintiffs then contend that George Ellis, having paid off the debt for the benefit of the estate, was entitled to stand in the place of the creditor, and that he transferred that right to James Ellis, who actually found the money. But, granting that such would be the right of George Ellis, and that the plaintiffs could assert that right by subrogation, any claim founded on it would now be barred by the Statute of Limitations. The debt is, of course, long since barred, and all claims under the original security are now barred also, for in this aspect of the case the payment of the interest was made by a stranger, and was not such a payment as would prevent the statute from running.

Moreover, even if it could be otherwise supported, a claim by way of subrogation to the rights of George Ellis would be effectually met by establishing his indebtedness to the estate in respect of the costs of the probate action, and possibly in respect of rents and other moneys.

On the whole I think the present action fails, and there must be judgment for the defendant with costs.

Solicitors, *A. B. Clifton; Henry Fisher, jun.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) May 16, 22.

REX *v.* TOLHURST AND OTHER LICENSING JUSTICES OF PENGE.
Ex parte FARRELL. (*a.*)

Licensing Acts—New duties devolving on justices—Reference to quarter sessions—Report of licensing justices that house is not needed—Notice to holder of licence—Evidence—Licensing Acts, 1872 (35 & 36 *Vict. c.* 94), *s.* 42; 1904 (4 *Ed.* 7, *c.* 23), *s.* 1, *sub-section* 2.

By section 1 (2) *of the Licensing Act,* 1904, *where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts,* 1828 *to* 1902, *of applications for renewal of licences are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district) an opportunity of being heard, and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.*

Held, that under the above section notice of objection must be given to the licence-holder so as to give him an opportunity of being heard, as required by section 42 *of the Licensing Act,* 1872, *and that the justices were only entitled to report to quarter sessions that the house was not needed after hearing evidence given on oath, although such evidence need not be so full as if they had finally to decide the question of renewal. Therefore the rules* nisi *for* mandamus *were made absolute in all those cases where the justices had reported without first giving the licensees an opportunity of being heard, and in every case the rules* nisi *for prohibition were discharged.*

In this case certain licensing justices for the Penge division of the county of Kent appeared to show cause against rules *nisi* for (1) a writ of prohibition to prohibit them from further proceeding in the matter of referring to quarter sessions the application of A. J. Farrell for the renewal to him of the licence of the Duke of Edinburgh beerhouse; and (2) a *mandamus* calling on the justices to hear and determine the same application of the said A. J. Farrell according to law.

Mr. Tolhurst, the chairman of the respondent justices, filed an affidavit which set out that he knew the Duke of Edinburgh beerhouse and was fully acquainted with its accommodation and the locality, and also the accommodation of the licensed houses in its neighbourhood, and that plans of all the houses had been supplied to the licensing justices. Besides the knowledge which he thus possessed, the house in question had been brought to his notice when sitting as a justice in petty sessions. This question as to the number of licensed houses in the neighbourhood had for some years been under the notice of the licensing justices of the district, but in consequence of impending legislation they had delayed taking steps towards reducing the number of the houses until the present year.

At the adjourned licensing meeting held on the 21st of February, 1905, the licences of all the houses in the neighbourhood were renewed with the exception of five, of which the Duke of Edinburgh was one. With regard to these houses he had then stated that notice of objection to the renewal of the licences on the ground that they were not required had been served, and that these cases would be immediately further considered and a decision come to with regard to them after the hearing of the evidence.

Evidence with regard to the Duke of Edinburgh beerhouse was given on oath by a police inspector, and was as follows: "I have made certain inquiries at the request of the justices. The house is situate in the Arpley-road, Penge, at the corner of Evelina-road. In a circle within a radius of one-eighth of a mile, taking as a centre the house in question, there are 533 inhabited houses, 22 uninhabited houses, a population, estimated upon an average of five persons to each inhabited house, of 2,665. There are five houses with full on-licences, two houses with beer on-licences, and four houses with off-licences within that one-eighth of a mile circle. Within a radius of a quarter of a mile there are in addition four houses with full on-licences, two houses with beer on-licences, and five houses with off-licences. The house is close to the police-station, and under frequent supervision."

In cross-examination the witness stated that the dwelling-houses in the vicinity of the Duke of Edinburgh were principally one-storey. He did not know anything of the trade of the house.

No evidence was called by the applicant in the case of the house in question, but in the case of three of the houses then under consideration evidence was given on behalf of the applicants.

After hearing evidence, the justices adjourned the further consideration of the five houses until the 28th of February, when after discussion amongst the justices, it was announced that the renewal of the licence of the Duke of Edindurgh and three other houses would be referred to quarter sessions.

Horace Avory, K.C., and *Hohler,* for the justices.—In all these cases rules *nisi* both for a prohibition and for a *mandamus* have been obtained against the licensing justices wrongly, because licensing justices are not a court or tribunal exercising judicial functions. Their duties are purely administrative, and therefore a writ of prohibition will not lie; moreover, the justices once having referred, as they had power to do, the matter for decision to the quarter sessions, ceased to have any further interest in the matter, and there being nothing further for them to do, there was nothing which they could be prohibited from doing. With regard to the rules for *mandamus,* the evidence showed that the justices had heard and determined the matter according to law, and therefore, whether the decision they came to was right or wrong, they cannot be required to re-hear the same applications. Section 1 (2) of the Licensing Act, 1904, takes away from the justices the power of refusing themselves licences, except on certain grounds applicable to the licensee or the premises, and provides instead that if they consider the house is not required they shall report to quarter sessions,

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

which have now the power to terminate the licence upon granting compensation. The justices' decision here comes within *Raven* v. *Southampton Justices*, 52 W. R. 574, [1904] 1 K. B. 430. Under section 1 (2) of the Act of 1904 the justices have to consider an application "in accordance with the Licensing Acts, 1828 to 1902," and if they came to the conclusion on the facts before them that the renewal should be refused, but on grounds that do not give them jurisdiction to decide themselves the application, their duty is to refer the matter to quarter sessions. That is all that the justices have done in this case. It is clear from the affidavits that the justices, apart from any consideration as to the sufficiency of the evidence, have considered each case, and have therefore complied with the Act. If that was so, it was unnecessary to go into the other question—the sufficiency of the evidence. All the justices did here is justified by the decision in *Rex* v. *Howard and Others, Licensing Justices of Farnham*, 51 W. R. 21, [1902] 2 K. B. 363, which shows that justices are entitled to collect information and to take steps to put matters in train for an inquiry, so long as when the application for renewal comes before them they decide it solely upon the evidence given in court. In all these cases the parties making the applications had an opportunity of being heard.

F. Low, K.C., and *Bruce Williams*.—The justices in reporting to quarter sessions are now required to act judicially, and must hear evidence on oath in the same way as if they were themselves dealing with the application and were against the renewal. It is not sufficient to make a report upon sworn police evidence and plans furnished them coupled with their own local knowledge. The seventeen cases in question in the list which will be covered by the decision in this appeal form themselves into two groups. The first group includes all those cases in which rules calling upon the justices to show cause why writs of prohibition should not issue to prevent them from taking any further proceedings in a certain matter of reports which they propose to make to quarter sessions in respect of application for the renewal of licences. That is still a question within their jurisdiction to determine, and in determining it they must still act judicially. Before the Act the question would have been for them to decide; now they have to decide, not the question of renewal, but whether the matter ought to be referred to quarter sessions. Section 1 (2) does not relieve them from the duty they had to perform, but merely alters the form of the order which they make if they decide against the application. The question the licensing justices have to decide is not the same as that which the quarter sessions have to determine. They pick out the victims, and the quarter sessions determine whether the victims shall be sacrificed. The quarter sessions may have thought they are not compelled to hear evidence on oath. Section 1 (2) of the Act of 1904 does not repeal section 42 of the Act of 1872, and the licensee is still entitled to have notice of objection. Nor is the onus of showing that the house is no longer required shifted from the shoulders of the objector, and in its place an onus cast on the licensee to show that the house is reasonably necessary for the requirements of the neighbourhood. There was no evidence here on which the justices could properly report. The facts are indistinguishable from those in *Raven* v. *Southampton Justices*, and therefore the writ of prohibition ought to be made absolute. In the second group of cases which arise, some on appeal from the decision of the Middlesex licensing justices and the others from the decision of the licensing justices of Maidstone, no notice at all was given to the licensees of the justices' intention to report, and therefore in those cases the proper remedy was not by prohibition but by *mandamus*.

Avory, K.C., having replied,

THE COURT reserved their decision.

May 22.—Lord ALVERSTONE, L.C.J., read the considered judgment of the court, which was as follows: In these cases rules *nisi* have been granted calling upon the licensing justices in a number of instances to show cause why writs of prohibition should not issue to prevent them from taking any further proceedings in a matter of certain reports which they proposed to make to quarter sessions in respect of applications for the renewal of certain licences. Rules *nisi* for *mandamus* were granted at the same time calling upon the same justices to hear and determine the applications for renewal. We think it doubtful whether prohibition is the right remedy; as, however, the same point is raised upon the applications for writs of *mandamus*, it is unnecessary to decide this point on the present occasion, and in the event of it being necessary to decide it on any future occasion it must be taken that we have expressed no opinion upon it now. The point raised on behalf of those for whom the rules were moved is that the justices had not before them any evidence sufficient to justify them in making reports to the quarter sessions in respect of the licensed houses in which the applicants for the rules were interested. This was the ground of the applications in the majority of the cases before us. In the remaining cases a further point was raised—viz., that no notice pursuant to section 42 of the Act of 1872 as amended by the Act of 1874 had been given to the applicants for renewal to attend before the licensing justices.

The questions really depend upon the construction which should be placed on sub-section 2 of section 1 of the Licensing Act, 1904; but in order to appreciate the point it will be convenient to consider the statutory enactments prior to that date. By section 42 of the Act of 1872, as amended by the Act of 1874, it was provided that where a licensed person applies for a renewal of his licence he need not attend in person unless he is required by the licensing justices so to do for some special cause personal to himself; that the justices shall not entertain any objection to the renewal of such licence or take any evidence in respect of the renewal thereof unless written notice of an intention to oppose the renewal of such licence, stating in general terms the grounds of opposition, has been served on such holder not less than seven days before the commencement of the general annual licensing meeting, with the proviso that the licensing justices may, notwithstanding that no notice has been given, upon an objection being made, adjourn the granting of a licence to a future day, and require the attendance of the holder of the licence when the case is to be heard and the objection considered. Sub-section 3 provides that the justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. The decisions in *Sharpe* v. *Wakefield*, 39 W. R. 561, [1891] A. C. 189, and *Rex* v. *Howard*, 51 W. R. 21, [1902] 2 K. B. 363, establish that a notice under the proviso to sub-section 2 of section 42 may be given by the direction of the justices themselves, and, further, that the question whether the licence should be renewed, having regard to the wants and requirements of the neighbourhood and the number of licensed houses therein, is one of the grounds, which the justices were entitled to consider upon the question of renewing any particular licence. This, so far as it is necessary to refer to it for the purpose of the case before us, was the position of matters at the time of the framing of the Act of 1904. That

Act, by sub-section 1 of section 1 confined the power of the licensing justices to refuse renewal to certain specified grounds, which do not include the question of necessity for the houses, having regard to the requirements of the district, and sub-section 2 provided that where the justices of a licensing district on the consideration by them in accordance with the Licensing Act, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of renewal of any particular existing on-licence requires consideration on grounds other than those "on which the renewal of an existing on-licence can be refused by them they shall refer the matter to the quarter sessions, together with their report thereon." It is upon these words that the question arises. It is contended by counsel on behalf of the justices showing cause against the rules that the justices may act on their own motion and rely solely on their own knowledge, that it is no longer necessary for them to require the attendance of any licence-holder in respect of whose house they propose to report or direct any notice, under sub-section 2 of section 42 of the Act of 1872, to be given to the holders of such houses, and that the justices need not take evidence on oath when the renewal of any existing on-licence requires consideration on grounds other than those on which the renewal can be refused by them.

We summarize these contentions, not that they all arise in every case, but that they were urged in one or other of the cases as being the true position of the licensing justices under this section. On the other hand, it was contended in support of the rules that the justices must pursue the course which they would have followed under section 42 of the Act of 1872, as amended by section 26 of the Act of 1874, and give notice to all the applicants who are holders of the licences of the houses upon which they propose to report, and hear all the evidence as though they were themselves deciding under the old law the question whether the licence should be renewed. It will be convenient to deal first with the cases in which no notice had been given to the licensed holders. We are clearly of opinion that the justices ought not to make a report respecting any house without giving notice to the licensed holder and giving him an opportunity of attending, and, if he desires, of tendering evidence. This seems to us to be clear, not only on principle, but from a consideration of the previous legislation. The report may certainly affect and alter the position of the licensed holder and in many cases his property. The objection that the house is not required may be raised by an opponent, independently of the justices themselves. In that case the Act of 1872 clearly provides that notice must be given to the licensed holder. Sub-section 2 of section 1 of the Act of 1904 directs the justices to report whether on the consideration by them in accordance with the Licensing Acts, 1828 to 1902, on applications for the renewal of licences, they are of opinion that the question requires consideration. It seems to us that, inasmuch as the question relating to a particular house can be raised by an opponent, and at the occasion referred to would, but for the Act of 1904, only arise where notice had been given, the language of sub-section 2 is not sufficient to alter the existing law, which the new legislation nowhere repeals, which law requires that notice should be given. Further, the knowledge that the particular house is not required for the needs of the district may be brought to the notice of the justices for the first time by the evidence given on behalf of an objecting opponent. The justices would certainly have to hear the evidence tendered by a person objecting. It seems plain on general principles that the person who or whose property is affected by such evidence must have the opportunity of tendering evidence in favour of renewing the licence, instead of referring the matter to quarter sessions. We do not see how the justices could properly consider the question of whether the renewal of any particular licence requires consideration on other grounds without at least giving the opportunity to the licensee of putting before them any evidence which he considers bears upon that question. In the cases, therefore, in which no notice was given to the licensed holders we are clearly of opinion that the proceedings were not regular, and that the rule for *mandamus* should be made absolute.

In the other cases notice was given to the licensed holders pursuant to sub-section 2 of section 42, and the question in these cases is whether evidence must be taken before the licensing justices can make a report, and whether there was sufficient evidence in any of these cases to justify the justices in making such a report. In our opinion the true position of the justices differs somewhat from that which was urged before us on either side. It must be remembered that the condition precedent to their making a report is that they shall be of opinion that the renewal of an existing licence requires consideration on grounds other than those on which the licence can be refused by them. This is obviously a somewhat different question from that which the quarter sessions have to consider—namely, whether a particular house shall be selected as the house, or one of a number, in respect of which the renewal of the licence requires consideration; but we see nothing to alter the existing law that the justices' opinion upon this question is to be based upon evidence, and that such evidence must be taken upon oath, and liberty given to the applicant, the holder of the licence, to cross-examine the deponent, and to call evidence in favour of his application. The amount of evidence, however, which may be sufficient for the purpose of enabling the justices to form the opinion indicated in the section may, in our judgment, be properly treated as different from the amount which could be regarded as sufficient if they had to decide judicially whether or not the particular licence should be renewed or refused. It will not, we think, be necessary in all cases for them to have detailed evidence with regard to the differentiation between public-house and public-house, as the majority of the court thought necessary in *Raven* v. *Southampton Justices*, [1904] 1 K. B., p. 431. There the quarter sessions had to consider the same question as will arise before the committee of quarter sessions under the Act of 1904—namely, whether they will decline to renew the licence of each particular house in respect of which a report is made. Evidence of the character of the district, the locality of the public-houses, and the number of public-houses in the district might be quite sufficient to justify the justices in making a report to quarter sessions that the question of the renewal of any particular licences requires consideration on grounds other than those on which the licensing justices can act. It was suggested in argument in opposition to the rules that in making a report the justices might act on their own knowledge and information only and without any evidence given before them. In our opinion, it was not intended that in forming an opinion as to whether they shall make a report they should exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, and the habits of the inhabitants. It seems to us, for the reasons expressed by Collins, M.R., in *Rex* v. *Howard* (at p. 376), that it cannot have been the intention of the Legislature

that the justices should divest themselves of such knowledge, or determine the question solely on materials provided by the individual who happens to object. But it seems to us to be an entirely different matter from that which we have to consider, and, in our opinion, is consistent with the view that notice must be given to the licensed persons whose licences will be affected, and in so far as the opinion of the justices is formed upon facts with regard to a particular house, those facts should be proved before them by evidence upon oath, so as to give the licensed person an opportunity of testing them and of himself giving evidence if he so desires to do. It only remains to be considered whether, in the cases with which we are now dealing, there was sufficient evidence before the justices to enable them to make a report. In each case they had evidence as to the number of public-houses, the amount of population, and the character of the neighbourhood, in each case the applicants for the licences were present and had the opportunity of cross-examining and calling further evidence, and, in our opinion, therefore, the justices in these cases acted in accordance with the view of the law which we have already expressed, and it was not necessary for them before reporting to go further and inquire into the matters which it may be necessary for quarter sessions to consider when they approach the question as to whether the licences of any particular houses should not be renewed. In those cases, therefore, the rules must be discharged. As has already been stated, the rule *nisi* for a writ of prohibition must be discharged in all the cases.

Solicitors for the justices, *Church, Adams, & Prior.*

Solicitors for the applicant, *Knapp-Fisher & Sons.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 4, 12.

KENSIT *v.* DEAN AND CHAPTER OF ST. PAUL'S. (*a.*)

Ecclesiastical law—Brawling—Ordination of priest—Notable crime or impediment—Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 *Vict. c.* 29).

An allegation that a candidate for ordination as priest has assisted in church services where illegal ritualistic practices are carried on does not constitute a "notable crime" or impediment within the meaning of the ordinal in the Book of Common Prayer.

Case stated.

The appellant John Alfred Kensit was charged at the Mansion House and convicted under section 2 of the Ecclesiastical Courts Jurisdiction Act for having unlawfully disturbed the Bishop of London while celebrating the service of the rite of ordination in St. Paul's Cathedral on the 28th of February, 1904. On that date, when the bishop was conducting the service the appellant and several others walked up the choir, and when the bishop read from the service book the words beginning "But yet if there be any of you knowing any impediment or notable crime in any of them for the which he ought not to be received into this holy ministry, let him come forth in the name of God and show what the crime or impediment is," the appellant came nearer to the bishop and commenced to read from a newspaper. The bishop said, "Unless the impediment comes within these bounds (reading from a paper) I shall prosecute you for brawling." The paper from which the bishop read was an opinion given by Sir Lewis Dibdin, which was as follows: "I think it is clear that neither membership of an ultra High Church society nor the candidate's intention to be advanced in the title of an incumbent who employs extreme (and I will assume illegal) practices in public worship constitutes a notable crime or an impediment within the ordinal. It is obvious that neither is a crime, and impediment is a technical word imputing these disqualifications for orders which are either absolute, as in the case of an unbaptized person, or only to be removed by special dispensation, as bastardy." The bishop also pointed out at the commencement that matters of ritual did not constitute an impediment. The appellant said to the bishop: "You have not heard what I have to say." He then read from his printed protest. The bishop said, "One person named is not here," whereupon the appellant desisted reading as to him. The bishop then said, "I shall prosecute you to-morrow for brawling." Some of those who were with the appellant also protested, and then they all returned through the choir down the nave. The proceedings created a commotion, but it was admitted that the appellant and those who were with him made no more noise than that necessarily caused by persons hastily coming forward. In the protest which he read the appellant stated that he felt it incumbent upon him to make very serious objections to four out of the eight deacons who were candidates on the occasion in question for the office of priest.

The protest as regards Basil Saunders Dyer, the only one of the four mentioned in it who was in fact about to be ordained priest, was as follows: "I call the impediments serious, as they form a complete betrayal of the distinctive principles for which our martyrs died, and for which the Church of England exists. First I object to Basil Saunders Dyer, who has been assisting at St. Matthias, Stoke Newington, and has been guilty of helping forward the effort to make our beautiful communion service resemble as far as possible the Roman Mass. On Sunday last in this church vestments were worn, candles burned when not required for light, distinct acts of adoration were made to the elements, and out of a considerable congregation only four people communicated. In this church there are separate seats assigned for men and women, but the number of men attendants is so small that half the space allotted to them is filled with ladies."

Seven lamps are continually burning before the so-called altar. There is a distinctly Roman request painted on the walls of the Lady Chapel, "Of your charity pray for the souls of"—here follow the names of four dead people. The Rubric in the Common Prayer, following the exhortation in the service set out for the Ordering of Priests, is as follows: "And if any great crime or impediment be objected the bishop shall surcease from ordering that person until such time as the party accused shall be found clear of the crime." This the bishop admittedly did not do, relying on the opinion furnished to him that the above practices would not, even if proved against Mr. Dyer, constitute an impediment within the meaning of the Prayer Book. The quarter sessions considered themselves bound by the opinion of Sir Lewis Dibdin as to the meaning of the word impediment, and as the appellant did not desist when informed by the bishop that irregularities in matters of ritual would not, even if proved, constitute an impediment, affirmed the conviction of the appellant, as they were of opinion that his subsequent conduct did disturb the congregation within the meaning of 23 & 24 Vict. c. 23, s. 2.

If the court should be of opinion that such practices

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

as were alleged in the case of Mr. Dyer would, if proved, constitute an impediment, then, as the bishop did not surcease until the complaint could be heard, the appellant was guilty of no illegal act but was strictly within his right in coming forward when called upon to do so in the name of God. If the court should hold that offences against ritual constituted an impediment, the conviction was to be quashed, if otherwise, the conviction was to stand.

Avory, K.C. (*Biron* and *Whitehead* with him), for the appellant.—The conduct of the appellant was not brawling within the meaning of the Act. The notice invites protests, and even if the appellant was mistaken as to this constituting an impediment his conduct was not brawling in the sense of wilfully molesting. Next, the allegation in the protest is an impediment. Article 35 of the Articles of Religion expressly forbids adoration of the elements, and disobedience to the articles is a notable crime or impediment: see the Act of Uniformity (1 Eliz. c. 2) and 13 Eliz. ss. 2 and 3. Sir Lewis Dibdin's opinion is opposed to that given by Sir John Dodson and Sir Herbert Jenner in 1843 (this opinion was reprinted in the *Record* of the 28th of March, 1904).

Danckwerts, K.C. (*C. W. Mathews* and *Kempe* with him).—The defendant was rightly convicted. He did in fact disturb the congregation. All that was alleged against Mr. Dyer was that he had been curate in a church where illegal ritual was practised. Even if true this did not constitute a notable crime or impediment: Lindwood's Provinciale, 33. A belief that one is exercising a right does not excuse "brawling": *Clinton* v. *Hatchard*, 1 Addams Eccl. 96.

Lord ALVERSTONE, L.C.J., read the judgment of the court, which, after stating the facts already reported, proceeded as follows: In giving our decision upon this case we think it right to decide only the point upon which our opinion is asked by the court of quarter sessions; but we desire to add that we are by no means sure that there was not sufficient evidence of an offence under the statute in that after the bishop who was conducting the service had clearly stated to the appellant that the matters which he (the appellant) proposed to raise were not, in the opinion of the bishop, objections which came within the rubric, the appellant persisted in continuing to interrupt the service by reading from the paper. But, inasmuch as the court of quarter sessions have not decided against Mr. Kensit upon this ground, or upon anything in connection with the way in which he made his protest, as we have said, we think it right to deal only with the point raised, and make the foregoing observations in order that it may not be supposed that we have formed an opinion in favour of the appellant upon the other points which were discussed in argument but which were not raised in the case. Dealing now with the question raised, we are clearly of opinion that the matters contained in the protest of Mr. Kensit are not impediments within the meaning of the rubric. Mr. Avory, in his argument, went so far as to contend that Mr. Dyer, in having assisted at St. Matthias', Stoke Newington, as stated in the protest, in which church distinct acts of adoration were made to the elements, had been guilty of a "notable crime," and in support of his contention he relied upon articles 25 and 28 of the Articles of Religion, and referred to section 4 of the statute 1 Eliz. c. 2, and section 5 of 13 Eliz. c. 12. We are, however, clearly of opinion that, even assuming that proceedings could be taken under these statutes in respect of the matters referred to in the appellant's protest, the allegations fall far short of anything which could be properly described as charging a candidate with a "notable crime" or alleging that there was in any of them any "impediment." The history of these words "notable crime" and "impediment" can clearly be traced in the ancient constitutions of the church; and, to quote the constitution of Archbishop Reynolds, cited in Lindwood, p. 33 (see Phillimore's Ecclesiastical Law, vol. 1, p. 94, second edition), would include such offences as are described in the words "no simoniac, homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having canonical impediment, shall be admitted into holy orders." The word "impediments" related originally to a number of matters, some of which can no longer be regarded as such—as, for instance, bastardy and certain physical defects, as the loss of a limb or eye—but included impediments which would still be considered as a bar to ordination, such as the fact that the candidate was an unbaptized person or was not of the requisite age for the orders to which he proposed to be ordained. Without attempting in this judgment to give an exhaustive enumeration of what may be regarded as "notable crimes" or "impediments," there is not a trace to be found in any authorities that a mere allegation that a candidate has been a party to, or taken part in, the service in a church in which breaches of prescribed ritual have taken place comes within those words; and, to answer the question submitted to us, we are of opinion that such practices as were alleged against Mr. Dyer would not constitute an "impediment." It is well established that the fact that a claim of right is set up is no answer to an offence under this section: see *Asher* v. *Calcraft*, 35 W. R. 651, 18 Q. B. D. 607. In the course of the argument our attention was called to the opinions of Sir John Dodson and Sir Herbert Jenner given in 1843. Taken by itself, we must not be taken to concur in the statement in the second paragraph, that an impediment of a purely doctrinal nature, as Romish heresy, may and ought to be stated; but, taken as a whole, the opinion has no bearing upon the case now before us. For the above reasons we are of opinion that the conviction was right and that the appeal must be dismissed with costs.

Solicitor for the appellant, *John Othen, jun.*

Solicitors for the respondents, *Lee, Bolton & Lee.*

Prob. Div. & Adm. Div. Divorce. } May 25, 26; June 5.

HODGSON v. HODGSON AND TURNER. (a.)

Divorce—Desertion by petitioner—Conduct conducing to adultery—Practice of Ecclesiastical Courts—Judicial separation refused.

The Court declined to grant a petitioner a decree of judicial separation on the ground of adultery on the ground that he himself had been found guilty of desertion.

This was a petition by a husband for a dissolution of his marriage on the ground of adultery.

The respondent and co-respondent denied the adultery, and the respondent alleged that the petitioner had been guilty of cruelty towards her, had deserted her, and that such conduct had conduced to her adultery, if any.

BARNES, P., found that the adultery was proved and the cruelty and desertion also, and that such conduct had conduced to the adultery of the respondent, and he dismissed the petition for dissolu-

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

tion, declining to exercise his statutory discretion under section 31 of the Matrimonial Causes Act, 1857, in favour of the petitioner.

Counsel for the petitioner then asked for leave to amend the prayer of the petition and pray for a decree of judicial separation, and leave was granted.

Priestley, K.C., and *Gwynne Hall*, for the petitioner. —Section 31 is applicable to suits for dissolution only and not to suits for judicial separation. Desertion was a matrimonial offence created by the Matrimonial Causes Act, 1857, and was unknown to the Ecclesiastical Courts, and a mere wilful separation would not have barred a petitioner from obtaining a divorce *a mensa et thoro* on the ground of adultery. Since this suit was now a suit for judicial separation the practice of the Ecclesiastical Courts was applicable.

They cited *Morgan* v. *Morgan*, 2 Curt. 679; *Sullivan* v. *Sullivan*, 2 Add. 299; *Reeves* v. *Reeves*, 2 Phillim. 125.

Waddy, for the respondent, relied on *Boreham* v. *Boreham*, 14 W. R. 317, 1 P. & D. 77; *Otway* v. *Otway*, 13 P. D. 141, 37 W. R. Dig. 84; *Duplany* v. *Duplany*, [1892] P. 53; *Synge* v. *Synge*, [1900] P. 180, 48 W. R. Dig. 56.

BARNES, P., in the course of a considered judgment, said that the petitioner in this case had been found guilty of desertion and of conduct conducing to the respondent's adultery, and he had refused to grant him a decree *nisi*. Counsel for the petitioner had thereupon asked to amend the prayer in his petition and pray for a judicial separation, and Mr. Waddy, on the respondent's behalf, had asked, if the prayer were amended, that he (the learned President) should refuse to grant the judicial separation. That raised a point of extreme difficulty. The 31st section of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), dealt with divorce. But the question here arose as to whether a petitioner, guilty of desertion and conduct conducing to his wife's adultery, against whom the court had exercised its discretion, could be granted a decree of judicial separation by reason of his wife's adultery. The point to be decided was, how would the Ecclesiastical Courts have acted, or, rather, what would be done now, having regard to the principles which would have been applied by the Ecclesiastical Courts to such cases? Section 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), governed this matter. It provided that "in all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act." That did not mean that they were to act on exactly the same principles, but upon such principles and rules as, in the opinion of the court, were as nearly as might be conformable to the principles and rules upon which the Ecclesiastical Courts had hitherto acted. What were the facts in the present case? He had found that the adultery had been the result of the husband's desertion. He had had in this case to deal with a class of person to whom desertion would mean exposure to temptation; and that it was quite easy, and also natural, to say that her adultery had been the result of her husband's conduct. One principle had been indicated in the books. *Compensatio criminis*, a set-off of equal guilt or recrimination, was held a sufficient plea in bar to a suit for divorce *a mensa et thoro* by reason of adultery since the case of *Lord and Lady Leicester* in 1737. "*Ea lege quam ambo contempserunt neuter vindicetur, paria enim delicta mutua pensatione dissolvuntur*," was said to be the maxim of the civil law, upon which the plea was founded: 2 Hagg. 292; Rogers' Eccl. Law, 334 (1st edition), 372 (2nd edition). But that was not exhaustive, for in *Drummond* v. *Drummond*, 30 L. J. P. 177, 4 L. T. 416, it was held that a judical separation could only be granted where the petitioner came to the court with a pure character, and was free from all matrimonial misconduct. Accordingly where a husband and a wife had both been found guilty of adultery, and the husband had also been found guilty of cruelty, it was held that the court had no jurisdiction to make a decree of judical separation on the ground of such cruelty, however aggravated its character might be. Counsel for the petioner had argued that malicious desertion was not considered a bar by the Ecclesiastical Courts: *Harris* v. *Harris*, 2 Hagg. Eccl. Rep. 376. But at p. 414 in the report of that case there was a very important passage in Dr. Lushington's judgment, which indicated the limits to which such a doctrine could be pressed: "On the one hand, the court is most desirous not to relax the obligation which the law imposes upon the husband, cautiously to protect and guard his wife from all associations that might expose her purity to hazard; or, by lowering her standard of female virtue, prepare the way for the inroads of the seducer. If, indeed, the court is not sufficiently alert in maintaining the necessity on the part of the husband of jealously watching over the society, conduct, and habits of his wife, it may occasion an irreparable injury to the great bonds of domestic happiness and peace. On the other hand, the court is equally anxious to introduce no new rule of law and not to strain any admitted principle of law beyond those limits which have been affixed by the wisdom of its predecessors and by the judges of superior courts." In the three cases cited to him—*Sullivan* v. *Sullivan*, *Morgan* v. *Morgan*, *Reeves* v. *Reeves*—mere desertion was not considered a bar, but those cases did not exhaust the matter. For those were cases in which a young husband had been sent away from his wife, or the desertion had taken place in a manner other than the desertion in the present case. These facts were not analogous to the facts now before him, and those cases did not really support the *dictum* contended for by Mr. Gwynne Hall. The doctrine of *compensatio criminis* had been much questioned in many cases by Dr. Lushington and in the Court of Appeal: *Otway* v. *Otway*, 13 P. D. 141, and in *Dillon* v. *Dillon*, 3 Curt. 92, and 13 P. D. 149. In the latter case Dr. Lushington had said: "I find it laid down that cruelty cannot be pleaded in bar to to adultery. I myself so held in *Harris* v. *Harris*, relying on the doctrine of Lord Stowell in *Chambers* v. *Chambers*, 1 Hagg Consist. 439." One could understand why cruelty was not a bar, for cruelty had taken place during the time the parties were living together, and the injured party had a remedy, if he or she chose to take it. But if no remedy was taken, and the injured party afterwards committed adultery, that was quite a different case than the one in which desertion occurred. In the first the effects of the cruelty did not continue, in the latter case the effects of desertion did. He had found it stated, so far back as when Paley wrote his Moral Philosophy, that desertion should be a ground for divorce. After having cited and discussed *Foster* v. *Foster*, 1 Hagg. Consist. 292, *Duplany* v. *Duplany*, and *Synge* v. *Synge*, the learned President said that in the later case Lord St. Helier had said: "Perhaps the Ecclesiastical Courts would have gone further, and in a case of such conduct as conduced to adultery, when that was the basis of the petition for judicial separation, it is

possible, I think, that the Ecclesiastical Courts might have refused a decree, though I do not desire to lay that down for certain." And it had been held by the House of Lords in *Simmond's Divorce Bill*, 12 Cl. & Fin. 339, that a husband living separate from his wife for many years without making any provision for her maintenance from his means, which were sufficient, was not entitled to a divorce though the adultery of the wife was clearly proved. That was in 1845, and although he did not say that he could find an exact parallel in the practice of the Ecclesiastical Courts, yet this case was a very strong one, and the judgment showed what was the attitude taken by the House of Lords in a divorce Bill prior to 1857, although not applicable to a divorce *a mensa et thoro*. Acting, therefore, on the principles in these cases, he thought that it would be wrong to hold that a petitioner, whose conduct had brought about his wife's fall, should obtain a judicial separation by reason of that adultery. He (the learned President) was not going to be the first to say that it was the law of this country that a man in that position could come forward and claim relief from this court. The proper course to pursue, therefore, was to allow the petitioner to amend the prayer in his petition, and refuse to grant him the relief prayed for and dismiss the petition with costs.

Judgment accordingly.

Solicitors for the petitioner, *Jaques & Co.*, for *Neil & Holland*, Bradford.

Solicitors for the respondent and co-respondent, *Campion & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — May 26.

STRONG & CO. OF ROMSEY (LIMITED) *v.* WOODIFIELD. (*a.*)

Inland revenue—Income tax—Deductions—"Disbursements exclusively laid out for the purposes of such trade"—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *cases* 1 *and* 2, *r.* 1; *and* 1853 (16 & 17 *Vict. c.* 34), *Schedule D.*

By section 100, *cases* 1 *and* 2, *r.* 1, *of the Income Tax Act,* 1842 (5 & 6 *Vict. c.* 35), *it is laid down that "no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern." To fall within the terms of this rule it is necessary that the expenses be incurred for the purpose of earning the profits of the trade, manufacture, adventure, or concern; the expenses must not come out of the profits after they have been earned.*

A., an innkeeper, in an action brought against him for negligence, whereby B., a guest at the inn, was injured, was obliged to pay damages and costs. In estimating the profits for income tax purposes,

Held, A. was not entitled to deduct from the year's profits the damages and costs so paid, as being an expense wholly and exclusively incurred for the purposes of carrying on the inn.

Appeal from the judgment of Phillimore, reversing the decision of the Income Tax Commissioners.

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

At a meeting of the commissioners for the general purposes of the Income Tax Acts for the division of Romsey, in the county of Southampton, held at the Town Hall, Romsey, on the 21st day of April, 1904, Strong & Co. of Romsey (Limited) (hereinafter called the respondents) appealed against an estimated assessment of £60,000 made upon them for the year ending the 5th of April, 1904, under Schedule D of the Act 16 & 17 Vict. c. 34.

The respondents are brewers carrying on business at Romsey, and at other places, principally in the counties of Hampshire, Wiltshire, and Dorsetshire, such business comprising the businesses of brewers, maltsters, and wine and spirit merchants and manufacturers and vendors of mineral waters, and any other businesses subsidiary or auxiliary to the said businesses or any of them.

The memorandum and articles of association of the respondents and their prospectus accompanied the case, and from pargraph 3 (4) of such memorandum and articles of association it was to be seen that one of the objects of the company is (*inter alia*) the acquiring for any of the purposes of the company any hotels, beerhouses, public-houses, or any share, right, or interest therein.

Accounts were submitted by the respondents, and the profits for the years ending the 30th of September, 1900, and the 30th of September, 1901, were agreed as £48,359 and £51,122 respectively.

For the year ending the 30th of September, 1902, a deduction was claimed by the respondents of an item of £1,490, being damages and costs incurred by them in defending an action brought against them for injuries sustained on the 2nd of March, 1901, by a guest at one of their licensed houses, known as the "Lion and Lamb Inn," Poole, caused by the falling in of a chimney during a gale. The house was owned by the respondents, and was under management at the time of the accident. If the deduction were not allowable, the profits for the year in question were agreed as £52,797.

Before the commissioners, it was contended on behalf of the respondents that as in the course of their business as brewers it became necessary for the respondents at times to carry on business as innkeepers, and that the profits of such business as innkeepers were included in the accounts of the company, that as the expenditure was incurred by the respondents in the course of and incidental to the conduct of the concern the profits of which were assessed, allowance must be made on account of such expenditure before the profits for the year in question could be ascertained.

The commissioners decided against this contention, and the respondents appealed.

Phillimore, J., reversed the decision of the commissioners, and the surveyor of taxes, on behalf of the Crown, now appealed.

Section 100, r. 1 of case 1 of the Act of 1842, enacts: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years. . . ."

Rule 1 of case 2 enacts: "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains for any disbursements or expenses whatever, not being money wholly or exclusively laid out or expended for the purpose of such trade, manufacture, adventure, or concern."

Sir R. Finlay, A.G. (*Sir E. Carson, S.G.*, and *Rowlatt* with him), for the appellants.—My submission

shortly is, that this expense was not a disbursement for the purpose of the trade. The expense was incurred by reason of want of care on the part of the respondents as innkeepers, on the principle laid down in *Sandys* v. *Florence*, 47 L. J. C. P. 598, 26 W. R. Dig. 107. This is not a disbursement at all, but damages for negligence. Many illustrations could be given which would show into what difficulties the court would be led if it decided against the appellants. For example, could damages paid by a newspaper for a libel which it could not justify be said to be a necessary expense wholly and exclusively laid out for the purpose of the business. It would amount to saying that negligence must be anticipated in the carrying on of business. Nor would it be possible to stop there, for it would be found necessary to hold inquiries into the nature of the negligence, to ascertain whether the person assessed was justified under all the circumstances in defending the action which resulted in the loss sought to be deducted. The respondents are in fact seeking to deduct from profits after they have been earned. The disbursement was not used to make the profits; it is laid out for negligence, and negligence cannot be necessary for the business. The whole object of the Income Tax Acts is to limit these deductions. The first rule of case 1 provides expressly that the duty shall be "paid without other deduction than is hereinafter allowed." This is again emphasized in section 159, "In the computation of the duty . . . it shall not be lawful to make any other deduction therefrom than such as are expressly enumerated in this Act. . . ." The authorities referred to in the judgment of Phillimore, J., do not assist. *Gresham Assurance Society* v. *Styles*, 3 T. C. 185, decided that annuities paid by the society should be deducted from the profits; these payments were in the ordinary course of business of an insurance office and could not be disallowed under rule 4 of case 1. *Brickwood & Co.* v. *Reynolds*, 3 T. C. 600, illustrates the proposition that the expenditure must be wholly in the course of trade. *Reid's Brewery Co.* v. *Male*, 3 T. C. 279, decided that bad debts incurred by brewers who made advances to their customers might be deducted; the ground of the decision was merely that it is part of the business of such a company to make pecuniary advances to its customers. *Royal Insurance Co.* v. *Watson*, 3 T. C. 505, contains a *dictum* at p. 506 upon which the learned judge below placed the greatest stress. It will be seen that Lords Herschell, Macnaghten, and Davey expressly leave the point open.

He also referred to *Watney Iron Co.* v. *Musgrave*, 1 T. C. 272, and *Rhymney Iron Co.* v. *Fowler*, 3 T. C. 476.

Danckwerts, K.C. (*Henriques* with him), for the respondents.—So far as the practice is concerned I understand that tramway companies are invariably allowed to deduct what they have paid by way of compensation. It is not a question of skilfulness or unskilfulness; that has nothing to do with the matter. The profits to be assessed are the gross profits less necessary deductions. The whole question is begged by saying that first of all the profits are arrived at and then deductions are made, and then arguing that the sum in this case sought to deducted is due to negligence. Part of expenses of carrying on a large business is to provide for the payment of servants, and for losses due to acts of servants; you cannot employ servants without anticipating they will occasion at some time or the other loss by their negligence. No man is voluntarily negligent; the Legislature assumes that he will not be so. In the case before the court the loss was due to the negligence of employees. [MATHEW, L.J.—Negligence of servants has nothing whatever to do with the matter. The house was in a dangerous condition. It was the want of care of the company.] Negligence in a business is an incident with which one has to deal; the Inland Revenue is not warranted against negligence; it takes the chance of there being any profits after all losses are deducted. For the purposes of income tax you must arrive at the balance of profits, and that has been repeatedly held to be net profits: *Cotness Iron Co.* v. *Black*, 6 A. C. 315, at p. 333. It is to be noticed that section 100 of the 1842 Act only gives a series of rules to assist at arriving at net profits. Case 1, r. 3, is negative in form, but is really permissive; the important words of that rule are "no sum shall be deducted from such profits . . . on account of loss not connected with or arising out of such trade. . . ." This is a loss connected with the trade: see *Russell* v. *Town and County Bank*, 13 A. C. 418, Lord Herschell at p. 424. It is important to notice that case 1, r. 3, allows deductions for the negligent breakage of utensils. Again, section 101 indicates that the object of the Act is to arrive at net profits; this section allows a person carrying on two businesses to set off the losses sustained in one against the gains acquired in the other.

He referred to *Brown* v. *Watts*, 2 T. C. 143.

Sir R. Finlay, A.G., replied.

THE COURT (COLLINS, M.R., and MATHEW and COZENS-HARDY, L.JJ.) allowed the appeal.

COLLINS, M.R.—This is an appeal from the decision of Phillimore, J., and the point, shortly, is whether in making out their account of profits for the purpose of assessment of income tax the respondents are entitled to deduct a sum of money which became payable by them in their capacity as innkeepers for injuries resulting to a customer enjoying the hospitality of the inn, who was sleeping in the inn, and while sleeping there suffered damage from a chimney falling upon him owing to the negligence of persons whose business it was to see to the condition of the premises. The respondents had to pay £1,490 by way of costs and damages. I say the fault of the chimney falling in was due to the persons whose business it was to see to it, for, by the courtesy of Mr. Danckwerts, we now have before us the pleadings in the action out of which resulted the obligation to pay the sum of money I have named. The owners of the inn are a brewery company, and as part of their business they became owners of this inn and put in a manager. It was their business, and they were carrying it on. They justify the deduction on the ground that the expenses were incidental to the carrying on of the business, and they were therefore entitled to deduct. That view commended itself to Phillimore, J., who found in their favour. The cases are difficult to distinguish, being extremely near the line on one side and the other. Mr. Danckwerts has succeeded in putting a good many difficulties before the court, but when one comes to look at the case it becomes comparatively simple. I go to the first rule under section 100, cited at p. 134 of Mr. Dowell's Acts Relating to the Income Tax.. [His lordship read the rule.] I now come to the rules applicable to the preceding cases which will be found at p. 152. [His lordship read them.] It seems to me that the root of the whole matter is this, all expenses necessary for the purposes of earning the profit are properly to be deducted, but expenses to come out of profits after they have been earned cannot be deducted unless there is to be found some express provision in this Act authorizing the deduction. Unless it can be shown here that the sum paid by way of damages, due to negligence, is an expense necessarily incidental for the purpose of carrying on their trade it cannot be

deducted. The distinction is that it is not a sum which had to be paid as a condition for earning profits, but was a sum which the owners of the inn were compelled to pay after the profits had been earned, and there is no provision which authorizes the deduction; the words I have read negative such a deduction. It seems to me it would lead to strange consequences if the person whose income is to be assessed were entitled to deduct claims for damages payable by him to third persons in respect to the negligence of himself. That is what we have to consider in this case. The negligence of servants may be the same case, but it is not the point before us, and I am dealing with this as a case of negligence of the person assessed. This is a company, but it makes no difference, as it was the negligence of persons who stood for the company. I think there is not very much to be gained by attempting to follow out the instances that have been cited in the course of the argument when one grasps the true principle: are these expenses incurred in earning the profits or do they come out of the profits after they have been earned. In this case damages paid to third persons cannot be said to be expenses incurred in the earning of the profits as a condition of earning them. They were incurred in the business, no doubt, but only because they were carrying on the business of the inn. It may be that they can only pay them out of the profits of their business, but they are not incurred in the earning of the profits. I think Phillimore, J., has treated this expenditure as incurred in earning the profits. I think he recognized the distinction, but he has come to the conclusion, which I cannot follow, that this particular expenditure was incurred in earning the profits. I cannot agree with that. The appeal must be allowed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed with costs.

Solicitor for the appellant, *The Solicitor of the Inland Revenue.*

Solicitors for the respondents, *Metcalfe, Birkett, & Rowlatt.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — May 23.

IMPERIAL AND GRAND HOTELS CO. *v.* CHRISTCHURCH GUARDIANS. (*a.*)

Poor law—Rating—Appeal—Time—Poor Relief Act, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Amendment Act,* 1864 (27 *&* 28 *Vict. c.* 39), *s.* 1.

Ratepayers who were aggrieved by a poor rate gave notice of objection to the valuation list to the assessment committee, but not until after two meetings of the assessment committee and one court of quarter sessions had been held since the making of the rate. Having failed to obtain relief from the assessment committee they gave twenty-one days' notice of appeal to the then next quarter sessions.

Held, that, having regard to section 1 *of the Union Assessment Committee Amendment Act,* 1864, *which says that an objection to a valuation list may be heard after notice given at any time, the quarter sessions had jurisdiction to entertain the appeal.*

Decision of the Divisional Court (ante, *p.* 349) *affirmed.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) on a case stated by the Recorder of Bournemouth upon the hearing of an appeal by the Imperial and Grand Hotels Co. (Limited) against a poor rate (reported, *ante*, p. 349, [1905] 1 K. B. 89).

The rate against which the company appealed was made by the overseers of the parish of Bournemouth in the Christchurch Union, on the 21st of April, 1903, to provide for expenses to be incurred before the 31st of March, 1904, and was made payable in two instalments, the first payable on the 1st of May and the second on the 1st of November, 1903. The assessment committee of the Christchurch Union held meetings for the purpose of hearing objections to the valuation list on the 15th of May and the 13th of August, 1903, but at neither of these meetings was any objection made by the company. Courts of quarter sessions were held on the 27th of June and the 27th of October, 1903.

On the 26th of October, having previously, in August, paid the instalment due on the 1st of May, the company gave notice of objection to the list, which objection was duly heard by the assessment committee on the 12th of November, when the company failed to obtain relief.

Due notice of appeal to quarter sessions was given on the 5th of December, 1903, and the appeal was heard on the 2nd of January, 1904.

It was objected on behalf of the guardians of the union that there was no jurisdiction to hear the appeal, inasmuch as the company had not appealed to the next quarter sessions, as required by section 4 of the Poor Relief Act, 1743 (17 Geo. 2, c. 38).

The recorder overruled the objection, and, after hearing the appeal, reduced the assessment, but inasmuch as the appellants had not taken steps, as they might have done, to appeal against the rate at an earlier date, refused to order the repayment of the excess paid by the company in respect of the first instalment.

The guardians appealed to the Divisional Court, who affirmed the decision of the recorder on the point in question, being of opinion that, as the company had given notice of objection and had gone before the assessment committee and had appealed during the currency of the rate, the appeal to quarter sessions was in time.

The guardians appealed to the Court of Appeal.

Ryde and *Francke*, for the appellants.

Clavell Salter, K.C., and *Haydon*, for the respondent company.

The following cases were cited: *Reg.* v. *Inhabitants of Sevenoaks*, 7 Q. B. 136; *Reg.* v. *Great Western Railway Co.*, 38 J. P. 822; *Lawes* v. *Churchwardens of Arlsey*, 18 W. R. 293 (reported under the name of *Reg.* v. *Biggleswade Union*, 21 L. T. 494); *Reg.* v. *Wiltshire Justices*, 4 Q. B. D. 326, 27 W. R. Dig. 151; *Liverpool United Gas Light Co.* v. *Overseers of Everton*, 19 W. R. 412, L. R. 6 C. P. 414.

COLLINS, M.R.—This is an appeal from a judgment of the Divisional Court affirming a decision of the Recorder of Bournemouth. The question is whether a party appealing against a poor rate has brought his appeal in time. The matter turns on the provisions of certain statutes, the earliest of which is the Poor Relief Act, 1743 (17 Geo. 2, c. 38). Section 4 of that statute enacts that, in case any person shall find himself aggrieved by any rate or assessment made for the relief of the poor, it shall and may be lawful for such persons, giving reasonable notice to the churchwardens or overseers of the poor of the parish, to appeal to the next general or quarter sessions of

the peace. That section has been construed, and, in my opinion, necessarily construed, as meaning that the appeal shall be to the next practicable sessions. The condition for giving reasonable notice requires that the words "the next general or quarter sessions of the peace" should be construed as meaning "the next practicable general or quarter sessions of the peace." The Union Assessment Committee Act, 1862, introduced a provision giving a person who desired to appeal against a poor rate the option of going before the assessment committee and objecting to the valuation list. Section 18 of that Act said that any person who might feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, might at any time after the deposit of the list and before the expiration of twenty-eight days after public notice of the deposit give to the assessment committee and to the overseers a notice in writing of his objection, specifying the grounds thereof. This procedure was optional at the will of the person who was proposing to appeal. Then, two years later, came the Union Assessment Committee Amendment Act, 1864, under which this procedure is no longer optional, but it is compulsory on the would-be appellant to go before the assessment committee. Section 1 of that Act is as follows: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union; provided, that after the first day of August no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full powers to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them; and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

The effect of this section of the Act of 1864 is to introduce two fresh conditions precedent to the right to appeal. The Act of George II. provides that the appeal shall be brought to the next quarter sessions; but the requirement for giving reasonable notice involved a qualification of the strict meaning of the words of the statute so as to meet the case where it was impossible to appeal to the next quarter sessions. That statute was therefore construed as meaning that the appeal should be to the next practicable quarter sessions. The two fresh conditions introduced by the Act of 1864 are, first, that the appellant has to go to the assessment committee and take his objection to the valuation list after notice which may be given at any time, and, secondly, that after failing to maintain his objection, he has to give the assessment committee twenty-one days' notice of his intention to appeal to the quarter sessions. Those conditions were sufficiently performed if they were performed in accordance with the terms of the legislation which imposes them. The only limit imposed on the condition of going before the assessment committee is that it is to be after notice given at any time. This condition is therefore fulfilled by an appellant who avails himself of the latitude allowed him of giving his notice of objection at any time. It is said that some limitation must be put on the words "at any time." Probably that is so, but it is not necessary in this case to attempt to lay down an absolute rule as to what that limitation may be. It is sufficient to say that in my opinion the time allowed by the statute has not been exceeded in this case. I agree with the Divisional Court in thinking that the decision of the learned recorder was right. The appeal must therefore be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Lovell, Son, & Pitfield*, for *Druitt & Druitt*, Christchurch.

Solicitor for the respondents, *C. F. Ingram*, for *C. J. Lacey*, Bournemouth.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) May 12, 16.

BUCKINGHAM v. MAYOR, &c, OF FULHAM. (a)

Master and servant—Employers' liability—Accident—Compensation—Warehouse—Workmen's Compensation Act, 1897, *s.* 7, *sub-sections* 1 *and* 2—*Factory and Workshop Act*, 1901, *s.* 149, *sub-section* 5, *Schedule VI., Part I.* (*II.*).

A yard is not a warehouse for the purposes of the Workmen's Compensation Act, 1897, *merely because waste material, some of which is occasionally sold in order to get rid of it, is stored there.*

Appeal from award of deputy judge of Brompton County Court under the Workmen's Compensation Act, 1897.

The applicant was accidentally injured while removing old scrap iron at Munster-yard, Fulham, for his employers, the respondents, who owned the yard. This was a space of two acres, on one side of which were arches, over which ran a railway. Cement was stored under some of these arches, and there were also in the yard furniture vans, a blacksmith's forge and shop, stacks of old scrap iron and wood-paving, and some stables.

The wood-paving was sometimes sold for firewood, and the yard was occasionally used for sharpening tools and repairing carts.

The county court judge held that the case did not come within the Act, inasmuch as the yard was not a warehouse, regarding the occasional sale of the wood-paving as a merely incidental purpose to which the yard was put, and finding as a fact that it was chiefly used as a dumping-ground for all kinds of waste material.

Ruegg, K.C., and *John O'Connor*, for the appellant.—The yard is a factory within the meaning of the Workmen's Compensation Act, because in the first place it is a non-textile factory within the meaning of the Factory and Workshop Act, 1901, since it contained a blacksmith's forge: Schedule VI., Part I. (II.), and section 149, sub-section 5, of the Factory Act, 1901. Secondly, it is a warehouse: *Willmott v. Paton*, 50 W. R. 148, [1902] 1 K. B. 237. [COZENS-HARDY, L.J.—In that case it was held that contiguity to water was not essential; moreover, the county

(a.) Reported by D. R. CHALMERS-HUNT, Esq., Barrister-at-Law.

court judge found that the yard was in fact a warehouse, and was justified in so finding.] The goods were stored for safe custody, as in *Green* v. *Britten*, 52 W. R. 198, [1904] 1 K. B. 350; and see *Henderson* v. *Glasgow Corporation*, 2 Fraser 1127.

Danckwerts, K.C., and *A. I. Symmons*, for respondents.—Warehouse implies something roofed over. [COLLINS, M.R.—*Middleton* v. *Wade & Son* (C.A., May, 1905, unreported) decided that a roof is necessary to constitute a warehouse.]

They also referred to *Haddock* v. *Humphrey*, [1900] 1 Q. B. 609, 48 W. R. 292, C.A.; *Colvine* v. *Anderson*, 5 Fraser 255; and *R.* v. *Hill*, 2 M. & R. 458.

Ruegg, K.C., in reply.

THE COURT dismissed the appeal.

COLLINS, M.R., said: This yard is described by the county court judge as a dumping-ground. The contention that this was a factory within the Factory Act, 1901, has not, I think, been seriously pressed. It is suggested on behalf of the appellant that the county court judge misdirected himself in that he found that the yard was not a warehouse. The only misdirection that could possibly be suggested is the reference of the learned judge to the fact that the goods were not stored for the purpose of sale. But he obviously only meant thereby to negative an element which might constitute the yard a warehouse. He did not intend an exclusive definition. The man in the street, whose terminology has been held to be the test in all these cases, would not call this yard a warehouse.

MATHEW, L.J.—I agree. The stuff was sold, not for the purpose of profit on sale, but in order to get rid of it. An occasional sale of goods stored in a yard will not necessarily constitute the place a warehouse.

COZENS-HARDY, L.J.—I agree. The word warehouse seems to me to involve the idea of a place where goods are stored for sale, or at least for some other commercial purpose. But it does not prove that a piece of ground where goods are stored for commercial purposes is necessarily a warehouse in law. This is shown by the decision in *Middleton* v. *Wade*.

Appeal dismissed.

Solicitors for applicant, *Pattinson & Brewer*.

Solicitor for employers, *Prescott*.

High Court of Justice.

Chan. Div.
Farwell, J. } May 11.

CORBETT *v.* SOUTH-EASTERN AND CHATHAM RAILWAY COMPANIES MANAGING COMMITTEE. (*a.*)

*Railway—Private owner—Agreement—Clause for protection of landowner—Third party—*Ultrà vires—*Bexley Heath Railway Act*, 1887 (50 & 51 *Vict. c. lxxx.*), *s.* 19—*South-Eastern and London, Chatham, and Dover Railway Companies Act*, 1899 (62 & 63 *Vict. c. clxviii.*).

By a private Act of Parliament a railway company were authorized to construct a line through the land of a private owner, H. B. By a section of the Act, after stating that it was for the protection of H. B., his heirs and assigns, and that certain provisions should, unless otherwise agreed, have effect, it provided, inter alia, *that, e.g., the company should construct and maintain a station with all proper access and accommodation for passengers and goods to and from the estate of the owner, H. B., at a certain point. The defendants, as the successors in title to the said railway company, and in whom all their obligations were now vested, had agreed with the plaintiff, the owner of an adjoining estate, to remove the said station, and in lieu thereof erect another on ground adjoining the estate of the plaintiff in a more convenient situation. They had acted in* bonâ fide *ignorance of the above-mentioned provisions. On their discovering their mistake they refused to carry out the agreement.*

Held, that the provisions in the Act were simply for H. B.'s benefit, his heirs and assigns, and that there was nothing to show it was for the benefit of the public. That that being so, the provisions were capable of being released by H. B., and that therefore, it being in the nature of an agreement to obtain such consent, it was not ultrà vires *on the part of the defendants, but they would be liable in damages for breach of the agreement to obtain such consent, though specific performance could not be enforced until such consent was obtained.*

Action.

The plaintiff, a Mr. A. C. Corbett, was the owner of a large piece of land situate at Eltham Park, Eltham, in Kent, known as the Eltham Park Estate, and lying between two stations on the South-Eastern Railway Co.'s line from London to Bexley Heath and Erith, known as Well Hall and Welling respectively.

This land the plaintiff was desirous of developing as a building estate, provided suitable railway accommodation was provided upon some portion of it.

The defendants were a corporate body with perpetual succession, and a common seal having been incorporated by the South-Eastern and London, Chatham, and Dover Railway Companies Act, 1899 (62 & 63 Vict. c. clxviii.), which was passed for the purpose of providing for the working union of the two companies; and by the said Act it was, amongst other matters, provided that from and after the passing thereof all the powers and authorities, duties, and obligations vesting in or attaching to the two companies or either of them in relation to the renewal, alteration, enlargement, or improvement of stations, buildings, works, and other conveniences, appliances, and things belonging to the undertaking of the two companies, and the construction or provision of additional stations and buildings for the purposes of the same should be transferred to the defendants.

By an agreement in writing dated the 13th of October, 1900, and made between the plaintiff and defendants, after reciting that the plaintiff was desirous of developing the said estate, and had requested the company to remove the Well Hall station to a position nearer the Welling station, on account of its being more advantageous to the said estate, and that the company had consented to do so upon certain conditions, it was thereby mutually covenanted and agreed by and between the said parties as follows:

"(i.) The company will, as soon as conveniently may be, discontinue the use of their present Well Hall station, and in lieu thereof will erect a new station nearer Welling station and adjoining Westmount-road.

"(ii.) The said Archibald Cameron Corbett, his executors or administrators, will pay to the company from the date of the first payment being made by the company upon the certificate of their engineer for work done in connection with the erection of the said new station, and the demolition of the present Well Hall station, interest at the rate of 2 per cent. per annum upon the moneys so expended by the company

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

from time to time until the said new station shall have been completed, and from the date of the opening of the said new station on or before the 1st day of October, 1902, at the rate of 3 per cent. on the sum of £20,000 until the expiration of ten years from the date of the said first payment, the said sum of £20,000 being hereby agreed to be the amount of the value of the present Well Hall station and the cost of the erection of the said new station, such payments of interest to be made quarterly on the usual quarter days in each year."

In their statement of claim the plaintiffs alleged that the defendants in breach of the said agreement refused to discontinue the use of the said Well Hall station and to erect in lieu thereof a station adjoining the said Westmount-road, and in consequence the plaintiff was unable to develop the estate as a building estate as he wished, and to the extent he could have done if the agreement had been carried into effect. He alleged that he had suffered already great damage by reason of the non-performance by the defendants of the said agreement.

The defendants denied that they had committed a breach of the agreement, and they relied on the Bexley Heath Railway Act, 1887 (50 & 51 Vict. c. lxxx.), s. 19. By this Act the then Bexley Heath Railway Co. were authorized to make a railway from Eltham to Charlton (through part of the estate of Sir Henry Barron, Bart., by a junction with the North Kent Railway of the South-Eastern Railway.

Section 19 of the Act is as follows: "For the protection of Sir Henry Barron, Bart., his heirs and assigns (hereinafter referred to as and included in the expression 'the owner'), the following provisions shall, unless otherwise agreed between the company and the owner, have effect (that is to say): (1) No part of the garden or curtilage of Well Hall shall be entered upon, taken, or used by the company; (2) no spoil banks shall be made by the company on any land forming part of the estate of the owner; (3) the company shall construct and maintain a station with all proper and sufficient works and accommodation and access to and from the estate of the owner, either on the boundary between the said estate and the adjoining estate of the Earl of St. Germans or within 100 yards on either side of such boundary, but no part of the goods portion of the station shall be placed upon any part of the estate of the owner; (4) the company shall construct and maintain a station for both passengers and goods, with all proper and sufficient works and accommodation and access to and from the estate of the owner, at the point of juncture of the railway authorized by this Act with railway No. 1, authorized by the Act of 1883, or as near thereto as the levels and other circumstances will permit; (5) no more land forming part of the estate of the owner shall be entered upon, taken, or used by the company than absolutely required for the purposes of the railway by this Act authorized, and the station, approaches, roads, and works connected therewith; (6) the owner may at any time hereafter make any roads, sewers, drains, and bridges across the railway by this Act authorized in addition to those to be constructed by the company, and such roads, sewers, drains, and bridges shall be made in all respects to the reasonable satisfaction of the surveyor or engineer for the time being of the company."

Under an Act of 1900 the South Eastern Railway Co. took over the Bexley Heath Railway Co., which now formed part of the joint undertaking of the defendants. The defendants contended that the agreement of the 13th of October, 1900, was *ultrà vires* by reason of section 19, sub-section 4, of the above-named Act, by which it would be unlawful to remove the existing Well Hall station and build a new one in lieu thereof somewhere else, though at the date of the agreement they had themselves acted in good faith and in ignorance of the section. The plaintiffs replied that if such were the case it was a mere parliamentary bargain which was capable of being released. The action was entirely on the point of law, and the question of damages was not put in evidence on behalf of the plaintiff. The persons entitled to Sir Henry Barron's estate had never waived their rights under the Act of 1887, and they insisted upon the strict performance by the defendants of their duties under sub-section 4 of section 19.

Haldane, K.C., and *H. Courthope-Munroe*, for the plaintiffs.

They cited *Goldsmid* v. *Great Eastern Railway Co.*, 32 W. R. 341, 25 Ch. D. 512, and judgment of Fry, L.J., on p. 553, 32 W. R. Dig. 127; *Savin* v. *Hoylake Railway Co.*, 14 W. R. 109, L. R. 1 Ex. 9, and Pollock, C.B., on p. 11; *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners*, 7 App. Cas. 694; *Davis* v. *Taff Vale Railway Co.*, 44 W. R. 172, [1895] A. C. 542, on p. 552; *Hampstead Corporation* v. *Midland Railway Co.*, 53 W. R. 187, [1904] 2 K. B. 802, [1905] 1 K. B. 538; also Leake on Contracts (3rd ed.), at pp. 590 and 597.

Neville, K.C., and *A. Adams*, for the defendants.—Simply a question of *ultrà vires* or not. If *ultrà vires*, damages, and specific performance will follow: *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*, L. R. 2 Sc. & Div. App. 347, 22 W. R. Dig 13. Where you have an agreement and effect given to it by statute, though a private Act, it remains a statutory agreement, unless and until it is put an end to by the consent of the parties.

He cited *Ashbury Railway Carriage Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. (Eng. & Ir. App. Cas.) 653, and remarks of Lord Selborne on p. 654; *Attorney-General* v. *Great Eastern Railway Co.*, 27 W. R. 759, 11 Ch. D. 449, 27 W. R. Dig. 153; *Cresfield* v. *Manchester Ship Canal Co.*, 52 W. R. 635, [1904] 2 Ch. 123.

Haldane, K.C., replied. [*A. Adams* mentioned *Hobbs* v. *Midland Railway Co.*, 30 W. R. 516, 20 Ch. Div. 418.]

FARWELL, J.—The plaintiff, Mr. A. C. Corbett, having bought a building estate at Eltham, wished to develop it, and accordingly entered into a contract with the defendants, the joint committee of the South-Eastern and Chatham Railway Companies that they would move Well Hall station from its present position, and build another station, in consideration of certain payments to be made by the plaintiff. On the face of it, that was a perfectly possible and proper contract on the part of all parties. When the railway company came to look into the matter after they entered into the agreement, they found that under one of their private acts, there was this section, section 19 of the Act of 1887, the Bexley Heath Railway Co. Act, that being the Act of one of the predecessors in title of the South-Eastern Railway Co., which is now represented by this committee which is a corporation. [His lordship read the Act down to the begginning of the first sub-section, as set out above.] I pause there to say that the Act of Parliament has said in terms that it is for the protection of Sir Henry Barron, his heirs and assigns, and the provisions are to apply unless otherwise agreed upon between the company and the owner—that is, Sir Henry Barron, his heirs and assigns. Down to that point I should have thought the case was too plain to admit of argument, that this was a private and statutory bargain between Sir Henry Barron and the railway company. These six items are enumerated in the sections. [His lordship

read the first two set out above.] They obviously concern Sir Henry alone, and the latter part of the third, whatever the first part may be. I do not stop to comment on that sub-section because the next one is in the same terms, and is the one in question here [His lordship read it.] I will pass on to the next two, both of which are obviously for the benefit of the owner only. [His lordship read them.] Now it is said that clause 4 (and clause 3 would follow the same reasoning) is not merely for the benefit of Sir Henry, but is for the benefit somehow or other of the public also. In my opinion, on the construction of the section that is not so. I have already pointed out that the section commences with the words that it is for the protection of Sir Henry, his heirs and assigns. It gives him a power to agree otherwise. The station is to be built there for the purpose of accommodation and access to and from the estate of the owner; and I can see no ground whatever for the suggestion that it is intended to be for the benefit of the public at large, or any portion of the public at large, so that therefore Sir Henry can, if he pleases, at his own will and for such consideration as he thinks fit, himself release the company from their liability to maintain it there.

The different sorts of provisions in a railway Act have been considered in a great many cases, and it is put by Lord Watson in *Davis* v. *The Taff Vale Railway Co.*, at p. 552, with his usual lucidity: "The provisions of a railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And whether provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios* in which they may have an interest, but have no title to enforce. These observations are meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act; because in such a case the form of the enactment might be held to indicate that it is to operate as a contract and not otherwise."

I think it is plain from that statement that what one has to find, if one is to say it is for the benefit of third persons, is something to show who those persons are, and words showing there is a benefit intended for them. On the construction of this particular case I have no sort of doubt myself that it is simply for the benefit and protection of Sir Henry, his heirs and assigns, and concerns him and the company only, and that the Legislature have in terms given both the parties power to agree to waive or alter any of those provisions.

The second point, if I apprehend it rightly, is this: Granted, it is said, that Sir Henry can, if he chooses, agree with the company, and that the company, if they make it worth his while, may be able to persuade him, or they may not—I do not know—it is a matter possibly of money or feeling on the part of Sir Henry; still, unless and until they have so agreed they cannot enter into a contract with the plaintiff to alter this station. Now, in the sense that the plaintiff cannot get specific performance, I agree that is one thing, but to say that it is *ultrà vires* I confess I do not follow; it is really and merely a question of title. The railway company enter into an agreement to deal with land in a way which they can do legally if they can obtain the assent of B., a person competent so to agree. I fail to see anything *ultrà vires* in their agreeing that they will obtain that consent whether they do so in terms or whether they do so by necessary implication, because they agree to do a thing which can only be done with that consent. There is nothing *ultrà vires* that I can see in any such agreement.

I think the observations of Pollock, C.B., in *Savin* v. *The Hoylake Railway Co.*, if authority were necessary, would be sufficient, but I cannot myself follow the argument which says that it is *ultrà vires*, because I can see nothing whatever in the nature of the bargain to make it *ultrà vires* for a company to agree to do that which under the statute they can do if they get the consent of A. B. Pollock, C.B., says in this case: "A private Act of Parliament is in the nature of an agreement between the parties; why may not an agreement be made in derogation of it, provided the agreement be not (as this is not) inconsistent with the public interest or morality? Suppose the plaintiff has absolutely released all claims under the Act, could he afterwards have recovered?"

I believe in fact this clause was overlooked, but for anything that appears or was known to the plaintiff when the contract was entered into, Sir Henry might have released it or he might have entered into an agreement that he would not enforce it. There is nothing that I can see to render it in any way an illegal contract or a contract *ultrà vires*, that the company should have agreed to do something which they can do if they obtain his consent. If they cannot obtain his consent, then they have contracted to do it, and they would be liable in damages for not having done it. I am not, however, now concerned with any question of the measure of damages.

I do not myself follow the argument that has been addressed to me as to its being *ultrà vires*, because this is contained in an Act of Parliament; in fact, as I understand the decision of Bigham, J., and the Court of Appeal in the *Hampstead Corporation* v. *The Midland Railway Co.*, that point is really covered by the particular case. The question there arose as to whether a railway company were to be deemed an owner within the meaning of the Act imposing liabilities on owners in respect of streets. They had got a piece of land on which they were bound to make and maintain plantations unless otherwise agreed. They had, therefore, the power to enter into an agreement which would render that land available for their own purposes and not sterilized, to use the word quoted in the authority. If it had been *ultrà vires* to enter into arrangement with regard to the land unless and until they had obtained the agreement, I cannot see how Bigham, J., and the Court of Appeal could have held the company to be in a position of owners, so that they must be deemed to have done something *ultrà vires* in order to expose them to liability. So far as I follow the argument, it appears to me that the decision is distinctly inconsistent with it. The result is that, in my opinion, the plaintiff is entitled to recover, and I suppose I had better make a declaration which you may take further if you like, and then leave the rest of the case open.

Solicitors for the plaintiff, *King, Adams, & Co.*

Solicitor for the defendants, *John W. Watkin.*

Chan. Div. }
Buckley, J. } June 27.

EDMUNDSON v. RENDER. (a.)

Restraint of trade—"Any work or act"—Letter posted outside prohibited area to person within—Articles of clerkship—Solicitor.

A solicitor by his articles of clerkship covenanted not to "do any work or act" for any person usually done by a solicitor within a certain radius from a certain place. The solicitor carried on his business from an office situated outside the radius, but he sent letters on the instructions of persons residing within the radius to other persons within the radius upon matters usually done by solicitors.

Held, that, although the letters were posted outside the radius, the sending them by post to a person within the radius was equivalent to going to such person, and was an act done within the radius and in breach of the covenant, and the defendant must be restrained.

Semble, *it would have been equally a breach of the covenant if the clients for whom the letters were written had resided outside the radius.*

The question in this case was whether certain work done by the defendant, who was a solicitor, was in breach of his articles of clerkship, by which he was restrained from practising within a certain area.

By articles of agreement in July, 1893, made between the plaintiff, who was a solicitor practising in the area in question, and the defendant, the defendant agreed to serve the plaintiff as his clerk for three years and the plaintiff agreed to teach the defendant in the practice of solicitor; and the defendant covenanted that he "shall not at any time hereafter, either on his own account, or as clerk, or partner, or otherwise on behalf of any person or persons who practise, or may practise or carry on the business or profession of a solicitor, do any work or act for or on behalf of any person or persons usually done by solicitors within a radius of fifteen miles of Masham Market Cross" without the permission of the plaintiff or his firm; and in case of infringement of the covenant the defendant would submit to an injunction of a court of law.

The defendant served the plaintiff as clerk pursuant to the agreement until August, 1899. He was admitted a solicitor in August, 1901, and opened an office at Harrogate, which is outside the radius above mentioned. He, however, resided within about a mile and a quarter of Masham Market Cross.

The defendant admitted that in October, 1904, he had on the instructions of a client who resided within the radius written and sent to a person at the address of the latter within the radius demanding an apology for an alleged slander, and also costs and expenses alleged to have been incurred by that person; that he had on the same date and instructions written and sent a similar letter to another person within the radius; and that in November, 1904, he had on the instructions of another client residing within the radius written and sent a letter to a third person at his address within the radius to collect a debt with his charges as a solicitor; and that in December, 1904, he had written and sent a letter to a fourth person at his address within the radius endeavouring to obtain evidence in a certain matter; but the instructions by the clients were given outside the radius, and the letters also were posted outside the radius. The defendant contended that these acts were not breaches of the agreement.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

The plaintiff brought this action asking for an injunction in the terms of the covenant. An injunction had already been obtained against the defendant for other acts as regards the same covenant: see *Edmundson* v. *Render*, 80 L. T. Rep. 814.

Buckmaster, K.C., and *Maugham*, for the plaintiff.

Astbury, K.C., and *O. Thompson*, for the defendant.—The acts complained of were not done within the prohibited area. The letters were posted outside the area, and the defendant did nothing further. The Postmaster-General is not the agent of the sender of a letter: *Taylor* v. *Jones*, L. R. 1 Com. Pl. Div. 87, 24 W. R. Dig. 145.

BUCKLEY, J.—I hold, and it is not disputed, that the covenant is that the defendant will not within the radius do any work or act for clients usually done by solicitors. That is to say, the words "within a radius of fifteen miles" do not qualify "person as persons," but "do any work or act." There are certain instances alleged by the statement of claim, and admitted by the defendant, upon which, of course, I give judgment, but for the assistance of the defendant I will go a little further, and point out other matters which he may or may not do. As regards the instances alleged and admitted of what the defendant did, in my opinion they were acts done within the prohibited district. The man who writes and posts a letter to another addresses that other necessarily at the place of receipt, and a letter of demand so addressed is an act of demand within the district. To make a demand you may either go in person, in which case nobody could contest the matter, or you may go by your agent, as by sending your clerk, which is the same thing, or you may go by a communication handed in to the post office and carried by the post office as the agent of the sender to the person to whom it is addressed, and whom it reaches as a demand. A demand thus made for a debt is an act done for the client—no matter where he resides—within the radius such as is usually done by a solicitor. Thus, suppose a client has an estate within the prohibited district. The solicitor could not go and collect the rents nor distrain for them within the district. It does not matter whether he goes himself or not. If he sends his clerk to do it he is equally doing the act within the district. Does it make any difference that instead of going personally to levy a distress or, say, recover possession of an estate, he writes to the debtor or the tenant, as the case may be, and says, "Do this thing," and the person thereupon does it. I think not. He has acted as a solicitor within the district. Let me also add this. There are two classes of cases which may arise. One is that which I have dealt with—namely, of acts done for a client residing—I do not care where—by way of collection of debts, or of demand for reparation for injuries or—I do not care what—made on persons residing within the district. The other is of cases such as this: Suppose a gentleman residing within the prohibited district comes to Harrogate to consult the solicitor, or, if you please, writes to Harrogate to consult the solicitor, and he replies by letter to the gentleman's address within the district giving him his advice. In my opinion in these cases also he is acting as a solicitor within the district. I do not see that anything turns on the question where the client lives. If when the client from within the district consults the solicitor this latter does nothing within the district there is nothing to complain of. The test is whether the act is done within the radius. I hold that such an act is done by the posting of a letter to an addressee within the district giving advice or making a demand, as the case may be. I do not see any distinction between the acts of the defendant

upon which Kekewich, J., gave judgment against the defendant and those in the case before me. Writing to the registrar of the county court within the district and getting money from him is the same for all material purposes as writing to the debtor himself and recovering the money, as he has done here. I must grant an injunction to restain the defendant on terms of the covenant.

Judgment for the plaintiff.

Solicitors, *Arthur Toovey; Edgar Robins & Clark.*

Chan. Div.
Swinfen Eady, J. } June 5.

CARDIFF RAILWAY CO. v. TAFF VALE RAILWAY CO. (a.)

Railway company—Statutory powers—Junction of new line with existing railway—Limits of deviation— Medium filum—*Railway Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 20), *s.* 15.

Section 15 *of the Railway Clauses Consolidation Act,* 1845, *as to the distance to which a railway company may deviate from the line delineated on the parliamentary plans, and the decisions under that section to the effect that the extreme limit of deviation is to be found by placing the* medium filum *of the proposed line upon the line of deviation as delineated in the parliamentary plan apply only to the construction of a new line of railway, and not to a junction of a new line with an existing line, according to the principle laid down, with regard to the widening of an existing line, in* Finck *v.* London and South-Western Railway Co., 38 *W. R.* 513, 44 *Ch. D.* 330.

Action.

By section 4 of the Cardiff Railway Act, 1897, the Cardiff Railway Co. were empowered, *inter alia,* to make and maintain, in the lines and according to the levels shown upon the deposited plans, a railway commencing at a point in the parish of Pontypridd and terminating by a junction with the main line of the Taff Vale Railway at Treforest.

The proposed railway was situated wholly to the east of the Taff Vale main line, and consisted only of two lines of rails, the Taff Vale Railway having four lines.

The line of deviation on the deposited plans, where the proposed line intersected with the Taff Vale line, was drawn on the west side along the centre of the Taff Vale line to the point marked as the termination of the junction, including only the two eastern and not the two western lines.

By their statement of claim the plaintiff company claimed a declaration that they were entitled to effect a junction with all four lines of the Taff Vale Railway Co.'s line.

Upjohn, K.C., Moon, K.C., and *E. Ford,* for the plaintiffs.—In measuring the extreme limit of deviation on the western side we are entitled under section 15 of the Railway Clauses Act, 1845, to go beyond the limit of deviation as shown by the line delineated on the deposited plan: *Armistead* v. *North Staffordshire Railway Co.,* (1851) 20 L. J. C. L. N. S. 249.

Cripps, K.C., and *W. J. Noble,* for the defendants.—The plaintiffs are not entitled to make a junction with either of the westernmost lines, but only with the two easternmost. *Armistead* v. *North Staffordshire Railway Co.* does not apply to the case of a junction of a new line with an already existing line. The principle in this case is governed by *Finck* v. *London and South-Western Railway Co.,* 38 W. R. 513, 44 Ch. D. 330.

Dowling v. *Pontypool, Caerleon, and Newport Railway,* 18 Eq. 714, was also referred to.

Upjohn, K.C., in reply.—In *Finck* v. *London and South-Western Railway Co.* there was no centre line, or *medium filum,* delineated upon the deposited plan; in this case there is. Moreover, that case applied only to the widening of an existing line, and not to the junction of a new line with an old line. I submit that the principle decided in *Armistead* v. *North Staffordshire Railway Co.* applies here.

Payne v. *Bristol and Exeter Railway Co.,* 6 M. & W. 320, was also referred to.

FARWELL, J.—I do not see any answer to Mr. Cripps's argument. By section 4 of the Act of 1897 the Cardiff Railway Co. is empowered to effect a junction with the Taff Vale Railway Co. "in the lines and according to the levels shown on the deposited plans and sections." According to the deposited plan the line of deviation is placed wholly to the east of the two western lines. To this I have to apply section 15 of the Railway Clauses Consolidation Act, 1845. The question is, do the decisions on that section, relied on by the plaintiffs, as to how the extreme limit of deviation is to be fixed, apply to the present case of a junction of a new line with an already existing line. I do not think so; this case is governed by the principle laid down in *Finck* v. *London and South-Western Railway Co.,* and there can only be a junction with the two easternmost lines. The plaintiffs' claim must therefore be dismissed with costs.

Solicitors for the plaintiffs, *Gribble, Oddie, Sinclair, & Johnson,* for *J. S. Corbett,* Cardiff.

Solicitors for the defendants, *Williamson, Hill, & Co.,* for *Ingledew & Sons,* Cardiff.

(a.) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

K. B. Div.
(Kennedy and Ridley, JJ.) } April 18.

LIVERPOOL CORPORATION v. WEST DERBY UNION ASSESSMENT COMMITTEE AND THE WAVERTREE OVERSEERS. (a.)

Rating—Free library—Rateable occupation—Rateability —Scientific and Literary Societies Act, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.

A free public library established and maintained by the corporation of a borough under statutory provisions requiring the authority to provide such a library, but leaving it to them to select such premises as they might be able to acquire for the purpose, with powers to transfer at any time the library to other premises and to dispose of the premises previously used for that purpose, in which books, newspapers, and periodicals are supplied, is not exempt from rating on the principle of Lambeth Overseers *v.* London County Council, [1897] *A. C.* 625, 45 *W. R. Dig.* 114, *as capable of being occupied only for the benefit of the public nor as being a society instituted for the purposes of literature within the meaning of section* 1 *of the Scientific and Literary Societies Act,* 1843.

Case stated by the Recorder of Liverpool on an appeal against a poor rate.

The corporation of Liverpool were rated as the occupiers of a free public library situate in Picton-road, Wavertree, at £300 gross and £255 net rateable value.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

They appealed against the rate to quarter sessions on the ground (1) that they were not liable for the rate inasmuch as their occupation of the hereditament in question was in respect of a building belonging to a society instituted for the purpose of science, literature, or the fine arts exclusively within the meaning of the Scientific and Literary Societies Act, 1843, and exempt according to the provisions thereof; (2) that they were in and by the said rate over-rated in respect of the said hereditament; and (3) that the said rate was in other respects illegal, informal, and incorrect.

The appeal was heard on the 9th of June, 1904, at Liverpool Quarter Sessions, by the late recorder, C. H. Hopwood, Esq., K.C., when it was agreed between the parties that in order to obtain a decision on the real question whether either the appellants or the Libraries and Museums Committee were rateable, the appellants should be permitted to bring forward two additional grounds of appeal—namely: (1) That the appellants were not occupiers of the said premises and could not be rated in respect thereof; and (2) that there was no rateable occupation of the said premises by the appellants or by anyone.

By consent the rate was confirmed subject to a case being stated.

Before any special case was stated the late recorder died and William Pickford, Esq., K.C., was appointed in his stead, who subsequently stated the following case, the shorthand notes of the proceedings before the late recorder being by consent admitted as evidence for the purposes of such hearing and determination by him.

The premises in question were opened as a free library on the 12th of May, 1903, and were placed under the control of the Libraries and Museums Committee by the appellants, acting under the provisions of the Liverpool Libraries and Museums Act, 1852, the Liverpool Improvement Act, 1867, the Liverpool Corporation Act, 1889, s. 7, the Local Government Board Provisional Order Confirmation (No. 10) Act, 1895, s. 2, and the Liverpool Corporation Act, 1900, s. 30. The premises were established by the appellants as a public library under the above powers and used by the public under regulations made by the appellants. They were open to the public during the appointed hours without charge or hindrance except as shown in the regulations.

The appellants from time to time appointed a committee under the Liverpool Libraries and Museums Act, 1852, and delegated to that committee the powers set out in the resolution hereinafter mentioned. The committee were appointed annually, and the exercise of the powers delegated to them was subject to confirmation or rejection by the appellants. The committee consisted in part of members of the council and in part of persons not members of the council.

The committee were invested with the control and management of all the public libraries in Liverpool, including the premises in question. The fund available to the appellants and the committee for the maintenance of the libraries was at the time in question derived from the following sources: (1) A library and museum rate of 1½d. in the pound collected with the poor rate. The money raised by the said rate can only be used for the purposes, or some of them, which the committee is appointed to manage and control. (2) A contribution of £250 per annum from the Liverpool Education Committee, being part of the annual grant made by the Imperial Exchequer out of the proceeds of national taxes to that committee, and allocated by them to the Libraries and Museums Committee for the purchase of technical books. This contribution might, if the Technical Instruction Committee so decided, have been allocated and used for other technical instruction purposes. (3) Moneys derived from fees paid by the public for admission to lectures given on premises other than those in question arranged and controlled by the Libraries and Museums Committee. (4) Moneys derived from fines imposed under rules and regulations in respect of books kept beyond the allowed period. In addition to the books, newspapers, and other publications purchased out of the said fund the appellants received gifts of books and reports of societies from various sources. All accounts and expenses incurred by the committee were examined and certified by them and paid by the city treasurer and debited to the said fund.

The Libraries and Museums Committee appointed two librarians and certain attendants to clean and keep order on the premises. The books bought for the library were purchased by the committee, who also had the custody and management of its affairs and of the premises, subject to confirmation or rejection of their proceedings by the council as required by the Act of 1852. No person resided on the premises. Books, furniture, and effects belonging to the corporation and held for the purposes of the library were always upon the premises. The premises were in the care of the librarians and servants, and open to the public from 9 a.m. to 9.30 p.m. Nothing was received by the appellants or by any one in respect of the use of the premises or the contents except certain fines for detaining books contrary to the regulations. The premises consisted of a general reading-room for men, a reading-room for boys, and a reading-room for women, and contained some 8,000 volumes of books and also current magazines, newspapers and directories. Books and papers could be read on the premises, or, subject to the regulations books could be taken to be read outside by members of the public whose respectability was certified by two Liverpool ratepayers. In the reading-rooms books, newspapers, magazines, and directories might be read and consulted. The reading-rooms were largely used by the public for reading newspapers and periodicals of the lighter kind as well as for reading books. They were also used by ladies for reading ladies' periodicals and by children for looking at children's picture-books. A minority only of those using the reading-rooms did so for the purpose of reading books or periodicals devoted to more serious literature or science or fine arts. The committee in 1899 applied under the Scientific and Literary Societies Act, 1843, for a certificate of exemption of the lands and buildings occupied by them or under their control from payment of rates, and on the 24th of November, 1899, a certificate of exemption was granted. That certificate was duly enrolled at the quarter sessions for the city.

It was contended for the appellants that they were not the occupiers of the premises, and that there was no rateable occupation either by the appellants or by the committee, and that, if the committee were in such occupation as would otherwise have made them rateable to the relief of the poor, they were by reason of the Scientific and Literary Societies Act, 1843, exempt from being rated.

The questions for the court were:

1. Were the appellants in occupation of the premises?

2. Were the Libraries and Museums Committee in occupation of the premises?

3. Were the premises in the rateable occupation of the appellants or the Libraries and Museums Committee?

4. If the appellants were in rateable occupation of the premises, were they exempt from rating by reason of the Scientific and Literary Societies Act, 1843, and the certificate?

5. If the Libraries and Museums Committee were in rateable occupation, had they become exempt from rating by reason of the last-mentioned Act and certificate?

Carver, K.C., and *F. E. Smith*, for the appellants.—There is no rateable occupation of the library by the committee or the appellants, and therefore the case falls within the decision of the House of Lords in *Lambeth Overseers* v. *London County Council*, [1897] A. C. 625, 45 W. R. Dig. 114. That decided that Brockwell Park, a park used by the public, of which the London County Council were in legal possession, was not the subject of rateable occupation, and for the same reasons as were there urged the library in the present case ought not to be held to be the subject of rateable occupation. The appellants are merely custodians for the public, and the public cannot be rated as an occupier. In *Hare* v. *Putney Overseers*, (1881) 29 W. R. 721, 7 Q. B. D. 223, it was held that the Metropolitan Board of Works had no beneficial occupation of Putney Bridge in respect of which they were liable to be rated, and therefore that decision is also in favour of the appellants. So are the decisions given *Reg.* v. *St. Pancras Assessment Committee*, (1877) 25 W. R. 827, 2 Q. B. D. 581, the case of an advertising station, and *Smith* v. *New Forest Union*, (1889) 61 L. T. 870, 37 W. R. Dig. 135, a case of vacant land. *Westminster Corporation* v. *Johnson*, 52 W. R. 350, [1904] 2 K. B. 737, as to the assessment of public sanitary conveniences to the land tax, is distinguishable, and *London County Council* v. *Erith Churchwardens*, 42 W. R. 330, [1893] A. C. 562, is not in point, as there was there no beneficial occupation. Further, the library is exempt under the Scientific and Literary Societies Act, 1843, because there is a purely voluntary element in the way in which it is supported. The committee is the "society" and the library the institution, and the committee are not liable to support it. There was a grant also by the education committee to the library of books, which gift would be a voluntary contribution within the Act: *Manchester Corporation* v. *McAdam*, [1896] A. C. 500, 45 W. R. Dig. 68.

F. Marshall, K.C., and *F. A. Greer*, for the respondents.—The present case is not governed by the *Brockwell Park case*, which was founded on *Hare* v. *Putney Bridge Overseers*, and can be clearly distinguished, for there is a great difference between a public road and public park and a valuable library. The contention that because a building is held on trust for the public it is therefore exempt from rating is no longer tenable in view of the decision in *Jones* v. *Mersey Docks*, 13 W. R. 1069, (1864) 11 H. L. C. 443, and upon the principle there laid down the appellants are rateable. Again, in *West Bromwich School Board* v. *West Bromwich Overseers*, (1884) 13 Q. B. D. 929, 53 L. J. M. C. 153, it was held that the school board were rateable in respect of the school because the hereditament there was capable of being beneficially occupied by a hypothetical tenant, and the same consideration applies to the library in the present case. The judgment of Bowen, L.J., in that case was referred to with approval by Lord Herschell in *London County Council* v. *Erith Overseers*. Therefore, the library being capable of occupation is rateable. The appellants are not instituted for the purposes of science, literature, or the fine arts arts exclusively, nor can it be said that the property belongs to the committee. Even if it were so held that would not constitute exemption here because all the requirements of the Act before exemption can be claimed are not fulfilled. In view of the fact that a rate is specially levied to maintain the library, it is idle to suggest that it is maintained by voluntary contributions. A reading-room was exempt under the Act—*Russell Institute* v. *St. Giles's-in-the-Fields*, 3 El. & Bl. 416—but there the facts were distinguishable, and that case is not in point. It is clear that the corporation and not the committee are the occupiers since the former exercise control and can dissolve the committee at any time.

Reg. v. *London School Board*, (1885) 17 Q. B. D. 738, 55 L. J. M. C. 169, was also referred to.

Carver, K.C., in reply, referred to *Cory* v. *Bristow*, 25 W. R. 383, (1877) 2 App. Cas. 262.

KENNEDY, J.—I have come to the conclusion myself, although I quite appreciate Mr. Carver's argument and the force of it, that there is in this particular case no exemption of the free public library from rating. The proposition, as it seems to me, is this: Here is a building, with its furniture and its fittings, with its rules and its regulations, and the land on which it stands, which is unquestionably controlled by the corporation, acting through the committee, which partly consists of actual members of the corporation and partly of persons appointed by the corporation from outside, which practically acts like any other committee appointed by a corporation as a department for purposes of administration. That being so, the corporation do a number of acts which would naturally be the acts of those who are for the time being occupiers. One cannot therefore leave out of sight the subject-matter of the rate and the relation of the public authority to the building.

Now, in the *Brockwell Park case* and in the *Putney Bridge case* the property was for all purposes the property of the public in the fullest sense. It seems to me, therefore, that dealing with the question of occupation apart from the question of beneficial occupation, a point so much insisted on in Mr. Carver's argument—rightly insisted on and fairly insisted on—even with regard to that, I think that the character of the property cannot be left out of sight and that acts which might be in a sense treated, when you have property clearly not the property of the controlling body, as acts merely of custodians, may nevertheless be, when the property is really the property of the administering body, treated as acts both in the nature of and as evidence of actual occupation. If the property were not their's we might treat them merely as custodians. Now here these buildings are brought under statutory authority. They happen to be buildings bought by the corporation, and the acts in this case are referable to occupation and the character of the occupation, although the corporation are bound to do these acts for the benefit of the public. Under the Liverpool Libraries and Museums Act of 1852 the council first of all is to establish and maintain a "public" institution. Then section 5 provides for these public buildings vesting in and being held in trust by the corporation, "and shall for all time be kept in fit and proper order for the benefit of the inhabitants of the borough of Liverpool and neighbourhood thereof, and others resorting thereto." That seems to be a provision which, as applied to property acquired, whether by purchase or lease, under the powers of the statute, is justly referable to the council as occupiers in the legal sense of the word and not merely as "custodians"—to borrow the word of the House of Lords in the *Brockwell Park case*. The very fact that it is only, as far as I know and as far as authority has been cited to us, in those two special cases where property is the property of the public, although administered and maintained under statutory authority by some public body, that any exemption has been made from the liability to rates of property which public bodies with statutory

duties hold for the benefit either of the public or portions of the public, seems to me to show that the central fact, referred to so often by Lord Halsbury and Lord Herschell, of the particular character of property with which they were dealing, or something of that kind, is required to take a case out of the class of cases where public bodies are administering property for the purposes of the public of an area more or less limited, be it schools or other institutions, or pumping stations, as in the *Erith case*, and are under public authority, for the time being using land and buildings thereon and machinery placed in those buildings for public purposes.

In all these cases although the purpose is public and although the public can require the use of the particular property which is held by the public body for those purposes, and can require it to be dealt with in accordance with statutory rules, the property is none the less subject to rates. In this case the property unquestionably may at any time, when it is no longer required for the purposes of the Act, be sold or leased and may be the subject of purchase; and the fact that it is not for the time being anything except a place used, subject to certain regulations, for the public, is not in itself sufficient to take this building out of the list of rateable buildings in respect of the occupancy of the corporation.

As to the contention based on the Scientific and Literary Societies Act, 1843, there seems to me several difficulties against the appellants which have not been met. In the first place (and that is sufficient for me), I do not see that this particular society—if either the corporation or the committee in respect of this library can be called a society, or treated as a society—is supported either wholly or in part by annual voluntary contributions. Neither the £250 per annum from the educational authority nor the gifts of books appear to me to be voluntary contributions within the Act. Further, even if the corporation or the committee was "a society instituted for purposes of science, literature, or fine arts exclusively," that would not cover an institution for the acquisition of knowledge from newspapers. But, be that as it may, it is sufficient for my view to say that this clearly does not fall as an institution within the meaning of the section.

I am of opinion, therefore, that the case ought to be decided in favour of the respondents.

RIDLEY, J.—I also have come to the conclusion that this rate ought to have been maintained. The hereditaments in question are not within the meaning of the decision in the *Brockwell Park* and *Putney Bridge cases*, which, speaking generally, we may regard as two cases standing by themselves, though there is another class of property, which has been put along with them—namely, sewers—which in one of the cases that came before the court were held not to be rateable. Upon the other side there is a long string of decisions since the case of *Jones* v. *Mersey Docks*, in which it has been decided from time to time that although lands are held for public purposes they are not on that account exempt from rateability. It was held otherwise formerly, but since the decision in *Jones* v. *Mersey Docks* that is the law which has been constantly followed. I think that the case of *Lambeth Overseers* v. *London County Council* is the first and the main decision to which we must turn, and we must look at that and see how it was that Brockwell Park was there held to be incapable of being rated. It was for two reasons: First, that there was no occupation of it in anybody; and, secondly, if there were any occupation, it was not an occupation of any benefit—it was not a beneficial occupation. Lord Herschell, in giving his judgment, distinguished that case from *London County Council* v. *Erith Overseers*. Perhaps *Hare* v. *Putney Overseers* ought to be mentioned, as that case, on the facts that appear to me material, cannot be distinguished from *Lambeth Overseers* v. *London County Council*. I wish to point out the reason why the cases are exactly alike is that in the *Putney Bridge case* there was an obligation, similar to that attaching to the London County Council in the *Brockwell Park case*, upon the Metropolitan Board of Works to hold the bridge for ever for the benefit of the public; and it was upon that ground that the bridge was held not to be subject to occupation, and therefore not rateable. Those two cases are the authorities upon which Mr. Carver claims that this rate ought not to have been made.

Upon the other side there are the school board cases and the *Erith case* with regard to the pumping-station, which perhaps is most convenient to discuss, although there are many others besides. The *Erith case* was the case which was distinguished in *Lambeth Overseers* v. *London County Council* by Lord Herschell, who said it had no application, because there the land on which the pumping-stations were constructed, and the rateability of which was in question, was not by the statute dedicated to that use. Nor was it affected by any statute at all; but there was a duty on the London County Council to make outfall works, which would get rid of the sewage, and one of those outfall sewers was, so long as they used that method, of necessity a pumping-station. So far the duty was one to the public. It was on behalf of the public that the thing had to be done. There was no statute that dedicated the pumping-stations to that use. On the other hand there was a statute dedicating Brockwell Park to the public use. The London County Council could place their pumping-station where they pleased; they could not take away Brockwell Park and place it where they wished. If they removed the pumping-stations elsewhere and adopted some other method of disposing of the sewage, they could sell or let the land to a tenant because the use of it would be unrestricted. I think the same distinction can be drawn here because there is no statute dedicating this library site to the public as there was in the *Brockwell Park case*.

In the *Erith case* Lord Herschell, among other authorities, cited *West Bromwich School Board* v. *West Bromwich Overseers*, and quoted from the judgment of Bowen, L.J., in that case, and that reasoning applies exactly in the present case. It was adopted by Lord Herschell, and it supplies a good distinction which we ought to follow between the two cases which are on the one side of this question and the long string of authorities which are upon the other. I certainly think it would be an extension of the principle upon which the *Brockwell Park* and the *Putney Bridge* cases were decided if we were to hold that it extended to the present case.

Here it lies on those who say that the public library is not rateable to show why, and, I think, for the reasons I have given, that, although the argument is one well worthy of consideration, according to my judgment it is not well founded, and that as these two authorities do not apply in their facts and are not on all fours with the present case, we ought not to extend their principle.

Appeal dismissed.

Solicitors for the appellants, *F. Venn & Co.*, for *E. R. Pickmere*, Liverpool.

Solicitors for the respondents, *Sharpe, Parker, & Co.*, for *Cleaver, Holden, & Co.*, Liverpool.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 14.

NOBLETT v. HOPKINSON. (a.)

Licensing law—Opening during prohibited hours—Completion of sale—Appropriation—Delivery, when a material part of the contract—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

If a term of the contract for the sale of intoxicating liquor is that it be delivered during the period when the licensed premises are required to be closed, then—Lord Alverstone, L.C.J., *and* Kennedy, J. (Ridley, J., *dissenting*)—*whether the said intoxicating liquor be appropriated to the purchaser or not, if delivery takes place in pursuance of the contract during prohibited hours, an offence is committed under section* 9 *of the Licensing Act,* 1874.

Case stated by the justices of the county borough of Bury.

The material paragraphs were: (1) An information was laid on the 7th day of November, 1904, under section 9 of the Licensing Act, 1874, by R. Noblett, superintendent of police of Bury, against J. Hopkinson, of the Hope and Anchor public-house, Bolton-street, Bury, for that the respondent on the 6th day of November, 1904, then being a licensed person for the sale of intoxicating liquor by retail in his house, did unlawfully open his said premises for the sale of intoxicating liquor during part of the time that his said premises were required to be closed—to wit, at 7.55 o'clock in the morning, the said day being Sunday, contrary to the form of the statute in such case made and provided, and after hearing the evidence we dismissed the said information.

(6) It was explained on behalf of the respondent, which explanation we accepted as the fact, that on Saturday, the 5th of November, 1904, two men, Doherty and Shedwell, were engaged cleaning flues at Bury St. Edmunds and went to the respondent's house during the time his licensed premises were allowed to be open, when Doherty asked the respondent if he could have half a gallon of beer, and if it could be sent down to them on Sunday morning, the 6th of November, 1904. Doherty paid for the beer, and directly afterwards, before closing time, half a gallon of beer was drawn and put into a bottle belonging to the respondent and then corked and put on the bar counter by the respondent's son, and subsequently taken by him, about closing time, to the brewhouse stable within the curtilage of the licensed premises, whence it was taken by him on the said Sunday morning and given to the barman behind the counter on the licensed premises to deliver to the two men. It was admitted in evidence by the respondent that at the time of the sale of the said beer on the said Saturday he agreed to deliver the beer during prohibited hours on the said Sunday to the two men Doherty and Shedwell, and that the beer was delivered during prohibited hours on the said Sunday by the barman.

(8) We, the said justices, were of opinion that the sale of beer referred to was complete by payment for and appropriation of the specific goods on the said Saturday, and we found as a matter of fact that the beer was paid for, drawn, put in a bottle, corked up, set aside and specifically appropriated on that day, and the property in the goods passed under that contract, and that in delivering the beer referred to on the said Sunday during prohibited hours the respondent did not open his house for the sale of intoxicating liquor within the meaning of section 9 of the Licensing Act, 1874.

The question of law arising upon the above statement is: Were we right under the circumstances in holding that intoxicating liquor having been ordered of the respondent, paid for and specifically appropriated during the time the licensed premises were allowed to be open, the fact that the beer was delivered by him, through his barman, during the period when his premises were required to be closed, constituted no offence of opening his house for the sale of intoxicating liquors during prohibited hours.

Section 9 of the Licensing Act, 1874, enacts: "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open his premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises shall for the first offence . . ."

Kershaw, for the appellant.—Assuming that the beer was appropriated on the Saturday night, still the delivery of the beer on the Sunday constituted a sale for the purposes of the Licensing Acts, in which the same technical meaning is not to be given to the word sale as is in law given to it in the general case. The object of the Acts is to restrict the sale on Sundays. Thus section 62 of the Act of 1872, in dealing with the question of evidence of sale or consumption of intoxicating liquor, says: "If the court be satisfied that a transaction in the nature of a sale took place." There would have been no contract at all if the respondent had refused to deliver the beer on the Sunday, and therefore the delivery was a material part of the sale, as referred to by Channell, J., in *Saunders* v. *Thorney*, (1898) 62 J. P. 404. [Lord ALVERSTONE, L.C.J.—In the unreported case of *Mackenzie* v. *Spear*, referred to in the Licensed Victuallers' Annual, 1903, at p. 197, the court held that delivery to a woman on Sunday during prohibited hours was not opening the premises.] That case can be distinguished on the ground that the woman intended to return on the Saturday and obtain delivery, but circumstances prevented her. Delivery on Sunday was no part of the contract. In this case the premises were opened for the sale of intoxicating liquor: *Commissioner of Police* v. *Roberts*, 52 W. R. 560, [1904] 1 K. B. 369 Secondly, I submit that there was no evidence of appropriation. In *Pletts* v. *Beattie*, [1896] 1 Q. B. 519, 44 W. R. Dig. 90, an authority cited against me, the evidence of appropriation was indisputable.

Fitch (*Geo. Elliott* with him), for the respondent.—Sale must have its strict legal meaning. Section 9 of the 1874 Act is more stringent against opening during prohibited hours than the amended section 24 of the 1872 Act—*e.g.*, "although purchased before the hours of closing," but it does not change "sale" into "sale or delivery." The judgments of Day and Wills, JJ., in *Pletts* v. *Beattie* are decisive in my favour.

He referred also to *Brewer* v. *Shepherd*, 36 J. P. 373; *Lloyd* v. *Barnett*, 82 L. T. 804, 48 W. R. Dig. 95

Kershaw replied.

Lord ALVERSTONE, L.C.J.—I confess I have considerable doubt as to whether I have arrived at a right conclusion, but I must give expression to the judgment I have formed. Mr. Kershaw took two points. Firstly, the delivery of this beer on the Sunday morning was of the essence of the contract between the parties. He says he is entitled to draw the conclusion that the beer would not have been

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

purchased at all unless it was to be Sunday-beer. Secondly, there was not sufficient evidence of appropriation. It is said that the licensed victualler merely put beer into a bottle and put it aside with the intention to deliver it the next morning; there was no evidence that the purchaser consented to the appropriation of that beer, as was the case in *Pletts* v. *Beattie*, [1896] 1 Q. B. 519. I think what we have to consider under section 9 may to a certain extent be a different question to what we have to consider under section 3—namely, as to where the sale actually took place. It seems to me for some purposes the question may be different. Mr. Fitch relies on the statement that the property had passed under the contract. That is, I think, an inference of law drawn by the magistrate from the facts, and I think it is material to see what the facts are. They are set out in paragraph 6: "Two men went to the respondent's house during the time his premises were allowed to be open, when Doherty asked the respondent if he could have half-a-gallon of beer and if it could be sent down to them on Sunday morning." I think the inference is that he would not have bought the beer unless he got it delivered on Sunday. "Then he paid for the beer, and directly afterwards, before closing time, half-a-gallon of beer was drawn and put into a bottle belonging to the respondent, then corked and put upon the bar counter by the son, and subsequently taken by him about closing time to the brewhouse stable within the curtilage of the licensed premises." I do not think there was evidence that what was done was done under license of the purchasers. It was done by the vendor in the performance of his contract. "He agreed to deliver the beer during prohibited hours on the said Sunday." That is a statement that he was party to the contract that the beer should be delivered on the Sunday. Taking the second point, I think he was right in his contention that there was not sufficient evidence of appropriation of the beer in the sense that the acts done by the barman were acts done as agent for the purchaser. I should have come to the conclusion that if the beer had been drawn on Saturday night and the publican had said "I am sorry the bottle is broken," he would have had to deliver another bottle. I think, therefore, there was not sufficient evidence of appropriation. It is true that the justices say "paid for it and put it in a bottle, &c." I do not think that meant put it aside with the consent of the purchaser. That conclusion would be sufficient to justify me in allowing the appeal. I do not wish to shirk the more difficult part of the question. I think there was evidence under section 9. It really comes to this, whether we should adopt the words of Channell, J., in *Saunders* v. *Thorney*, where he says, "I think a person opens his premises within the meaning of the section where he opens them for carrying out any material part of the contract."

I shall adopt the rule of Channell, J. I think if any part of the bargain and sale involves the keeping open the premises for the delivery of the beer, I think the mischief aimed at by the section occurs, and the offence has been committed. I come to the conclusion that Doherty did bargain that if he bought the beer it should be delivered to him from the public-house on the Sunday. For the purposes of to-day the question in the *Pletts case* does not affect us. The only question there under section 3 was whether or not the transaction took place upon licensed premises, and whether the purchaser had authorized the traveller to act as his agent. With regard to the *Mackenzie case*, I have no doubt that the judgment did proceed on the principle to which Channell, J., called attention, and that in that case there had been an ordinary bargain and sale and an intended delivery within licensed hours. The goods had been sold on the Saturday and intended to be delivered upon the Saturday night. It was not part of the transaction at all to deliver on the Sunday, although the woman came on the Sunday and took the bottles of beer away. I do not think the decision in that case laid down any principle which prevents me from saying that this bargain for delivery on Sunday necessitated the premises being opened within the meaning of section 9 for the sale of intoxicating liquor, when they are open for any material part of the bargain and sale. I have expressed my opinion on the second point. On both grounds the appeal should be allowed.

KENNEDY, J.—I am of the same opinion. It seems to me that nothing is more likely to destroy the manifest intention of the Legislature in creating prohibitive hours for the sale of intoxicating liquor on Sunday, if a bargain is held to be good where a person comes to licensed premises: "I buy a half gallon of beer providing you deliver it to me during prohibited hours on Sunday." What is the real transaction here. I do not know what the justices meant by sufficient appropriation. What happened was this: that Doherty said, "Can I have a half gallon of beer to be sent down to me during prohibited hours on Sunday?" The publican says "Yes, you can." Doherty pays the price for the beer, but does nothing more.

Now in *Pletts* v. *Beattie* there was appropriation in the strictest sense of the word, not only assented to by the purchaser by written notice, but acted on by the seller, who took six bottles and labelled them with the purchaser's name and put them into a box. Here all the publican did was to put the beer into his own bottle, cork it, and put it on the bar counter, whence it was taken by the son to the brewhouse stable within the curtilage and handed to the barman for delivery on Sunday morning. It seems to me clear that if before the beer reached the hands of Doherty it had been spilled or the bottle had been broken, the publican would have had no right to say, "I retain the money because you accepted the bottle holding this particular half gallon of beer; the thing perished for you. You are the master, I am not." Clearly not. No property passed in that sense. Speaking for myself, I agree with what my lord has said upon the first point. It seems to me whatever the magistrates may choose to say in paragraph 8, the facts absolutely fail to justify the conclusion that there was a sale of particular beer, of a particular body of beer. I think, with great diffidence to my brother Ridley, if a man, pointing to a row of bottles on a shelf in a public-house, said, "I want those six bottles, and I will pay for them now, but you are to deliver them to me to-morrow during prohibited hours"; I think the delivery under those circumstances would be a material part of the transaction of sale and would be an act within the statute under this section. Where there is a complete contract it may be that delivery during prohibited hours would constitute no violation of the statute, as in the *Mackenzie case*, where it was no term of the contract to deliver during prohibited hours, but by an accident the bottles of beer remained on the premises and by an accident were delivered during prohibited hours. So if a man purchases bottles of beer without saying anything about the day for delivery, that because the next day during prohibited hours he said to the publican, "Will you let me have those bottles," I am not prepared to say the publican would be liable for merely handing him the bottles. Therefore I am of opinion that the decision of the justices was wrong.

RIDLEY, J.—I do not dissent from the judgment

of the court because on the facts I find there is no appropriation of the beer. If I had come to a different conclusion on the facts, I should have held that the decision of the justices was right. I should like for a moment to look at the section and see how it deals with the question of sale. My brother Kennedy says if delivery on Sunday during prohibited hours is a term of the contract, it must come within the offence created by the 1874 Act. In my opinion on the words of the section it does not come within the Act. [His lordship read the section.] I think that the section must be read in accordance with the words as they are, and not as we would wish to find them. Section 62 of the 1872 Act says, "In proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under the Act . . . if the court be satisfied that a transaction in the nature of a sale took place. . . ." It is not necessary that that should be read into section 9 of the 1874 Act, but it is connected with the subject and comes very near to the matter with which section 9 is dealing—was there a transaction "in the nature of a sale" on Sunday? I should have said not. Upon the question whether delivery is to be regarded as a necessary part of the sale, the case of *Saunders* v. *Thorne* has been cited, in which there is an observation of Channell, J. I agree in that case there was no appropriation of the beer, and that was the main consideration why Russell, L.C.J., gave the decision he did, with which Channell, J., agreed. If the appropriation is not complete delivery is part of the contract. If the appropriation is complete, the sale is at an end and delivery is no part of the sale itself. I should like to refer to *Pletts* v. *Beattie*. There it was a question whether the sale was complete at Burnley although delivery took place at Accrington. Day, J., says: "In my judgment there was a complete sale at Burnley and an appropriation of the goods there. Nothing was left but to deliver and pay for the goods, which was done in due course." Wills, J., uses expressions to the same effect. I consider where the appropriation is complete delivery is no part of the sale.

Appeal allowed.

Solicitors for respondents, *Snow, Fox, & Higginson.*

Solicitor for respondent, *Bentley*, for *Bertwistle*, Bury.

Prob. Div. & Adm. Div. Admiralty. } Dec. 14.

"THE ASHTON." (a.)

Admiralty—Collision—Crossing vessels—Arts. 19 *and* 22 *Rules for Preventing Collisions at Sea—River Humber.*

The plaintiffs' vessel was proceeding up the Humber on the starboard side of the channel between the Bull and the Cleeness buoys on a course N.W. magnetic, making about eight knots. The defendants' vessel was outward bound, and making about ten knots over the ground on a course S.E. by E. ¾ E. magnetic. A collision occurred at a place very close to the Cleeness buoy. The vessels approached green to red, and the defendants' vessel, being jammed up close to the buoy, struck the plaintiffs' vessel on the starboard side about thirty feet abaft the stern, doing considerable damage.

The Court held that the facts of the case showed that both vessels were to blame. It considered that the crossing rule ought to have been observed in that locality, and therefore the plaintiffs' vessel ought to have kept her course and speed, and that the defendants' vessel ought not to have attempted to cross, but should have stopped her engines and reversed.

Action.

Aspinall, K.C., and *Balloch*, for the plaintiffs.

Robson, K.C., and *Butlin*, for the defendants.

The facts sufficiently appear from the judgment.

GORELL BARNES, J., in giving judgment, said: In this case a collision took place between *The King Stephen* and *The Ashton*, at about one o'clock in the morning, on the 11th of May last. According to the two preliminary acts the collision is put by the plaintiff as occurring "in the River Humber in the vicinity of Cleeness buoy," and by the defendants as occuring in the River Humber "a little above Cleeness buoy." The actual angle at which this collision took place is not substantially in dispute. Drawings have been put in which show it, I think. *The Ashton*, with the starboard side some distance from the stem, came against the port side of *The King Stephen*, and the vessels were both damaged. Now, the plaintiffs' case is that *The King Stephen* was coming in from the North Sea fishing grounds to Grimsby, with a cargo of fish, and was coming up on the starboard side of the channel, between the Bull buoy and the Cleeness buoy, heading N.W. and making about eight knots; that the masthead and green lights of *The Ashton* were seen at first, at a distance of a mile and a-half or thereabouts, two points on the port bow of *The King Stephen*; that afterwards the red light of *The Ashton* came into view, and thereupon the helm of *The King Stephen* was ported, one short blast given on her whistle, and the helm steadied; that the red light of *The Ashton* was shut in and again opened, and the helm of *The King Stephen* was ported a little more and one blast again sounded, and the helm steadied; but that then *The Ashton* came on at a high speed, again shutting in her red light, and the engines of *The King Stephen* were then stopped and reversed and her helm put hard a-port. The effect of that is to suggest that the vessels were in such a position that *The King Stephen*, seeing the red light of *The Ashton*, ported and kept away, allowing more room, but that *The Ashton* produced the collision by starboarding and not keeping out of the way of *The King Stephen*. On the other hand, the story told by those on *The Ashton* is absolutely inconsistent with that told by the plaintiffs. *The Ashton* is a screw steamer of 1,031 tons gross, and she was bound from Grimsby to Hamburg with cargo and passengers. She was making a course of S.E. by E. ¾ E., the defendants say, at a speed of 10 knots over the ground—allowing for the flood tide it would be about 11½ knots—and the defendants' case is that they saw the masthead and red lights of the trawler four points on the starboard bow and distant from one and a-half to two miles, and slightly starboarded the helm, and then steadied it, but did not sound their whistle because there were some steamers on the port bow which might have been hampered by the starboard helm signal; that the red light of the trawler broadened on the starboard bow, and the vessels would have passed all clear without risk of collision, but as the trawler came nearer she was observed to be closing in under a port helm. The defendants then say that *The Ashton's* engines could not be reversed without certainty of collision, but they were at once stopped and the helm put hard a-starboard, two blasts being blown on her whistle, but the collision happened by the other vessel porting and hard a-porting. The great inconsistency between that case and the plaintiffs' case is that upon the defendants' case those on

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

the plaintiffs' vessel never could have seen the red light of the defendants' vessel. Now, the case involves certain considerations of the rules applicable to the navigation in this locality. Amongst them are the starboard-hand rule, or narrow channel rule, and the crossing rule. The plaintiffs' contend that they were not in a position in which they could be held to be wrong with regard to the side of the channel on which they were navigating, and that in a sense there is no channel. The defendants contend that the plaintiffs were in a wrong position as regards the channel, and that they are to blame in that respect. The navigation of this place is perfectly clear from the chart. The river runs from Hull downwards past the Middle red light, out to the Bull, and then the port of Grimsby lies, coming down, on the starboard hand, and any vessels coming out of Grimsby have to get into the main stream by passing out first near the Spar buoy and then by the No. 4 buoy, which I think is called the Burcom buoy, and then have to come round under port helm near the Cleeness buoy, and so get straight down to the Bull. There seems no doubt whatever, to my mind, that the ordinary course of navigation would be what I have just indicated, and that the traffic treats the part of the river opposite Cleeness buoy as a narrow channel, in which vessels pass close to the Cleeness buoy going down, and other vessels coming up ought to give the Cleeness buoy a wide berth and keep well to the northward of it. My impression is that the narrow channel rule does apply to the place where this collision happened, and that vessels which come out properly should round the Cleeness buoy, and that vessels going in should keep well over away from the Cleeness buoy, so as to allow the outward traffic to pass between them and the Cleeness buoy. I do not think, however, it makes any practical difference whether the strict terms of the narrow channel rule are treated as applying or not, because it is quite obvious that any vessel coming out from Grimsby must come as the defendants' ship came, practically down on the line of the sector from the Spurn Light, and quite close round the Cleeness buoy, and that any vessels coming up must make an allowance for that position, whether there were a strict rule or not. The incoming ship would have to allow the down-coming vessel room to pass there, and so to my mind it does not make much difference whether you treat the rule as strictly applying, or whether you do not. The first thing to determine is whether the collision took place close to the buoy or whether it did not. The plaintiffs contend that it was at some distance, a quarter of a mile, from the buoy, and the defendants that it was two or three lengths from it. My impression after having heard the whole of the evidence and especially the conversation between the two masters, or whoever it was, is that the collision took place very close to Cleeness buoy, in such a position that the down-coming vessel was jammed up close to the buoy—that, in fact, there was no room left for that vessel to go down without difficulty. I think that must be so, whichever case you take, because when the plaintiffs speak of the vessel coming out on a two point bearing on their port bow it puts the defendants' vessel in a position in which she would be coming from Grimsby as she says she was, namely, along the line of lights. Therefore, if this matter had depended upon that point alone, I should have thought that the plaintiffs' vessel was wrong in being in the position in which she was, and that quite apart from any difference as to the bearing on which the defendants first saw the plaintiffs' vessel. My impression upon that is that the plaintiffs' vessel must have been very close to the line of that buoy, and that there is some justification for what the defendants are contending, but I cannot quite accept their view of the breadth of the bearing on which they say the plaintiffs' vessel was when they made her out. I think that is quite correct, and I think there is some exaggeration on the defendants' part in relation to it. The next matter is whether the crossing rule comes into force in this locality. The impression which I have formed is that it does. The traffic going up and down the river has to go past, in this locality, the traffic coming out of Grimsby, which has, speaking in general terms, to go across it to get into position; and vessels at certain times and places seem to me necessarily to be in the position of crossing vessels. The plaintiffs, in order to get rid of that difficulty, suggested that they kept seeing touches of the red light of the defendants' ship, and therefore ported. On the other hand, the defendants say their position was such that the red light could never have been seen, and that is the view I accept. It seems to me that a vessel coming out of Grimsby in the natural course of things—and that natural course of things is supported by the evidence of the defendants that they were coming down with the Spurn Light slightly on their starboard bow, along the line of the sector shown on the chart—it is almost impossible for the plaintiffs ever to have seen the red light of the defendants' ship. Of course it is possible if the defendants' ship was finding her way through different craft—she might then have altered so much as to show her red light, but that was not really suggested, and my view is that the plaintiffs never were in position to see that red light, and wrongly ported from first to last. If the crossing rule applies, it is quite clear that this vessel had no business to port at all. She had to keep her course and speed; but even if the rule does not apply, it does not seem to make any practical difference, because you would have the position of one vessel approaching with her green light showing and another coming up with her red light showing, and you would have that position for a considerable time. You have a position of danger ahead which, when you consider the angle of the blow which I have referred to, shows that the plaintiffs' vessel was running into danger and ported to such an extent as really to create that danger in a violent way at the finish, and kept on without reversing her engines until the very last moment. The engineer of the plaintiffs' vessel said that the vessel's engines were going astern ten or twelve revolutions, and that the ordinary number of revolutions at full speed was eighty per minute. Therefore the engines must have been reversed at the very last moment, and my view is that the great alteration which produced the blow, leading forward, according to the drawing, was produced by the plaintiffs' action, and that the alteration by the defendants was much slighter. So the plaintiffs were not only running into danger from the first, but bringing about that danger more effectively at the last, and doing nothing to counteract it by stopping and reversing the engines. Whatever view you take of the rules, I think the plaintiffs' vessel must be held to blame. Unfortunately that does not exhaust this case, because there remains the question whether the defendants' vessel is to blame for this collision, for, I think, two reasons. The first of those is on the assumption that the crossing rule applies, which I think it does. With regard to that, as I have already said, I am not quite prepared to accept the defendants' case that this other vessel was so very broad upon the bow as the witnesses seek to make out. The crossing rules which affect the defendants are the 19th, which is "When two steam

vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other," and the 22nd, which provides that "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." The only way in which, if that rule applies, the defendants can escape liability, on the position of the vessels, is by showing that they were crossing so as not to involve risk of collision. If they could make out that the steamer was crossing so as not to involve risk of collision, then the 19th rule could not apply, and as it could not apply the 22nd would not apply. That appears to have been the way in which the defendants placed their case, because the master of the defendants' vessel—who, by the way, I think I ought to say, was navigating, speaking generally, with care, and gave his evidence very well—stated this: "I saw the red and the masthead light, bearing about four points on the starboard bow, a mile and a-half off. I thought she was inside the buoys, out in the channel, and I starboarded, as a matter of precaution, and then kept my course." If it was a sound view to take, that there was no risk of collision in the position in which the vessels were, then why starboard as an act of precaution? That shows that in acting as he did, taking the position of the other vessel to be as broad as he said it was, which I doubt, he was acting as a matter of precaution, and therefore was considering, on his own action, that there was a risk. Then he described why he did not whistle for that starboarding, and then he said: "I took a second bearing and she had broadened a point." That only means, in reality, that she had broadened half a point, because half a point had been produced by the starboarding of the defendants' ship. He then said: "I kept on on my course and the mate reported that the vessel was porting. I watched and found she had done so, and I stopped the engines," &c. The question I have to consider is whether it can be said that at the outset there was no risk of collision, so as to make the rule not applicable. The ground upon which the defendants put it must be that, having regard to their speed, and the other vessel approaching them at a slower speed on the starboard side, there really was no risk of collision. That is a view that neither I nor the Elder Brethren can accept, because although it is said that the vessel broadened, she broadened very slightly. Action had been taken as a precaution against the very risk which ultimately turned out to be a real risk, and in those circumstances it seems to me it is impossible to say that the rules as to keeping out of the way and not crossing ahead of the other ship are not applicable. The defendants, it seems to me, were within those rules, and their vessel ought not to have attempted to cross ahead of the other ship. If there were any difficulty, with regard to the buoys, in porting at that time, then the difficulty could have been avoided either by stopping the engines and waiting until the red light had crossed their bows or by running away under hard a-starboard helm, although that is probably not nearly so advisable a course as stopping and waiting. In fact that very point is referred to in the notes to rule 22 in Mr. Stuart Moore's collection of Rules of the Road, where he says: "By this rule a steam vessel should port to a red light on her starboard bow. She may, however, stop without porting and wait till the other vessel has passed." Then there is this further view of this matter upon which the Elder Brethren also advise me, and that is, supposing the rules do not apply—if you say that, for any reason that would bear investigation, the crossing rule is not to apply, then you have still two vessels approaching, one showing a green light and the other showing a red light, and at a certain period risk is created by the plaintiffs' vessel porting her helm and running up to the northward and N.E. under that port helm. The captain of the defendants' vessel said substantially that he stopped his engines and put his helm hard a-starboard, blowing two blasts, when the other ship was about a length off, and that he did not reverse as it would have canted the defendants' steamer towards the other vessel. Now, if you assume, as I have done, that the most alteration was by the plaintiffs' vessel, that alteration was a very large one. It was an alteration which, even taking into consideration the smallness of the vessel which effected it, would require time to execute; and the moment it was seen that this other vessel was not going on broadening, and was porting, the engines of the defendants' vessel, in the opinion of the Elder Brethren, should have been stopped and reversed. That, I think, is in accordance with sound good sense and sound judgment, because then this collision could not have happened. The other vessel would have ported right across the defendants' vessel. The result, in my judgment, must be that, although I cannot help thinking the main blame rests with the trawler, both ships must be held to blame for the collision.

Solicitors for the plaintiffs, *Deacon, Gibson, & Co.*, for *Grange & Winteringham*, Grimsby.

Solicitors for defendants, *Crump & Son*, for *Jackson & Co.*, Hull.

House of Lords.

From C.A. (England). April 14.

BRINTONS (LIMITED) v. TURVEY. (a.)

Master and servant—Employers' liability—Accident—Compensation — Disease — Anthrax contracted from infected wool—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A workman employed in a wool factory contracted anthrax in one of his eyes from the wool which he was sorting,

Held, that this was an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897.

Decision of the Court of Appeal (52 *W. R.* 195, [1904] 1 *K. B.* 328) *affirmed* (Lord Robertson *dissenting*).

Appeal from a decision of the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.).

The respondent's husband was a wool-sorter in the appellants' factory, and while employed one of his eyes became affected with an anthrax germ from the wool which he was sorting. His death resulted from an operation which became necessary.

The county court judge made an award in favour of the widow and children of £201, which was affirmed by the Court of Appeal.

Ruegg, K.C., and *A. Parsons*, for the appellants.—The courts have distinguished between disease and accident: *Sinclair* v. *Maritime Passengers' Assurance Co.*, 3 E. & E. 478; *Walker* v. *Lilleshall Coal Co.*, 48 W. R. 257, [1905] 1 Q. B. 481. In *Fenton* v. *Thorley & Co.*, 52 W. R. 81, [1903] A. C. 443, the injury was caused by an overstrain which was accidental.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

J. S. Pritchett and *H. Norton*, for the repondent.—The injury arose out of and in the course of the employment, and was an accident within the interpretation of the word given in *Fenton* v. *Thorley & Co.*

Ruegg, K.C., replied.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—I am not able to deny the cogency of the reasoning of my noble friend Lord Robertson, when he contests that this House is concluded by its decision in *Fenton* v. *Thorley & Co.* I do not think the point which now stands for decision was either argued or upon the facts open for decision. Nevertheless, I am of opinion that the judgment now under appeal is right.

One proposition which, to my mind, goes far to solve the question under debate appears to have been accepted by all the judicial minds which have been directed to the subject, and that is that the language of the statute we are called upon to construe must be interpreted in its ordinary and popular meaning. The use of language preceded scientific investigation. Probably it is true to say that in the strictest sense, and dealing with the region of physical nature, there is no such thing as an accident. The smallest particle of dust swept by a storm is where it is by the operation of physical causes, which, if you knew beforehand, you could predict with absolute certainty that it would alight where it did; but when the Act now under construction enacted that if in any employment to which the Act applied personal injury "by accident" arising out of and in the course of his employment is caused to a workman his employers shall pay compensation, I think it meant that, apart from negligence of any sort—either employers or employed—the industry itself should be taxed with an obligation to indemnify the sufferer for what was "an accident" causing damage. I do not stop to discuss the provisions which disentitle a sufferer, because they are not relevant to the question now under debate.

I so far agree with my noble friend that I think, in popular phraseology, from which we are to seek our guidance, it excludes, and was intended to exclude, idiopathic disease; but when some affection of our physical frame is in any way injured by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase "accident causing injury" because the injury inflicted by accident sets up a condition of things which medical men describe as disease. Suppose in this case a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease; but would anybody contend that it was an accident causing damage? An injury to the head has been known to set up septic pneumonia, and many years ago I remember, when that accident had in fact occurred, it was sought to excuse the person who inflicted the blow on the head from the consequences of his crime because his victim had died of pneumonia, and not, as it was contended, of the blow on the head. It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequential results of the injury that has been inflicted. Many illustrations of what I am insisting on might be given. A workman in the course of his employment spills some corrosive acid on his hands; the injury caused thereby sets up erysipelas—a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the Act, because the immediate injury is not perceptible until it shows itself in some morbid change in the structure of the human body, and which when shown we call a disease? I cannot think so. I am therefore of opinion that the county court judge was quite right.

Lord MACNAGHTEN.—On the facts found by the learned county court judge I am of opinion that the decision of the Court of Appeal was right. It is plain, I think, that the mischief which befel the workman in the present case was due to accident, or rather, I should say, to a chapter of accidents. It was an accident that the noxious thing had settled on the man's face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down-draught or suck of the fan which the Board of Trade, as we were told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man's system, for the judge finds that there was no abrasion about the eye, while the medical evidence seems to be that without some abrasion infection is hardly possible. The result was anthrax, and the end came very speedily.

Speaking for myself, I cannot doubt that the man's death was attributable to personal injuries by accident arising out of and in the course of his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease which was immediately the cause of the death, and would no doubt be certified as such in the usual death certificate. I have nothing more to add, because the meaning of the expression personal injury by accident, as used in the Act of 1897, was very fully considered in the case of *Fenton* v. *Thorley & Co.* in this House. I am content to abide by what I am reported to have said in that case. It had the express concurrence of my noble and learned friends, Lord Shand and Lord Davey, and the approval, I think, of my noble and learned friend Lord Lindley. I agree that the appeal must be dismissed with costs.

Lord ROBERTSON.—This man died of anthrax, having become infected in his eye from the wool at which he was working. It is clear that the man's being attacked by anthrax arose "out of and in the course of his employment," and the question is, was his catching anthrax an "accident" in sense of the Act of 1897? The language in which the county court judge describes the "accident" puts the case in the most favourable way possible for the theory of the respondent; for he speaks of "the accidental alighting of a bacillus from the infected wool on" the man's eye. But, while scientifically accurate, this vivid presentment as of a concrete, although occult, incident must not blind us to the fact that any other case of disease falling within the wide scope of bacteriology might with equal accuracy be traced to the occurrence of a similiar "accident." Anthrax is a disease, and unless the contracting of infectious disease (arising out of and in the course of the employment) is an "accident" in the sense of the Act, I do not see how this judgment can stand. If it does stand, then, in every case in which a man dies of any infectious disease (his taking which arose out of and in the course of his employment), all he has got to do is to get the doctor to prove (what could not be disputed) that a bacillus did it, and the accident is there. It may be rash to say that a similar process of illustration and reasoning might not extend the application to non-infectious diseases besides; but I wish to confine the argument to what is clear. And I must add that the "illustrations" (given by one of my noble friends) of tetanus, pneumonia, or erysipelas

ensuing on accidents differ from the present case in the one point essential to the controversy, for in the illustrations there is postulated an accident distinct from the disease, while in the case before your lordships the "accident" so-called is simply the inception of the disease.

Now it is necessary steadily to have in mind that the question is whether, in the sense of the Act of 1897, this man's catching anthrax was an accident. It is nothing (or little) to the purpose to say that it was an accidental occurrence. Colloquially and accurately we say that So-and-so accidentally caught cold or any other disease; and yet no one would think of saying that he had met with an accident. It is not everything that happens accidentally that is an accident. Accordingly, when the learned county court judge, in what is a very well-expressed judgment, bases it on the fact that there was here "a fortuitous intrusion of a foreign substance into the eye," the word "fortuitous" does not convince me, and the rest is merely once more the graphic description of the occult initiation of disease.

Did the Legislature, then, mean, *inter alia*, the catching of infectious disease when it spoke of "personal injury by accident"? I cannot bring myself to think so. The class of mishaps now proposed to be included is so wide, and so heterogeneous to those dangers to life and limb which admittedly are included, that I do not believe that language so remote was intended to have this result.

But then the question is a good deal clarified and brought up to the matter in hand by the argument of Mr. Ruegg and Mr. Parsons. This establishment, where the man took ill, comes under the Workmen's Compensation Act as being a "factory" in the sense of the Factory Acts. Now, in the existing Factory Act of 1901, which is subsequent to that directly in question, and may therefore be referred to for a gloss or implication of the meaning of the Act of 1897, there are careful provisions about various diseases, and among them anthrax; and the medical officer is required to send, in the case of an outbreak of any of those diseases, certain notices, which are to be the same as in the case of "accidents." It is difficult to read this section 73 otherwise than as speaking on the assumption that an attack of anthrax is not an accident in the sense of such legislation.

The respondent's main reliance was placed on the recent case of *Fenton* v. *Thorley & Co.* Now, first of all, what are the facts of that case! They are the very simplest possible; the man ruptured himself, or, in other words, broke a part of his body, by over-exertion in his work. No one grasping this fact could possibly say that this was a disease; and therefore the question now before your lordships was not raised. It is true that Lord Macnaghten used the expressions on which the Court of Appeal founded its judgment. It seems to me that those expressions were *obiter dicta* only. My noble friend's judgment, besides being very able, is very long; and in discussing of the section, he was so enterprizing as to hazard a definition. He was not thinking of disease, or at least that was not the matter in hand, and is not referred to in his or any other judgment; but I shall assume that it turns out that the words used are so wide as to cover disease. Now I must respectfully protest against this House being held bound by *dicta*, and above all by the most dangerous of all *dicta*—namely, definitions, except in so far as they relate to or are involved in the matter then in hand. I hold myself free on the present occasion to consider on its merits the question now raised, and I should think it much to be regretted if this House were precluded from doing so by observations made when the question of disease had not been considered. On the merits, and for the reasons I have stated, I think that these judgments ought to reversed.

Lord LINDLEY.—I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act, and I concur with the observations made by Cozens-Hardy, L.J., on this point at the end of his judgment.

In this case your lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental. The fact that an accident causes injury in the shape of disease does not render the cause not an accident. Whether in any particular case an injury in the shape of disease is caused by an accident or by some other cause depends on the circumstances of that case and on the meaning to be attributed to the word "accident." The meaning of the word as used in the Workmen's Compensation Act was settled by this House in *Fenton* v. *Thorley & Co.*, and, having regard to that authority, and to the facts of this case as stated by the learned county court judge, his decision, and the decision of the Court of Appeal were, in my opinion, quite right, and this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Helder, Roberts, & Co.*, for *Tunbridge & Co.*, Birmingham.

Solicitors for the respondent, *Roberts, Billing, & Co.*, for *W. Waldron*, Brierley Hill.

Court of Appeal.

Original Motion.
(Collins, M.R., and Romer, L.J.) June 26.

BORTHWICK v. ELDERSLIE STEAMSHIP CO. (a.)

Practice—Judgment—Interest—Action for unliquidated damages—Judgment reversed by Court of Appeal and entered for plaintiff—Date from which interest runs—Ord. 41, r. 3; ord. 58, rr. 1, 4.

Where in an action in the High Court to recover unliquidated damages judgment is entered for the defendants at the trial, but this judgment is reversed on appeal and directed to be entered for the plaintiff for damages to be assessed, interest is payable on the amount of the damages when assessed as from the date of the judgment of the Court of Appeal and not as from the date of the original judgment at the trial, unless the Court of Appeal, acting under ord. 41, r. 3, ante-dates the judgment. The power of ante-dating a judgment ought only to be exercised upon some good ground, as, for instance, where the damages have been wrongfully withheld, or where there has been some unreasonable act on the part of the defendant causing the delay in the ascertainment of liability.

Application by the plaintiff for directions as to the amount for which judgment should be entered.

The action was brought against shipowners to recover damages for injury to a cargo of meat owing to the ship being unfit to carry the cargo. At the trial on the 9th of March, 1903, Walton, J., came to the conclusion that the damage arose from the condition of the ship at the commencement of the voyage,

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

but he held that the defendants were protected by certain exceptions in the bill of lading (8 Com. Cas. 150). The Court of Appeal, on the 25th of January, 1904, reversed this judgment, and gave judgment for the plaintiff, holding that the defendants were not protected by the exceptions (52 W. R. 439, [1904] 1 K. B. 319, 9 Com. Cas. 126). The following was the material part of the judgment as drawn up: "It is ordered that the plaintiff's appeal be allowed; that the above-mentioned judgment of the Honourable Mr. Justice Walton of the 9th day of March, 1903, be wholly set aside, and instead thereof, that judgment be entered in the action for the plaintiff against the defendants on all issues for such sum as damages as may be assessed by a referee to be agreed upon by the parties." The House of Lords, on the 16th of February, 1905, affirmed the decision of the Court of Appeal (*ante*, p. 401, [1905] A. C. 93, 10 Com. Cas. 109). The assessment of damages was not referred, the parties, on the 16th of May, 1905, agreeing them at £3,750 with interest. On the 23rd of May the defendants paid the £3,750 to the plaintiff, the time from which interest ran being in dispute. The plaintiff claimed interest on the £3,750 from the date of the judgment of Walton, J., which the defendants refused to pay. The plaintiff thereupon applied to the Court of Appeal for a formal order that the judgment directed by the court on the 25th of January, 1904, should be entered for the plaintiff for £3,750, the agreed amount of damages, together with interest thereon at the rate of £4 per cent. per annum from the 9th of March, 1903.

J. A. Hamilton, K.C., and *Maurice Hill*, for the plaintiff.—By ord. 58, r. 1, an appeal is a rehearing, and by rule 4 the Court of Appeal has power to make any order which the court appealed from ought to have made. Walton, J., ought to have given judgment for the plaintiff, and if he had done so interest would have run from the date of his judgment. The plaintiff has been wrongfully kept out of his money since that date. If necessary the court will, under ord. 41, r. 3, ante-date the judgment—the Court of Appeal having by ord. 58, r. 4, all the powers of the High Court—so as to carry out the intention of the court, which is shown by the formal order as drawn up directing that "instead" of the judgment of Walton, J., judgment should be entered for the plaintiff. The judgment, therefore should be for interest on the £3,750 from the 9th of March, 1903.

Carver, K.C., and *D. C. Leck*, for the defendants.—Until the judgment of the Court of Appeal there was no sum ascertained as payable by the defendants, and interest only becomes payable when a party comes under a duty to pay it. There was no duty to pay until the judgment of the Court of Appeal. By ord. 41, r. 3, the judgment of the Court of Appeal is to be held as of the day on which it is pronounced, and that was the course pursued here. It is now too late to ask the court to ante-date its judgment. Interest, therefore, ought only to be allowed from the date of the judgment of the Court of Appeal.

Caledonian Railway Co. v. *Carmichael*, L. R. 2 H. L. Sc. 56; *In re Richard and Great Western Railway Co.*, *ante*, p. 83, [1905] 1 K. B. 68; and *In re London Wharfing and Warehousing Co.*, 33 W. R. 836, 54 L. J. Ch. 1137, were referred to.

COLLINS, M.R.—This is an application by the plaintiff that judgment should be entered for him for an agreed sum, together with interest thereon at the rate of £4 per cent. per annum from the date of the original judgment. The learned judge at the trial gave judgment for the defendants. That judgment was reversed upon appeal to this court, and judgment was ordered to be entered for the plaintiff for a sum to be ascertained by a referee. That decision was affirmed by the House of Lords. The result of all those proceedings was that a considerable time elapsed between the date of the judgment at the trial and the date of the judgment of the House of Lords. After this latter judgment, the amount of the damages was agreed at a certain sum with interest. The plaintiff now contends that he is entitled to interest not merely from the date when the Court of Appeal decided that the plaintiff was entitled to a sum of money as damages and gave judgment to that effect, but from the date of the original judgment at the trial, basing his claim upon the ground that, if the rights of the parties had been properly understood at that time, the learned judge would have pronounced him entitled to judgment for a sum to be ascertained by a referee, which would, according to the practice, carry interest upon the sum so ascertained from the date of the judgment. The judgment of the Court of Appeal, however, for the first time decided that the plaintiff had a right to recover damages at all; and, if we take the practice laid down in ord. 41, r. 3, the result will be that the plaintiff will only get interest from the date of the judgment of the Court of Appeal. That rule provides that "where any judgment is pronounced by the court or a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the court or judge shall otherwise order, and the judgment shall take effect from that date; provided that by special leave of the court or judge a judgment may be ante-dated or post-dated." Now, no doubt by ord. 58, r. 1, an appeal to the Court of Appeal is by way of rehearing and, though by rule 4 the court has all the powers of the High Court, and has power to give any judgment and make any order which ought to have been made, still, in my opinion, the judgment of the Court of Appeal is a judgment as of the date when it is pronounced, and it would require the invocation of the power conferred upon the court by ord. 41, r. 3, to ante-date it. The judgment clearly would not *ipso facto* be ante-dated. That power of ante-dating a judgment ought only to be invoked upon some good ground shown by the party making the application. No good ground has been shown in the present case. The delay was not the fault of either party, but of the law, or rather of those who administer the law. There was no wrongful act of the defendants causing the delay. There was no unreasonable obstacle placed by the defendants in the way of settling the question of their liability. Therefore, I think that no case has been shown for having the judgment ante-dated in order that the plaintiff may get interest in the interval between the original judgment and the judgment of the Court of Appeal. When the principle of the decision of the House of Lords in *Caledonian Railway Co.* v. *Carmichael*, which was followed in *In re Richard and Great Western Railway Co.*, is examined we are assisted in arriving at a determination of the present case. In *Carmichael's* case a landowner claimed compensation from a railway company under the Lands Clauses (Scotland) Act, 1845. The head-note runs as follows: "Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand, it was held by the House, reversing the decision below, that the right to interest on the principal sum did not commence until after the debt had been established and the precise amount settled. A sheriff's jury, awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to £5,272; saying, however, nothing as to interest. The court below added to the

principal sum twelve years' interest. Their order reversed. *Per* Lord Westbury.—Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld." Now, though the point which was decided in that case does not arise here, the principle of that case assists the court, as I have said, in determining the present case. In that case there was a long delay and consequent loss, but the principle of the decision is that the sum was not one in respect of which the railway company could have been called upon to pay interest, there being no exigency upon them to pay the sum until it had been ascertained. In the present case the damages could not be regarded as having been wrongfully withheld. The question whether the principal sum has been wrongfully withheld is, no doubt, an important factor in determining whether the judgment should be ante-dated; but when the delay is part of the ordinary process of ascertaining liability there is no wrongful withholding of the money. As a matter of fact, the plaintiff here was in the position in which the landowner was placed in that case. There there was delay in ascertaining the amount of the claim, and in the result an obligation arose to pay the ascertained sum. It was held that the landowner was not entitled to recover interest. I think, therefore, that the principle of that case helps us in deciding whether, having jurisdiction to ante-date the judgment, the court ought to ante-date it so as to give interest to the plaintiff. In these circumstances we ought not to interfere with the judgment. I say nothing as to the case where the sum is a fixed sum, which is either due or not due, and the question whether it is due is the only question for decision. Here the sum was one which could not be ascertained without a further inquiry. I desire, as I understand Romer, L.J., also desires, to express no opinion where the sum is one which is an ascertained sum without any inquiry.

Judgment will therefore be entered for the agreed sum, with interest thereon from the date of the judgment of the Court of Appeal until payment.

ROMER, L.J.—I am of the same opinion. It ought to be borne in mind that when an appeal comes before the Court of Appeal it comes by way of rehearing. That is very forcibly shown by the case of *Quilter* v. *Mapleson*, 31 W. R. 75, 9 Q. B. D. 672. Where a plaintiff who fails at the trial, and whose action is dismissed appeals, and succeeds on the appeal, and the judgment is reversed and entered for him, it cannot properly be said that the judgment of the Court of Appeal is to be regarded as if for all purposes it were the judgment of the court appealed from. The judgment of the Court of Appeal in favour of the appellant must be regarded as pronounced upon the day on which the Court of Appeal pronounced it, subject to the power of the court to antedate it. The Court of Appeal has powers given to it to remedy any possible injury to the appellant by reason of his not having judgment entered for him in the court below, as, for instance, the power to antedate the judgment. But that power should be exercised with great caution. In the present case there was a claim for damages. The judgment of the Court of Appeal, reversing the judgment of the court below, was that the plaintiff was entitled to damages to be assessed by a referee. In my opinion, the judgment must be regarded as a judgment of the date on which it was pronounced, and I can see no sufficient ground for ante-dating it. This is not a case in which the court, in the exercise of its jurisdiction, should ante-date the judgment. That to my mind is the true view of the matter upon principle. What then happened was this. The parties agreed upon the amount of the damages and that the amount so agreed upon should bear interest, but from what date the interest should run was not expressly stated. As a matter of construction I think that the interest runs from the date of the judgment of the Court of Appeal. Therefore, both upon principle and upon construction, interest can only be allowed to the plaintiff from the date of the judgment of the Court of Appeal.

Order accordingly.

Solicitors for the plaintiff, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Lowless & Co.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 2.

ATTORNEY-GENERAL v. LETHBRIDGE. (a.)

Inland revenue—Estate duty—Property deemed to pass on death—Interest provided by deceased by arrangement with other person—Policy of life insurance—Family arrangement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (d).

The tenant for life of certain estates, who had raised a sum of money on the security of his life estate and of fifteen policies of insurance on his life, entered into an arrangement with his son, the tenant in tail, in accordance with which the entail was barred, a sum of money was raised on a mortgage of the fee simple, out of which the charges on the father's life estate and on the policies were paid off, and the policies were assigned to the son. By a deed of settlement the income of the estates was to be applied, first, in paying the interest on the mortgage debt; next, in paying the premiums on the policies or substituted policies, and, if any policies should be surrendered, the amount of the premiums on such policies were to be paid to the son; and next, in paying £1,000 a year to the son. The son mortgaged the policies, assigning to the mortgagees the benefit of the provisions in the settlement for keeping up the policies, but without any covenant by himself to keep up the policies. The father having surrendered his life interest in the estates to the son, subject to the trusts for keeping up the policies, the son paid off the mortgage on the policies and then remortgaged them, covenanting in the new mortgage to pay the premiums. Shortly after the new mortgage the father died, and all the policy moneys were duly paid to the son. No premium in respect of five of the policies fell due or was paid after the date of the new mortgage. In respect of each of the remaining ten policies the defendant himself paid one premium under his covenant. The Crown claimed estate duty on the death of the father in respect of the policy moneys.

Held, that the estate duty claimed was payable, as the policies were an interest provided by the deceased by arrangement with his son within the meaning of section 2, *sub-section* 1 (d), *of the Finance Act*, 1894.

Appeal by the Crown from the judgment of Phillimore, J., on an information by the Attorney-General claiming estate duty.

The information claimed that on the death of Sir Wroth Acland Lethbridge estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value received under certain policies of insurance.

The information stated that by an indenture dated the 19th of August, 1885, and made between Sir

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Wroth Acland Lethbridge and his eldest son, the defendant, reciting that under the will of Sir Thomas Lethbridge (the grandfather of Sir Wroth Lethbridge) certain estates were vested in trustees upon trust for the payment of certain annuities and subject thereto upon trust to pay the income thereof to Sir Wroth Lethbridge for life, and after his death in trust for the defendant in tail male with equitable remainders over; and reciting that at the date of the indenture next hereafter mentioned Sir Wroth Lethbridge had raised by way of charge upon his life estate and sundry policies of assurance on his life (including the fifteen policies hereinafter mentioned) sums amounting to £59,121; and reciting that by an indenture dated the 4th of March, 1885, and made between Sir Wroth Lethbridge of the first part, the defendant of the second part, and Charles Longbourne of the third part, which indenture was executed as part of family arrangement between Sir Wroth Lethbridge and the defendant, and was duly enrolled as a disentailing assurance on the 6th of March, 1885, the estates were limited to Charles Longbourne and his heirs subject to the several annuities, mortgages, and encumbrances affecting the same, but freed and discharged from the estate in tail male of the defendant and the remainders thereon upon such trust as Sir Wroth Lethbridge and the defendant should by deed jointly appoint, and in default of appointment upon the trusts therein referred to (being the trusts subsisting under the will of Sir Thomas Lethbridge); and reciting that as a further part of the family arrangement, and by an indenture dated the 10th of June, 1885, and made between Sir Wroth Lethbridge and the defendant of the first part, Ambrose Lethbridge and others of the second part, and Sir W. F. Pollock and others of the third part, Sir Wroth Lethbridge and the defendant in consideration of £71,000 paid to them, appointed and conveyed certain portions of the estate to Sir W. F. Pollock and others by way of mortgage for securing the said sum of £71,000 and interest; and reciting that the said sums, amounting to £59,121, charged on the life estate of Sir Wroth Lethbridge and on the said policies of assurance, were paid off out of the said sum of £71,000, and that the said several policies on the life of Sir Wroth Lethbridge, including the fifteen policies, had been reassigned to, and were then vested in, Sir Wroth Lethbridge; and reciting that it was further part of the family arrangement that the fifteen policies of assurance should thenceforth be kept up out of the rents of the estates, and that the policies should be assigned to the defendant absolutely; and reciting that by an indenture also dated the 19th of August, 1885, the estates had, subject to certain rent-charges, been appointed and granted to the use of Thomas Benyon, his executors, administrators, and assigns, during the life of Sir Wroth Lethbridge upon trust for the management of the estates, and out of the rents to pay expenses of the management, the said rent-charges and annuities, and the interest on the mortgage debt, and in the next place to pay the annual premiums and other sums which were then and from time to time should be necessary for keeping on foot the said policies of assurance specified in the schedule thereto, and any policy or policies effected as thereinafter mentioned, or for restoring the same respectively if the same respectively should become voidable, and in case the said policies or any of them should become void to effect a new policy or policies to be delivered to the defendant, his executors, administrators, or assigns, with such office or offices as he or they should direct, and in his or their name or names on the life of Sir Wroth Lethbridge in such sum or sums as should amount to the sum or sums which would have become payable under the policy or policies so become void if Sir Wroth Lethbridge had then died, but so that in case any such policy or policies should during the life of Sir Wroth Lethbridge be surrendered by the defendant to the office granting the same, and the annual premium or premiums payable in respect thereof should in consequence cease to be payable, the amount of such premium or premiums should not cease to be raisable, but should be raised and paid to the defendant, and to apply the residue of the said rents and profits as therein mentioned, that is to say, in the next place to pay to the defendant the sum of £1,000 a year, and, subject to the trusts aforesaid, the premises thereby appointed and granted were to be in trust for Sir Wroth Lethbridge as tenant for life with remainder, to the use of the defendant, his heirs and assigns; by the now stating indenture it was witnessed that in further pursuance of the said family arrangement and in consideration thereof Sir Wroth Lethbridge, as beneficial owner, assigned to the defendant, his executors, administrators, and assigns, all those fifteen policies of assurance on the life of Sir Wroth Lethbridge specified in the schedule to the indentures, and all moneys to become payable thereunder, to hold the same to the defendant, his executors, administrators, and assigns, for his and their own benefit. The amount of the fifteen policies in question, which had been taken out at various dates between February, 1856, and December, 1872, was £26,500, and the annual premiums payable in respect thereof at the date of the said indenture amounted to £864. Bonuses to the amount of £3,567 4s. 2d. had been declared on the policies prior to June, 1885. The defendant, by indentures dated the 1st of November, 1892, the 13th of November, 1893, and by four subsequent indentures, mortgaged the policies to secure moneys advanced to him. The said mortgages contained no covenant by the defendant himself to keep up the policies, but the defendant assigned to the several mortgagees the benefit of the provision for keeping up the same contained in the indenture of settlement of the 19th of August, 1885. Thus by an indenture of the 24th of October, 1899, made between the defendant of the one part and W. J. Trevelyan of the other part, reciting that the defendant was entitled to the policies specified in the schedule thereto (being seven of the fifteen policies) and was entitled to the benefit of the provisions contained in the indenture of the 18th of August, 1885, for keeping on foot the same or any new policies in lieu thereof, the defendant, in consideration of £3,000 advanced to him, covenanted for the repayment of the sum so advanced, and assigned to W. J. Trevelyan the said seven policies of assurance, together with the full benefit of the provision for keeping on foot the same policies contained in the indenture of settlement of the 19th of August, 1885. By an indenture dated the 8th of September, 1898, in consideration of £4,100, Sir Wroth Lethbridge assigned (by way of surrender) to the defendant his life interest in the estates comprised in the indenture of August, 1885 (subject, *inter alia*, to the indenture of mortgage of June, 1885, and to the trusts by the indenture of August, 1885, declared for keeping on foot the said fifteen policies, so far as was necessary for the security and protection of the respective mortgagees of the policies, but discharged from the other trusts thereby declared for Sir Wroth Lethbridge and his assigns), to hold unto and to the use of the defendant, his heirs and assigns, during the life of Sir Wroth Lethbridge, to the intent that the life estate might merge in the reversion. The purchase-money of £4,100 was calculated on the footing that the defendant was entitled under the provisions contained in the settlement to have the

premiums on all the policies during the life of Sir Wroth Lethbridge paid out of the rents and profits of the estates. The mortgages by the defendant of the fifteen policies continued until the 8th of January, 1902, when the defendant paid off the same, and by an indenture of the 9th of January, 1902, he again mortgaged the same policies, covenanting in the new mortgage to pay the premiums. Sir Wroth Lethbridge died on the 25th of November, 1902. All the moneys (including bonuses) secured by the fifteen policies then became payable, and had been duly paid or accounted for to the defendant. No premium in respect of five of the policies fell due or was paid after the 8th of January, 1902. In respect of each of the ten remaining policies the defendant himself paid one premium under his covenant.

The information claimed that, in these circumstances, estate duty under the provisions of the Finance Act, 1894, ss. 1 and 2 (1) (*c*) and 2 (1) (*d*), or one or more of those sections became payable in respect of the moneys received under all the said policies of assurance, or, alternatively, in respect of such moneys, less a sum in proportion to the premiums paid in respect of any of the policies dated the 8th of January, 1902, or, alternatively, on the moneys received under the said policies in respect of which no premium had been paid after the 8th of January, 1902.

The defendant refused to pay duty according to any of the alternative claims, and contended that no estate duty was payable in respect of the moneys received under any of the policies.

By section 2 (1) (*d*) of the Finance Act, 1894, property passing on the death of the deceased is deemed to include "any annuity or other interest provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Phillimore, J., was of opinion that the effect of the family arrangement was that the deceased assigned the policies of insurance on his life to the defendant, and also assigned to him an income wherewith to pay the premiums on the policies. And he held that, inasmuch as the policies were given to the defendant and had been kept up by him, the defendant was not liable on the death of his father to pay estate duty under section 2 (1) (*d*) in respect of the moneys received under the policies.

The Crown appealed.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Vaughan Hawkins*, for the Crown.

Montague Lush, K.C., and *A. ãB. Terrell*, for the defendant.

The following cases were cited: *Attorney-General* v. *Murray*, 52 W. R. 258, [1904] 1 K. B. 165; *Attorney-General* v. *Hawkins*, 49 W. R. 320, [1901] 1 Q. B. 285; *Lord Advocate* v. *Fleming*, 45 W. R. 674, [1897] A. C. 145.

Cur. adv. vult.

June 2.—COZENS-HARDY, L.J., read the judgment of the court as follows: This is an appeal by the Attorney-General from a judgment of Phillimore, J., dismissing an information which claimed estate duty as payable on certain policy moneys under section 2 (1) (*d*) of the Finance Act, 1894.

In 1885 Sir Wroth Acland Lethbridge, the late baronet, hereinafter called the father, was equitable tenant for life of the Lethbridge estates, and his son, the defendant, the present baronet, was equitable tenant in tail. The father had raised £59,121 upon the security of his life interest and of fifteen policies on his life for £26,500, on which bonuses to the amount of £3,567 4s. 2d. had been declared. A family arrangement was entered into, by virtue of which (1) the estate tail was barred, and the son became equitable tenant in fee simple in remainder after his father's death; (2) a sum of £71,000 was raised on the security of the fee simple; (3) out of the £71,000 the charges on the father's life interest and on the policies were paid off; (4) £1,000 a year was provided for the son during the joint lives of the father and the son out of the father's life interest; (5) the policies were assigned to the son absolutely; and (6) provision was made for payment of the premiums on the policies. Of these various transactions the last is the only one to which attention need be called in detail. It is part of the provisions of the settlement or resettlement dated the 19th of August, 1885. The father's life interest was vested in trustees upon trust out of the net rents and profits to pay the interest on the mortgage debt of £71,000, and in the next place to "pay the annual premiums and other sums which are now or from time to time shall be necessary for keeping on foot" the fifteen policies, "or for restoring the same respectively if the same respectively shall become voidable, and in case" the fifteen policies "or any of them or any policy or policies effected as hereinafter mentioned shall become void effect a new policy or policies of assurance, to be delivered to" the son, his executors, administrators, or assigns, with such office or offices as the son, his executors, administrators, or assigns, should direct, and in his or their name or names, on the life of the father in such sum or sums of money as should be or amount to the sum or sums which would have been payable under the policy or policies so become void if the father had then died, but so that in case any such policy or policies should during the life of the father be surrendered by the son, his executors, administrators, or assigns, to the office or offices granting the same and the annual premium or premiums payable in respect thereof should in consequence cease to be payable to such office or offices respectively, the amount of the premium or premiums which would have been payable in respect of such surrendered policy or policies respectively in case the same had not been so surrendered should not cease to be raiseable under the present trust, but should be raised in the same manner in all respects as if such policy or policies had continued in force, and should be paid to the son, his executors, administrators, and assigns. Subject as above, the trust was for payment to the son of £1,000 a year during the joint lives and then for the father and his assigns.

The first question that arises is whether under this transaction the fifteen policies were an "interest purchased or provided" by the father, either by himself alone, or in concert or by arrangement with the son, within the meaning of section 2 (1) (*d*). It has been held by this court that a policy may fall within this clause: *Attorney-General* v. *Murray*, [1904] 1 K. B. 165. And in our opinion the fifteen policies were "provided" by the father by arrangement with the son by means of the application of part of his income in paying the premiums which kept the policies alive. Phillimore, J., seems to have held that this elaborate arrangement was nothing more than a trust to pay to the son, or for his sole benefit, an annual sum of £864 (the amount of the then premiums), plus £1,000 a year, but we cannot adopt this view. In one event only could the son claim to be paid the £864—viz., in the event of his electing to surrender the policies. Moreover, the £864 was not a fixed charge upon the father's income. It might be increased if a fresh policy had to be effected. It would be reduced whenever a bonus was declared, for the son could not call

upon the trustees to apply out of the father's income anything more than the premiums "necessary for keeping on foot" the policies. But however that may be, we think that, if nothing else had happened and the policies had been kept up under the trust of 1885 until the father's death in November, 1902, the case would clearly have fallen within sub-section 1 (*d*).

It was urged that the policies were really purchased by the son, and therefore were exempt from estate duty. But the language of section 3 does not justify this argument. A family arrangement of the nature above described is not "a *bonâ fide* purchase for full consideration in money or money's worth"; and the transactions of 1885 were, both in form and in fact, a family arrangement, although there was ample consideration on each side.

It remains to consider whether the subsequent dealings of the father and son have materially altered the position. (*a*) The son mortgaged the policies by six deeds, in each of which he assigned the benefit of the provisions for keeping up the policies contained in the settlement of 1885, but without any personal covenant for payment of the premiums. This left the position unchanged. (*b*) In September, 1898, the son purchased his father's life interest for £4,100. The father surrendered his life interest to the son to the intent that the life interest might merge in the reversion. But the surrender was subject (*inter alia*) to the trusts for keeping on foot the policies so far as was necessary for the security or protection of the respective mortgagees. (*c*) In October, 1899, the defendant mortgaged the policies with the full benefit of the provisions for keeping on foot the policies. This is remarkable as indicating an intention to keep alive the trust, in spite of his being then the absolute owner of the Lethbridge estates. (*d*) In January, 1902, the defendant paid off the mortgages of the policies and again mortgaged them, but without assigning the benefit of the provisions for keeping on foot the policies; and he covenanted in the usual way to pay the premiums. No premium fell due or was paid on five out of the fifteen policies after the date of this mortgage, the father having died in November, 1902. The result is that these five policies were kept on foot solely by virtue of the trust in the settlement of 1885, and we think that they clearly fall within sub-section 1 (*d*).

With regard to the remaining ten policies there is rather more difficulty, inasmuch as one premium was paid by the defendant pursuant to his covenant, although with that exception they were likewise kept on foot by virtue of the trust. Upon the whole, however, we think that they were "provided" by the father, a part of whose income was appropriated for the purpose of keeping them on foot. The merger of the life interest in the son's reversion did not substantially affect this. The son never ceased during his father's life to have the benefit of this appropriated fund, and when he purchased his father's life interest the price paid was calculated on the footing that this prior trust was subsisting. The circumstance that the last premium was not paid through the hands of the trustees, but directly by the son, does not suffice to alter the nature or effect of the provision made by the father and retained by the son. In our opinion, therefore, this appeal ought to be allowed and estate duty must be paid on the full amount received in respect of all the fifteen policies.

Appeal allowed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendant, *Tomlin & Chitty.*

From K. B. Div. (Mathew and Cozens-Hardy, L.JJ.) — May 29.

NELSON v. EMPRESS ASSURANCE CORPORATION (LIMITED).

FABER, THIRD PARTY. (*a*.)

Practice—Third party—Reinsurance—Action on policy of marine insurance—Right of underwriter to bring in reinsuring underwriter—Ord. 16, *r.* 48.

In an action on a policy of marine insurance against an underwriter who has effected a policy of reinsurance, the original underwriter cannot bring in the reinsuring underwriter as a third party under ord. 16, *r.* 48.

An appeal from the refusal of Bigham, J., to discharge an order of a master giving the defendant corporation leave to issue and serve a third-party notice under ord. 16, r. 48. The action was brought on a policy of marine insurance.

The policy, which was dated the 30th of May, 1902, was effected by James Hartley Cooper & Co. (Limited) on behalf of the plaintiff with the defendant corporation. The subject-matter of the insurance was seven bulls, thirty heifers, and one cow and calf on board the steamship *Highland Scot* on a voyage from the United Kingdom to Buenos Ayres. The policy contained the following clauses: "On and/or under deck. Including all risks of mortality, jettison, and washing overboard. Warranted free from all claim (except for general average, salvage, and special charges) in respect of animals which may walk ashore or are capable of walking after leaving the ship at port of destination, but to include risk of mortality for three days after landing of animals . . . each animal to be deemed a separate insurance."

The insurance was expressed to be against the usual perils, and the sue and labour clause was as follows: "And in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said subject-matter of assurance, without prejudice to this assurance; to the charges whereof the said corporation will contribute according to the rate and quantity of the sum herein assured."

On the 5th of June, 1902, a policy of reinsurance was subscribed by G. H. Faber and other underwriters at Lloyd's. This policy was described on the face of it as being a reinsurance of the Empress Assurance Corporation and as applying to the above policy, and as being subject to the same clauses and conditions as the original policy and to pay as might be paid thereon. It was expressed to be on cattle as per original policy, and it contained the following clause: "Warranted free from particular average, jettison, washing overboard, and mortality, unless caused by the ship being stranded, sunk, on fire, or in collision." It also contained a sue and labour clause similar to that in the original policy.

The plaintiff alleged that during the currency of his policy a total loss arose of each and all of the said animals by perils insured against—namely, mortality, and arrests, restraints, and detainments of kings, princes, and people and other like perils. One heifer died on the voyage to Buenos Ayres, and the rest of the animals were prevented from landing at Buenos Ayres by order of the Argentine Government. Notice of abandonment of such animals was duly given.

The plaintiff claimed for a constructive total loss and also for sue and labour expenses, and special charges in respect of the animals. In the alternative, the plaintiff claimed for a partial loss, and also for a

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

proportion of a sum which represented sue and labour expenses and other special charges.

The defendants, in pursuance of an order obtained by them, issued and served upon Faber a third-party notice. By this notice they claimed to be indemnified by him against liability in respect of the claim made against them under the original policy, on the ground that they had effected with him a policy of re-insurance of the cattle insured in the original policy.

Faber applied to the judge at chambers that the order giving leave to serve the third-party notice upon him might be rescinded, and that all proceedings thereunder might be set aside.

Bigham, J., refused the application.

The third party appealed.

Scrutton, K.C., and *Leck*, for the third party.—A contract of reinsurance is not a contract of indemnity to which third-party procedure is applicable. In order to constitute a case of indemnity within the meaning of ord. 16, r. 48, it is necessary that there should be a contract to indemnify the defendant against the claim of the plaintiff. A contract of reinsurance is not a contract of indemnity in that sense. For the difference between a contract of indemnity in this sense and in the sense in which every contract of marine insurance is a contract of indemnity, see the judgment of Lindley, L.J., in *Johnston* v. *Salvage Association*, 36 W. R. 56, 19 Q. B. D. 458. Secondly, it would be inconvenient in this case to adopt third-party procedure, for the claim of the plaintiff against his underwriters is different from their claim against the reinsuring underwriters. The original policy covers partial loss; the policy of reinsurance is for total loss only. And, although the sue and labour clauses in the two policies are in similar terms, the measure of their application is not the same; for one applies to work done by the factors, servants, and assigns of the assured, the other to work done by the factors, servants, and assigns of the corporation: *Uzielli* v. *Boston Marine Insurance Co.*, 33 W. R. 293, 15 Q. B. D. 11.

Carver, K.C., and *F. T. R. Bigham*, for the defendants.—The plaintiff claims either to recover as on a constructive total loss by restraint of princes, or to recover, under the sue and labour clause, expenses incurred in avoiding restraint of princes. If he succeeds in either part of his claim, the defendants are entitled under the policy of reinsurance to be indemnified by the third party. In *Uzielli* v. *Boston Marine Insurance Co.* there were intermediate underwriters, and the expenses claimed were expenses incurred by them. In this case the expenses claimed are expenses incurred by the original assured. There being a question proper to be tried as to the liability of the third party to make indemnity, the third-party procedure is applicable.

MATHEW, L.J.—I am of opinion that the appeal must be allowed. The rule under which the defendants apply to bring in the third party has been in existence for many years, and policies of reinsurance have been in existence for a still longer period, but this appears to be the first occasion on which it has been sought to apply the third-party rule to a case of reinsurance. The authorities show that a contract of insurance and a contract of reinsurance are independent of each other. This is an attempt to treat a policy of reinsurance as a mere contract of indemnity. In my opinion the promise by the reinsuring underwriter to pay as may be paid on the original policy does not make the contract of reinsurance a contract of indemnity. If it were a contract of indemnity, the underwriter of the original policy might, on being sued, give notice to the reinsuring underwriter that he did not wish to contest the claim, and that, if the reinsuring underwriter did not pay, he would defend the action and then claim to be indemnified against the costs. No one has ever heard of a policy of reinsurance being so treated. Further, in this case, the third party is alleged to be liable only in respect of some part of the plaintiff's claim. I think that great inconvenience would arise if a third party were allowed to be brought in with regard to some part only of the subject-matter of the action. It might be that at the trial it would turn out that there was no point of common liability at all; and then the third party would have appeared and incurred expense for nothing. I therefore think the appeal must be allowed.

COZENS-HARDY, L.J., concurred.

Appeal allowed.

Solicitors for the third party, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *W. A. Crump & Son.*

High Court of Justice.

Chan. Div. Warrington, J. — April 10.

KELLY v. SELWYN. (a.)

Conflict of laws—Assignment abroad of reversionary interest — Personal estate in England — Notice — Priority.

In June, 1891, A. H. S, being then domiciled in the State of New York, assigned to his wife by deed his reversionary interest under his late father's will absolutely. The estate was invested in English trust securities. Notice to the trustees of the will was not necessary to complete an assignment of a chose in action *or reversionary interest in personalty according to the law in the State of New York, and notice of this assignment was not sent to the English trustees. In August, 1894, A. H. S., being then in England, assigned by deed his reversionary interest in his father's estate to the plaintiff to secure £400 by way of mortgage. The plaintiff forthwith gave notice of this assignment to the trustees of the will. In September, 1903, the wife gave notice to the trustees of the assignment made to her. In an action to settle the priorities of these two assignments,*

Held, that, as the court was administering an English trust fund settled by the will of an English testator, the rights of the claimants to that fund must be regulated by English law, and, accordingly, that the plaintiff was entitled to priority by virtue of the notice he had given to the trustees.

Witness action.

The important question raised in this action was whether the validity and consequent priority of an assignment of a reversionary interest in English trust funds was to be determined by the law of New York, where the assignment was executed by deed dated July, 1891, or by the law of England, where the fund was being administered.

Under the will of his father, A. H. Solomon, who died in March, 1888, Arthur Hammond Selwyn was entitled to a protected life interest in a legacy of £20,000, and was also contingently entitled in reversion to certain other legacies bequeathed to various members of the testator's family. The will contained a trust for sale, under which, at the time of events

(a.) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

referred to hereunder, all the real estate had been converted, and the whole estate was invested in English trust securities.

By an indenture of the 8th of June, 1891, A. H. Selwyn, being then domiciled in the State of New York, assigned to his wife, an American lady, all his share and interest of what nature or kind soever which he then had or might thereafter have in the estate of his late father, A. H. Solomon, under or by virtue of his said will or otherwise (except his life interest in the £20,000 legacy), whether in possession, reversion, remainder, or expectancy, for her sole and separate use absolutely. According to the law of the State of New York, notice to the trustees of the will was not necessary to complete an assignment of a *chose in action* or reversionary interest in personalty, and no notice of the deed of the 8th of June, 1891, was sent to the English trustees.

By an indenture of the 10th of August, 1894, A. H. Selwyn, being then in England, assigned all his share and interest in the estate of his late father, whether under his said will or otherwise, or whether in remainder, reversion, or expectancy (except his life interest in the £20,000 legacy), to the plaintiff, Thomas Kelly, by way of mortgage to secure £400 and interest.

Notice of this assignment was forthwith given by the plaintiff to the trustees of A. H. Solomon's will.

Subsequently A. H. Selwyn created various other incumbrances on his said reversionary interest, of which notice was in due course given to the trustees of the will, one of the trustees being himself an incumbrancer.

In September, 1903, notice of the assignment of the 8th of June, 1891, was given to the trustees of the will on behalf of Mrs. Selwyn.

A reversionary interest in A. H. Solomon's estate having fallen in, a portion of which would have been payable to A. H. Selwyn or persons claiming under him, the plaintiff commenced the present action against the trustees of the will, Mrs. Selwyn, and the other incumbrancers, claiming a declaration that he was entitled by virtue of his security of the 10th of August, 1894, to a first charge on A. H. Selwyn's interest in his father's estate in priority to any right or claim of Mrs. Selwyn under the assignment in her favour of the 8th of June, 1891.

H. Terrell, K.C., and *Lyttelton Chubb*, for the plaintiff.

Norton, K.C., and *A. H. Jessel*, for Mrs. Selwyn.

Cave, K.C., and *Henry T. Thomson*, for other English incumbrancers.

WARRINGTON, J.—The important question in this case has resolved itself into one of law upon which there does not seem to be any direct authority, though the case, I think, comes within certain well-known principles. The question I have to determine is which of these two assignments is to have priority. But for one circumstance, which I will mention directly, there can be no doubt, in the case of an English trust fund created by an English testator with trustees in England, that by the law of England, if that is the proper law to apply to this case, the mortgagee who first gave to the trustees notice of his security would take priority over the secret assignment (as I may call it) in favour of the wife, who did not give notice of it till later. But it is said on behalf of the wife (and this is the circumstance I referred to just now) that owing to the accident of the assignment in favour of the wife having been executed in the State of New York, where the English doctrines of notice are not recognized or are not in force, the law which I ought to regard myself as administering is not the law of England, but the law of New York, at any rate as far as that assignment is concerned. A number of cases have been cited to me, none of which are actually in point. In fact, I do not think they were at all in point on the actual question which I have to determine. The first case, *In re Queensland Mercantile and Agency Co.*, 39 W. R. 447, [1891] 1 Ch. 536, [1892] 1 Ch. 219, 40 W. R. Dig. 55, merely decided that where there is a *chose in action* owing from persons residing in a particular country (in that case in Scotland) an assignment in that case by process of law of those *choses in action*, valid according to the law of Scotland, would be valid elsewhere. I do not think that case decided anything more. If it is of any value in assisting me in the present case—I do not think it is—it is rather in favour of the defendant Mrs. Selwyn than in favour of the plaintiff; but I do not think that is the point which I have to decide. The assignment in New York is valid, but what I have to determine in administering an English trust fund, constituted by an English testator, who may be taken to have made his will with the English law in his mind, is, in what order am I to treat the several claimants who come here with charges on the trust fund? The doctrine of notice, as I understand it, is that, till notice is given the assignee of a share in a trust fund is not completely constituted a *cestui que trust*, and that the order in which the fund is to be administered is the order in which the several claimants claiming to be assignees completely constituted themselves *cestuis que trust*.

Another case that was cited, and a good deal relied on, is *Lee* v. *Abdy*, (1886) 34 W. R. 653, 17 Q. B. D. 309, which seems to me like *In re Queensland Mercantile Agency Co.*, and merely decided this, that if a question arises whether an assignment of a chose *in action* is valid according to the law where it is executed, that question will be determined by the law of place where it is executed. The question in *Lee* v. *Abdy* was whether an assignment made by a husband to his wife, which according to the law of Cape Colony was for that reason void, was to be treated as a good assignment of an English policy of assurance.

I have listened to the citations from Foote, Dicey, and Westlake, but I do not think there is anything in those passages that actually guides me in what I have to decide in this case. The ground on which I decide it is that, the fund here being an English trust fund, and this being the court which the testator may have contemplated as the court which would have administered that trust fund, the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the court which is administering that fund. On that footing it seems to me that the assignment to the plaintiff of August, 1894, is entitled to priority over the assignment to Mrs. Selwyn of June, 1891, by reason of the notice given by the plaintiff to the trustees of the will, and I will make a declaration to that effect.

Solicitors, *Farrar, Porter, & Co.; Lewis & Yglesias.*

Chan. Div. Warrington, J. March 14, 15, 16.

BEVAN v. WEBB. (a.)

Partnership — Trustee — Reversion purchased by trustee —Leaseholds forming part of the trust estate—No right of renewal—Ownership of the fee.

The doctrine that wherever the reversion on a lease which forms part of a trust estate is purchased by the trustee of the lease the purchase is for the benefit of the trust estate applies only to leaseholds which are renewable by custom or contract. Consequently, in the case of a lease which is not thus renewable, the trustee may buy the reversion on the lease and, in the absence of fraud, hold it for his own benefit.

Longton *v.* Wilsby, 76 *L. T.* 770, 45 *W. R. Dig.* 165, *explained and followed.*

This action was brought to obtain a declaration that in making a valuation of a share in a brewery partnership the freehold of the business premises ought to be treated as forming part of the assets.

In 1854 William Webb was possessed of certain leasehold properties at Aberbeeg, partly under a lease of 1839, which expired in 1901, partly under a lease of 1840, which expired in 1903, and the remainder under a yearly tenancy. On the premises he was carrying on three separate businesses—namely, those of a brewer, a maltster, and a wine and spirit merchant.

On the 16th of June, 1854, he made over the brewery business to his sons W. H. Webb and J. R. Webb, and his son-in-law, J. Crook. The partnership was to continue for seven years; the partners were to hold equal shares, and were to pay to W. Webb £70 a year rent and interest on the value of the brewery plant. No lease of the premises to the partners was executed. W. Webb continued to carry on the other businesses on another part of the same premises.

In 1857 T. A. Bevan, another son-in-law, was admitted into the partnership.

In 1863 Crook retired.

In 1864 Bevan assigned his share to W. Webb and Crook as trustees for his wife and children. The brewery was still carried on under the terms of the original agreement, and the partners were W. H. Webb and J. R. Webb, who each held a third, and the trustees, who held the remaining third.

In 1865 T. A. Webb, another son of W. Webb, became a partner and the shares were thenceforth held in fourths.

In 1866 W. H. Webb died, and W. Webb succeeded to his share.

In 1871 Bevan died.

In 1876 a partnership deed was executed; the partnership was to continue till 1903, but no lease of the premises was granted.

In 1880, the widow and children of Bevan assigned their share by deed to the other partners upon trust to carry on the business and make certain payments to the Bevans.

Also, in 1880, one moiety of the reversion expectant on the two leases of 1839 and 1840 and of the property, of which W. Webb was yearly tenant, was put up for sale by auction; it was bought by W. Webb and conveyed to him in January, 1881. There was nothing to show that he bought that reversion otherwise than for his own benefit.

In 1882 Crook died. In 1883 W. Webb died, leaving J. R. Webb and T. A. Webb, his executors, and giving them beneficially his interest in the leaseholds and the reversion. They also became entitled under his will to the other businesses.

In 1893 J. R. Webb and T. A. Webb bought the other moiety of the reversion. In the same year articles of partnership were agreed to as the result of a compromise of litigation, and under them the Bevans took a one-fourth share. By the articles the partnership became tenants to the owners of the brewery premises. In 1900 J. R. and T. A. Webb turned the malting business into a limited company by the name of J. R. & T. A. Webb (Limited).

In 1901 another action was commenced by the Bevans; a preliminary point was decided—*Bevan* v. *Webb*, 49 W. R. 548, [1901] 2 Ch. 59—and this action was also compromised.

In 1902, a third action was brought by them for a dissolution and an account. That action was compromised by an agreement that the Webbs should purchase the interest of the Bevans in the partnership at a sum to be ascertained by valuation. In making the valuation the question arose whether the reversion belonged to the brewery partnership on the ground that W. Webb was a trustee for the Bevans when he bought one moiety, and that J. R. and T. A. Webb were co-partners with the Bevans when they bought the second half. The Bevans brought this action against the other partners and the representatives of W. Webb for a declaration that the reversion formed part of the assets.

H. Terrell, K.C., and *C. Lyttelton Chubb*, for the plaintiffs.

Warmington, K.C., and *J. Rolt*, for the defendants other than the malting company.

WARRINGTON, J., in the course of an exhaustive judgment, said: This is beyond dispute, that if a trustee, or a person in the position of a trustee, holding as part of his trust property a lease, takes the renewal of that lease, that renewed lease is treated as a graft or addition to the trust property and itself forms part of the trust property. And I think also there is no doubt that the principle is applicable to the relations between partners, and if part of the assets of the firm consists of leasehold premises, one partner cannot take a new lease of those premises and then insist on keeping that for his own benefit. But it is sought to extend that further by saying, in equally general terms, that no such trustee or partner is capable of taking to himself the reversion expectant on a lease of which the trust estate or the partnership, as the case may be, is possessed. Now, is that proposition sound? In my opinion, in the wide terms in which I have expressed it, and in which alone it must be expressed if the plaintiffs are to succeed, it is not sound. The question was first raised in a suit of *Randall* v. *Russell*, (1817) 3 Mer. 190, 17 R. R. 56, before Sir William Grant.

In that case a testator had been possessed of certain premises held under a college lease. He had given these premises, with others, to his wife during her widowhood, with gifts to other persons after her second marriage. After his death his widow took a new lease, and she subsequently purchased the reversion, not from the college, but from a man to whom the college had conveyed it. Now, it will be noticed, therefore, that that case raised both the question as to the renewed lease and the question as to the title to the reversion. Sir William Grant held, in accordance with the general principle which I have stated, that the new lease did belong to the estate of which the widow had been tenant for life, but that the reversion did not. And the grounds on which he so held are most important. His judgment is on page 197 on this point, and he says: "No case was

(a.) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

mentioned, in which this sort of equity had been carried to such a length. The ground commonly stated, on which the renewed lease becomes subject to the trusts of a will disposing of the original lease is, that the one is merely an extension or continuation of the other. But the fee is a totally different subject, which the testator had it not in his contemplation to acquire or dispose of. Yet, if Mrs. Russell had purchased from the college, it might be said that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although, as I have already said, I am not aware of any decision to that effect. But, here, the situation of the parties was altered by the act of the landlord, without any intervention of the tenant for life. The college had aliened the property to an individual. The benefit attending the tenant-right of renewal with a public body was gone. A lease at a rack-rent was all that was to be expected from the private proprietor. Mrs. Russell's purchase from the first vendee wrought no change whatever in the situation of those who had had interests in the lease as a college lease. Before she bought, it had become a lease that must expire at the end of fourteen years. Whether Mr. Hull" (who was the purchaser of the reversion) "sold or kept the reversion, was a matter of indifference to them." And then he proceeded to hold that the tenant for life did not hold the reversion in trust for the persons interested under the will, and he makes his reasons as plain as reasons can be made. Holding under a college lease there was a reasonable expectation of renewal at the old rent and under the old terms; holding from a private individual there was no such expectation, and the tenant could not expect to get anything but an ordinary lease, if he got it at all, in competition with other persons, and at a rack-rent, and the learned judge distinctly refused to apply to such a case the principle which he said he thought might be applied if the lease had remained a college lease. In the same volume of Merivale is another case before the same learned judge, the case of *Hardman* v. *Johnson*, (1815) 3 Mer. 347, 17 R. R. 96; but I do not refer to it further, because, although in that particular case he also held that the reversion did not belong to the trust estate, the reasons for that decision are not given, and it is therefore, of not very much value as an authority.

No cases bearing on the decision in *Randall* v. *Russell* have been referred to until the year 1885, when *Phillips* v. *Phillips* (1885), 33 W. R. 863, 29 Ch. D. 673, came before the Court of Appeal. *Phillips* v. *Phillips* was just the case which Sir William Grant said he thought might be determined in favour of the trust estate. In that case a testatrix had certain leaseholds which were renewable by custom, that is to say, they were leaseholds held under the Bishop of London, the lease of which the Bishop for many years had been in the habit of renewing on payment of a certain fine. The testatrix devised those leaseholds to one James Phillips for the residue of his term, and after the death of James to his children. James renewed the leases more than once, and he afterwards purchased the reversion. There was no dispute as to the renewed lease, but the question was whether his children became entitled to the reversion. It was held in the Court of Appeal that they did, but why? I think quite plainly, because the case was just that which Sir William Grant referred to in *Randall* v. *Russell* as a case in which that equity might be applied. The Master of the Rolls, who gives the first judgment there, puts it in perfectly plain terms. He says: "The will must be construed with reference to the facts which existed at a time when it was made, and which must be presumed to have been known to the testatrix. She was possessed of a term for twenty-one years created by a lease granted shortly before she made her will; her interest was of a somewhat peculiar nature, for the yearly rent was only £3, but it was an ecclesiastical lease, and upon payment of a fine and upon surrender within a limited time, it gave a right to renewal. She would, therefore, consider herself to be possessed of a renewable lease, and she must be assumed to have intended to dispose of a renewable lease by her will. It is a well-established doctrine of a court of equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where the tenant for life has purchased the reversion. This is, no doubt, an extension of the principle; but I think that it is an extension which we ought to sanction."

I ought to mention that *Randall* v. *Russell* had been cited there, but cited to distinguish it so far as the decision was concerned, and to rely upon it so far as the *dictum* of Sir William Grant was concerned. What I think the Master of the Rolls in that case intended to do was to turn the *dictum* of Sir William Grant into a decision of his own, and not to go further. He did not intend to overrule the decision in *Randall* v. *Russell* in the least.

Cotton, L.J., gives judgment to the same effect, premising it by the statement that the question was, "Who has the right to what was a reversion in property comprised in an ecclesiastical lease?" Lindley, L.J., concurred in the judgment.

In my judgment that case carries the matter no further forward. It is a decision which is perfectly consistent with *Randall* v. *Russell*. It carries out that which Sir William Grant, though hesitating to affirm it positively, thought possibly might be the law.

But the matter does not stay there. So far I have expressed my own view upon the effect of those two cases; but the matter came distinctly for decision before Stirling, J., in *Longton* v. *Wilsby*, (1897) 76 L. T. 770, 45 W. R. Dig. 165.

Now, there the testator had been possessed of certain leaseholds not renewable, and had given them to a brother for life with certain remainders over. The second tenant for life (not the first) during the life of the first, had purchased the reversion, and the question there was, whether he was a trustee for the remainderman. This is the exact question which I have to decide. *Randall* v. *Russell* was referred to, as was *Phillips* v. *Phillips*, and Stirling, J., in his judgment stated *Randall* v. *Russell*, quoting that part of the judgment which I have read, and then said: "That is the decision eighty years ago of a very eminent judge, and, as far as I can find, it has not been overruled nor dissented from." Then there is a reference to *Phillips* v. *Phillips*, stating in express terms that that was a case with reference to leasehold renewal by custom. Then it goes on: "And the grounds of the decision are given by the Master of the Rolls. He says: 'She was possessed of a term of twenty-one years created by a lease granted shortly before she made her will; her interest was of a somewhat peculiar nature, for the yearly rent was only £3; but it was an ecclesiastical lease, and upon payment of a fine, and upon surrender within a limited time, it gave a right to renewal. She would therefore consider herself to be possessed of a renewable lease, and she must be assumed to have intended to dispose of a renewable lease by her will. It is a well-established doctrine of a court of

equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where a tenant for life has purchased the reversion. This is no doubt an extension of the principle, but I think that it is an extension which we ought to sanction. Cotton and Lindley, L.JJ., take the same view. But none of the learned judges indicated any intention of overruling *Randall* v. *Russell*, or of departing from what was there laid down. That case was cited and the passage I have read, from 'if Mrs. Russell had purchased from the college,' down to 'decision to that effect' was referred to and relied on on behalf of the remaindermen, and the court adopted the view expressed by Grant, M.R., in that passage. If *Randall* v. *Russell* is, as I think, a binding authority, the present case falls well within it, because it is less favourable to the purchaser in two respects. First, the purchase there was made by an actual tenant for life in possession, whereas here it was made by a reversioner, and, secondly, in that case the leases were at one time renewable by custom, whereas here it is not so. Not finding any case in which the doctrine of *Keech* v. *Sandford*, (1726) Sel. Cas. 61, 2 W. & T. (7th ed.), p. 693, has been applied to leaseholds which were not renewable by contract or custom, and finding that the case of *Randall* v. *Russell* has not been overruled, I shall follow it, and I therefore hold that that case applies." I think there has been a slip in taking down the learned judge's judgment. What he meant in his last sentence obviously is: "Not finding any case in which the doctrine of *Keech* v. *Sandford* has been applied to the purchase of the reversion of leases which were not renewable," &c. He obviously meant that; the rest of the judgment shows it.

Now, even if I thought differently, as I do not, even if I did not agree with that judgment of Stirling, J., I should be bound by it. It seems to me, therefore, both on principle and on authority, that the purchase of the reversion in this case did not in the least enure for the benefit of the partnership firm, either on any doctrine based on the consideration of the relations of trustee and *cestui que trust*, or by regarding William Webb, or the purchasers of the other moiety, as trustees for the Bevan family. On that ground that part of the case fails.

But I think it fails on another ground, which is this: In my judgment, even if the reversion could be treated as a graft or an addition to something possessed by the firm, or by the *cestuis que trust*, there is not in this case anything to which it could be grafted. I need not repeat what I said when I was reading the documents in the case. In my judgment the true effect of those documents was, not to create an interest in the firm in these leasehold premises, but to give them by contract a right to carry on the business. If so, there is nothing to which, even if a renewed lease were granted, it could attach under the equitable doctrines which I have referred to. In my judgment, therefore, on this part of the case, instead of the declaration asked for by the plaintiffs, I think there ought to be a declaration that the fee simple—the freehold and inheritance of the brewery premises—ought not to be treated as part of the assets of the firm.

Solicitors, *Andrew Wood, Purves, & Sutton*, for *Powell & Hughes*, Brynmawr; *Le Brasseur & Oakley*, for *Le Brasseur & Bowen*, Newport, Monmouthshire.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 12, 18.

SQUIRE *v.* MIDLAND LACE CO. (*a.*)

Master and servant—Truck Acts—"Lace clippers"—Wages paid for piece-work done at workman's home—Deductions from wages—"Workman"—Truck Act, 1896 (59 & 60 *Vict. c.* 44), *s.* 2, *sub-section* (*i.*)—*Employers and Workmen Act,* 1875 (38 & 39 *Vict. c.* 90), *s.* 10.

The provisions of the Truck Acts are only applicable to payments made to a workman whose contract with the employer requires that the whole or part of the work contracted to be paid for is to be done personally by the workman.

Ingram *v.* Barnes, 5 *W. R.* 232, 7 *E. & B.* 115, *followed.*

Case stated by justices of Nottingham.

The appellant, Miss Squire, an inspector of factories, appeared before the justices to support two summonses against the respondents, who were lace manufacturers and occupiers of a factory.

The first summons charged the respondents that they, being the occupiers of a factory and employers within the meaning of the Truck Act, 1896, did unlawfully make a deduction from the sum contracted to be paid to a workman—to wit, a Mrs. A. L. Flinders—in that the deduction was not made in pursuance of such contract as is required by section 2 (i.) of that Act. The second summons charged a like offence in the case of a Mrs. Amy Lamb.

At the hearing it was admitted or proved that after lace has been removed from the machines it has to go through the process of being clipped—that is, superfluous threads and material have to be removed; that in the city of Nottingham there are a large number of women known as clippers who carry on the business of clipping, undertake to get laces clipped, and with that intent apply to the manufacturers for and take lace home to be clipped; that such clippers are not employed exclusively by any one firm or for any definite time, but are independent and may and do take laces from different firms; they may and do employ other persons to assist them, the firm having no control whatsoever over them; clippers may refuse to take work, and, having taken it, may execute it or give it to other persons to execute, or may return it unexecuted, and the manufacturers may refuse to give them work as they please; clippers are responsible in case of non-return of the lace; that such clippers are paid at the end of each week, when the account is made up according to the amount of work done; that the lace is examined, and, if any damage has been done to the lace, the clipper is required to pay damages in respect thereof; that this course of business has been in vogue in Nottingham for considerably over twenty-five years and clippers are generally well aware of it; that the said Mrs. Flinders sought to obtain lace for clipping from the respondents and some was handed to her; she took it home, and subsequently returned it clipped but damaged, and on the 13th of June, 1904, a sum of 6d. was deducted from the amount due to her for clipping; that the said Mrs. Lamb, under circumstances similar to the above, obtained laces from the respondents and returned them damaged; on the 23rd of June, 1904, the sum of 6d. was deducted for such damage from the amount due to her; that the respondents were not aware of the person or persons who actually

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

did the clipping; that there were no notices posted up in the respondents' factory relative to the alleged offences under the Truck Acts, nor was there any contract in writing signed by the clippers; that the deductions did not exceed the amount of damage done and were fair and reasonable.

In the case of Mrs. Flinders it was further proved that the lace was given out to her only as an outworker, that she had never worked in the factory, and that she did the clipping at home herself. In the case of Mrs. Lamb it was also further proved that she had been employed daily in the respondents' factory since a year last Whitsuntide, and occasionally after the factory closed at night took work home to do; that she knew that her home work was not considered as part of her work at the factory; that she also knew that deductions were made for damaged goods from her wages, and that her daughter assisted her in the clipping and did part of the damage in respect of which the deduction was made.

For the respondents it was contended that the appellant had failed to prove in both cases any contract of service, that the term wages had been wrongly used and was simply money for work done, that there was no contract to execute the work personally, and that neither Mrs. Flinders nor Mrs. Lamb was a workman within the definition contained in section 10 of the Employers and Workmen Act, 1875.

The justices, being of opinion that neither Mrs. Flinders nor Mrs. Lamb was a "workman" within the meaning of the Truck Acts, dismissed both summonses, but stated this case, the question for the opinion of the court being whether upon the facts their determination in either or both cases was right or not.

Section 10 of the Employers and Workmen Act, 1875 (the definition of "workman" in which is made applicable to the Truck Acts—see Truck Amendment Act, 1887, s. 2), provides as follows: "The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, . . . has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

G. S. Robertson, for the appellants.—The justices were wrong in holding that neither Mrs. Flinders nor Mrs. Lamb were "workmen" within the meaning of section 10 of the Employers and Workmen Act, 1875, and so within the provisions of the Truck Act. The test is whether the work to be done requires manual labour, and not whether the person who contracts to work for an employer is bound by his contract to exercise his own skill and labour wholly or in part in doing the work. The women went to the factory for the work, and they were just as much personally responsible for it as the ordinary hand who works only in the factory. In *Grainger* v. *Aynsley*, 29 W. R. 242, 6 Q. B. D. 182, a potter's assistant engaged by the potter was held to be a workman of the firm. In *Brown* v. *Butterley Coal Co.*, 53 L. T. 964, 34 W. R. Dig. 118, a slater employed on piecework by a builder who found him materials was held to be a workman within section 8 of the Employers' Liability Act, 1880.

Stuart v. *Evans*, 31 W. R. 706, 49 L. T. 138, was also referred to.

Stanger, K.C., and *Tinsley Lindley*, for the respondents.—The test is whether a man engages merely to get work done for his employer or is bound by his contract to do the work himself. If he contracts to do the work himself, he does not cease to be a workman merely because he gets someone else to do part of the work for him. In *Sharman* v. *Saunders*, 1 W. R. 152, 13 C. B. 166, which affirmed *Riley* v. *Warden*, (1848) 2 Ex. 59, it was held that a person who undertakes work under a contract and employs several men to assist in doing the work is not a workman or an employer within the Truck Act of 1831. *Weaver* v. *Floyd*, 21 L. T. Q. B. 151, is also in point. In *Ingram* v. *Barnes*, 5 W. R. 232, 7 E. & B. 115, the distiction between wages and remuneration for personal services is very clearly put in the judgment of Cockburn, C.J. *Grainger* v. *Aynsley*, relied on by the appellant, is really not in his favour, for no other decision was there possible, as the man in that case was engaged personally to work for the respondents and in their factory. Here the women were free to get the work done by somebody else, and were therefore not "workmen."

G. S. Robertson, in reply, cited *Pillar* v. *Llynvi Coal and Iron Co.*, 17 W. R. 1123, 38 L. J. C. P. 294.

Cur. adv. vult.

April 18.—KENNEDY, J., read the following judgment of the court: This is an appeal on a case stated by two of the justices of Nottingham against the dismissal of a summons against the respondents for an alleged unlawful deduction from the sum contracted to be paid by the respondents to a workwoman, Mrs. Annie Lizzie Flinders, contrary to the provisions of the Truck Act, 1896, section 2, subsection 1; and against their dismissal of a like summons in the case of another workwoman, Mrs. Amy Lamb. The justices were of opinion that neither Mrs. Flinders, in the one case, nor Mrs. Lamb, in the other case, was a workwoman within the meaning of the Truck Acts, and on that ground dismissed both summonses. After carefully considering the findings of fact stated in the case by which we are bound, we find ourselves unable, in view of the language of the Acts of Parliament which apply to these cases and of judicial decisions which were given upon a practically identical statute, and which are binding upon this court, to hold that the determination of the justices was erroneous in point of law. The definition of workman (which includes a workwoman) is contained in section 10 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90). We may summarize it for the purposes of this case as including any person, not being a domestic or a menial servant, who, being engaged in manual labour, has entered into, or works under, a contract with an employer, the contract being a contract of service or a contract personally to execute any work or labour. The material facts in relation to the employment of "clippers" in the lace trade at Nottingham, generally, are set forth in the case, and the further particular facts in regard to the two "clippers" whose cases form the subject of the present appeal are these. Mrs. Flinders never worked in the respondents' factory. She applied for and obtained work as a "clipper" and did the clipping herself at home. Mrs. Lamb was regularly employed in the respondents' factory during the day, and occasionally took home clipping work, which she knew was not considered part of the work at the factory. Her daughter helped her with the clipping work at home. In neither case were the respondents aware of the person or persons who actually did the work. It was further stated by counsel that the clipping work was entered in the wages book and the women were paid weekly, subject to deductions from their pay for damaged work. We feel ourselves precluded by authority from considering, upon this state of facts, whether we

might not give section 10 of the Act of 1875 an interpretation sufficiently liberal to include these two persons as workwomen entitled to the protection of the Truck Acts. The basis of the decision of the Exchequer Chamber in the leading case of *Ingram* v. *Barnes*, 5 W. R. 232, 7 E. & B. 132, affirming the judgment of the majority of the Court of Queen's Bench (*ibid*, p. 115), unquestionably is that to be a "workman" or "artificer" within the protection of the Truck Acts the person who contracts to do work for an employer must be a person absolutely bound by the terms of the contract to work with his own hands in the performance of it. The fact that he may work, or will probably work with his own hands in the performance of the contract is insufficient. The principle of *Ingram* v. *Barnes* was distinctly recognized in the judgment of the Court of Common Pleas in the later case of *Pillar* v. *Llynvi Coal and Iron Co.*, 17 W. R. 1123, 38 L. J. C. P. 394. Montague Smith, J., delivering the judgment of the court, said (p. 297): "The result of that decision [*Ingram* v. *Barnes*] is that a man is not an artificer within the Act unless the employer has, by the contract of hiring, a right to require his personal work and labour in return for 'wages'—of course as wages are defined by the Act." In the present case the justices have found the employment of these women clippers to be the employment of persons who may execute the work or give it to other persons to execute. In fact Mrs. Flinders herself executed at home the work she got; so did Mrs. Lamb, with the assistance of her daughter. But neither of them was bound by the terms of the contract with the employer to do any part of the work personally; and this, as we have already said, appears to be established by the judgments of the judges in the Exchequer Chamber in *Ingram* v. *Barnes* to be essential in order to constitute a workman under the Truck Act. It is true that *Ingram* v. *Barnes* was decided, not in regard to the Employers and Workmen Act, 1875, s. 10, but upon the interpretation of an earlier Act (1 & 2 Will. 4, c. 37); but the learned counsel for the appellant was unable to point out to us, and we have been unable to discover, any real or material distinction in the somewhat different wording of the two Acts in regard to the definition of "workman." We must therefore dismiss the appeal. We do so with some reluctance, having regard to the facts disclosed in this case as to the nature of the employment and the position of the women clippers, who, though they do sometimes employ assistants, are evidently, as a class, wage-earning manual labourers, and not "contractors" in the ordinary and popular sense, or persons who "speculate on the state of the labour market"; and we venture to express the hope that some amendment of the law may be made, so as to extend the protection of the Truck Act to a class of workpeople practically indistinguishable from those already within its provisions.

Appeal dismissed.

Solicitor for the appellant, *The Treasury Solicitor.*

Solicitors for the respondents, *Hind & Robinson*, for *Vells & Hind*, Nottingham.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 11.

KING v. JOHNSON AND OTHERS (JUSTICES FOR THE CITY OF WORCESTER). (*a.*)

Licensing—Exemption from closing—"Populous places"—Public market or lawful trade—Certiorari—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 26.

In order to ground jurisdiction under section 26 *of the Licensing Act*, 1872, *to grant an order exempting from the provisions of the Act with respect to the closing of licensed premises, the local authority must take into consideration some evidence that it would be for the accommodation of a considerable number of persons attending a public market or following a lawful trade, that is to say, a market which is held as a matter of course or a trade that is habitually carried on at hours during which, but for the order of exemption, the licensed premises would be closed.*

When justices are sitting in petty sessions to act upon evidence which is brought before them, then, if they act beyond their jurisdiction by acting upon evidence which is not legal evidence of any matter which may be tried before them, certiorari *will lie.*

Queen *v.* Sharman, 46 W. R. 367, [1898] 1 *Q. B.* 578, *discussed.*

Rule calling upon the justices for the city of Worcester to show cause why a writ of *certiorari* should not issue to remove into this court all and several the orders under the hands of Chas. C Johnson, Esq., and Rev. R. S. Bagnall, justices of the peace, exempting one Isaac Randell Budden, of the Lion Hotel, Upton-on-Severn, being a person duly licensed to sell intoxicating liquor at the said Lion Hotel, from the provisions of the Licensing Acts, 1872-1902, with respect to the closing of the said premises between the hours of ten and eleven at night from the date thereof until the 30th day of September, 1904, upon the ground of want or excess of jurisdiction.

The rule *nisi* for a writ of *mandamus* was not argued and was dismissed.

The material facts were as follows: In the year 1874, the justices, acting under section 32 of the Licensing Act, 1874, declared Upton-on-Severn to be a "populous place" whereby by section 3 of that Act the licensed premises of the district might be kept open till eleven o'clock instead of ten o'clock at night. The order was duly renewed after the taking of the census, as required by the Act, but after the 1901 census the licensing committee decided that the order should not be renewed, and the order was definitely revoked as from the 18th of December, 1902. After much discussion at subsequent meetings, section 26 of the Licensing Act, 1872, was brought to the notice of the justices, which enacts as follows: "The local authority of any licensing district, upon the production of such evidence as such authority may deem sufficient to show that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market or following any lawful trade or calling (or attending any theatre) may grant, if such authority think fit . . . in respect of premises in the immediate neighbourhood of any such market or of the place where the persons follow such lawful trade or calling, an order exempting such persons from the provisions of this Act with respect to the closing of his premises on such days and during such time . . . as may be specified in such order."

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Accordingly on the 22nd of October, 1903, the justices present made separate orders to twelve licensed houses, purporting to act under this section, and they intimated that they would grant similar orders to all who applied. The order made in respect to the Lion Hotel, Upton-on-Severn, was as follows: "We, the undersigned justices of the peace, usually acting at the petty sessions for the petty sessional division of Upton-on-Severn, within which district the Lion Hotel, hereinafter mentioned, is situated, and having heard evidence to show that this was necessary and desirable so to do for the accommodation of a considerable number of persons following the lawful trade or calling of gardeners, fruit and pea dealers, market gardeners, in the immediate neighbourhood of the said premises, and being satisfied that it is so necessary and desirable as aforesaid, and that the said premises are in the immediate neighbourhood of such lawful trade or calling aforesaid, do hereby consent to the grant and do grant an order exempting Isaac Randell Budden, of the Lion Hotel, Upton-on-Severn, being a person duly licensed to sell intoxicating liquors at the said Lion Hotel, from the provisions of the Licensing Acts, 1872-1902, with respect to the closing of the said premises between the hours of 10 and 11 o'clock at night from the date hereof until the 30th of September, 1904. Given under our hands . . . Chas. C. Johnson, R. S. Bagnall."

Amphlett, K.C. (*Coventry* with him), showed cause: I submit that the justices acted after careful consideration of all the evidence, that there were persons carrying on lawful trades for whose accommodation the order of exemption was made; and if there be any evidence, this court ought not to interfere. Secondly, the writ of *certiorari* will not lie at all here, because the order complained of was made by the justices as an administrative act and not a judicial act. No evidence under the section is heard against the grant of the order, no notice is given to any persons. *The Queen* v. *Sharman*, [1898] 1 Q. B. 578, which was decided on *Boulter* v. *Kent Justices*, [1897] A. C. 556, has laid down the principle that before *certiorari* will lie you must have a judicial proceeding. [Lord ALVERSTONE, L.C.J.—That was a case of a licensing committee, not of justices sitting in petty sessions.] See the judgment of Lord Herschell at p. 569 of *Boulter* v. *Justices of Kent*: "The question is not one *inter partes* at all. The justices have an absolute discretion to determine in the interests of the public whether a licence ought to be granted, and every member of the public may object to the grant on public grounds. . . . A member of the public merely informs the mind of the court to enable it rightly to exercise its discretion." [Lord ALVERSTONE, L.C.J.—Lord Halsbury, in his judgment, calls attention to the distinction between a licensing committee and courts of petty session. Do you mean to contend that there is no remedy here in the case of error in jurisdiction?] There might be a remedy against the publican for keeping open during prohibited hours. *The Queen* v. *Sharman* has brought back the law to the position in which it stood many years ago. [The following cases on this point were referred to: *King* v. *Sunderland Justices*, [1901] 2 Q. B. 356; *Q.* v. *Bowman*, [1898] 1 Q. B. 663, 46 W. R. Dig. 83; *Q.* v. *Cotham*, 46 W. R. 512, *ibid.* 802; *Q.* v. *Manchester Justices*, 47 W. R. 410, [1899] 1 Q. B. 571; *Laceby* v. *Lacon & Co.*, 47 W. R. 497, [1899] App. Cas. 222; *Q.* v. *Nicholson*, 1899] 2 Q. B. 455; *Q.* v. *Bolton*, 1 Q. B. 66; *Q.* v. *Cheshire*, 8 A. & E. 398.] Thirdly, in this case the mischief sought to be remedied is over, as the order has expired, and under such circumstances the court will not exercise its discretion to grant a writ of *certiorari*: *Q.* v. *Surrey Justices*, L. R. 5 Q. B. 472; *R.* v. *Taunton St. Mary's*, 3 M. & S. 461; *Q.* v. *Lord Newborough*, 17 W. R. 861, L. R. 4 Q. B. 585.

Matthews.—This court cannot overrule *Sharman's case*, but the narrowest construction ought to be given to it. In all the old cases the term "administrative" in respect to acts of justices did not occur. The distinction then was between "judicial" and "ministerial." In the case of the former, *certiorari* would go, but in the case of ministerial acts it would not, because there was another remedy. The term administrative cropped up in connection with local bodies other than justices.

He referred to *Cardiffe Bridge case*, 1 Salk. 146; *K.* v. *Glamorganshire*, 1 Raym. 580; *K.* v. *Uttender*, 1 Bott's Poor Law 292; *Q.* v. *Arkwright*, 12 Q. B. 960.

THE COURT (Lord ALVERSTONE, L.C.J., and KENNEDY and RIDLEY, JJ.) made the rule for a writ of *certiorari* absolute.

Lord ALVERSTONE, L.C.J.—The question raised upon one part of the case entails considerable difficulty—viz., whether what the justices have done here can be questioned by *certiorari* at the time the rule was moved. If the whole matter had come to an end before the rule was moved, certainly we should not have interfered, but the only authority is the one Mr. Coventry cited—the case of Lord Newborough—and I find after inquiry, as I thought, that in that case the rule was moved after the whole effect of the order had been carried out. Therefore no proceedings were taken. Strictly speaking this rule might have been argued in July last, when there were yet two months to run during which the order was operative. As to the facts, I pass by all that Mr. Amphlett told us with regard to the history of "the populous place." It was an extraordinary thing that a place such as this should ever have been deemed a populous place; but anyway, if it was thought that the effect of the rescission of the order could be got over by some operation of this statute, I do not think the justices considered the purview of the statute. Section 26 says: "The local authority" (and in that case it was two justices of the peace in petty session assembled). [His lordship continued to read the section set out above.] There is no question that in this case the justices have purported to exempt twelve out of fourteen public-houses that applied in this apparently small township contained within some barely 1,500 square feet from keeping their premises closed from 10 to 11 o'clock. They have purported to repeal provisions of the Licensing Acts without any evidence whatever, it seems to me, of those facts which they are allowed to take into consideration under the section. I understand the law with regard to *certiorari* generally in these cases to be this: If there is an erroneous decision of the justices either in fact or in law, *certiorari* does not lie. If there is an erroneous assumption of jurisdiction in point of law based upon evidence which is not legal evidence of any matter which may be tried before them, *certiorari* will go, and the existence of want of jurisdiction might be established by affidavit. I think that follows from *Queen* v. *Bowman*. There has, no doubt, grown up a certain class of cases where *certiorari* has been held not to lie, as in *Boulter* v. *Kent Justices*, where the justices were acting as a licensing committee, and the jury cases, *Hogmaier* v. *Wilson Overseers*, [1904] 2 K. B. 356, and there are others. But I must say, where the justices are sitting in petty session to act upon evidence which is brought before them, if they act beyond their jurisdiction I should have thought that it required strong ground to come to the conclusion

that *certiorari* does not lie. The order which they have made exceeded their jurisdiction. The facts of this case bring it within those two propositions. Mr. Amphlett says you cannot question the weight of evidence. If there had been any evidence at all of the matters which may fairly be considered within this section I should think this application ought to be dismissed. Now, the first point is evidence of "persons attending any public market." It is perfectly well known that some markets begin early in the morning and others late at night; the business is done in the early hours of the morning or late hours of night. In this case there is no evidence except of market gardeners. Then "or following any lawful trade of calling"—what does that mean? There are trades which require to be carried on during the early hours of morning. Take for example employees at railway stations. If it had been the case that the magistrates had evidence before them that a particular public-house was necessary for such a class of people we should not have interfered. Again, "or attending any theatre" (now repealed), referring to a laudable class of people who go to such places. It would be an abuse of language to suggest where the magistrates said "for the accommodation of a considerable number of persons following the lawful trade or calling of gardeners, tradesmen, fruit and pea dealers," that they meant a market or particular trade. What they did mean was that they hoped, by means of this section, to allow the inhabitants of this small district to get drink from ten to eleven, and therefore they stated that any other publican might have the same order. It shows they were not acting under this section. Unless the authorities prevent us, I come to the conclusion that the magistrates assumed a jurisdiction they have not got—viz., the jurisdiction to extend the hours of closing because the general inhabitants desire to get drink and not because it is "for the accommodation of any considerable number of persons attending any public market. . . ." I think the object of the section is strengthened when you notice that the order is to be granted in respect to particular premises, on particular days, during particular hours, not for every day of the week, for local needs and local requirements of persons. The order is to be made by two justices of the peace in petty sessions assembled. I should have thought, apart from authority, there would be no doubt that *certiorari* would lie. Is the state of the authorities such as to prevent us? I think there are certain expressions of opinion to be found in many judgments which, without being binding upon us, so nearly direct us upon this point that I am not prepared to go against them. There is so much opinion on the point that I think we ought not to act against it unless a court of higher authority says it is wrong. *Queen* v. *Sharman* is relied on by Mr. Amphlett, but if the judgment is looked at it is obvious that Wright, J., could not have included this case because he excepts the case of justices who are making a judicial order and sitting as a court. I think for the purposes of to-day I need only refer to three judgments. Smith, M.R., in *The Queen* v. *Sunderland*, at p. 368, referring to *Boulter* v. *Kent Justices*, says: "I see no ground for extending the effect of that decision to the present case. The decision in *Boulter* v. *Kent Justices* related only to proceedings before the licensing meeting." Vaughan Williams, L.J., in a passage on p. 370, says: "It is not necessary to decide this point, but I can only say, speaking for myself, that having regard to the general principles of the common law, I should have been disposed to think that wherever a body such as justices have under the provisions of a statute to grant or withhold a certificate, such as a certificate for a licence, and it appears from the statute that they have to exercise a judicial discretion in so doing, a *certiorari* would lie to bring up the proceedings before them, in the case of erroneous exercise or excess of jurisdiction, whether they could or could not be said to have acted as a court in the strict sense of the term. If the proceedings are in the nature of judicial proceedings *certiorari* will lie for the reasons stated in the judgment of Channell, J., in *King* v. *Manchester Justices*, which I need not read. I think that the fact that evidence is taken before them, and taken before them as sitting in petty sessions, is another argument in support of the view I am taking; and the fact that the evidence is such as they shall deem sufficient does not justify them in taking evidence which has no bearing upon the matter. I do not think that the Lord Chancellor in *Laceby* v. *Lacon & Co.*, [1899] App. Cas. 222, used language contrary to the view I am taking. In this case the magistrates had in fact exceeded the jurisdiction conferred upon them by the section. They acted upon evidence which had no reference to the matter before them. The rule must be made absolute. The rule for *mandamus* will be discharged.

KENNEDY and RIDLEY, JJ., concurred.

Solicitors for the appellants, *Blundell, Gordon, & Co.*, for *S. Thorneley*, Worcester.

Solicitor for the respondent, *Brook*, for *Geo. Coventry*, Upton-on-Severn.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — July 14.

FRANCIS WALTON & CO. *v.* TOPAKYAN, KEVORKIAN, AND MARLER. (*a.*)

Practice—Joint debtors—Judgment signed against one joint debtor—Bar to further proceedings—Ord. 14, *r.* 5.

Ord. 14, *r.* 5: *If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.*

A. took out a summons under ord. 14, *r.* 2, *against B., C., and D., who were alleged to be jointly indebted to him. B. took no further part in the proceedings, but C. and D. showed cause by filing affidavits. On the hearing of the summons leave was given to sign judgment against B., and liberty to C. and D. to defend. A. signed judgment against B.*

Held, although B., C., and D. were sued as jointly liable and judgment was signed against B., yet that was not a bar to further proceedings against C. and D., the general rule of law, as laid down in McLeod *v.* Powell, [1898] 2 *Ch.* 295, *being no longer applicable to cases falling under ord.* 14, *r.* 5.

Appeal from the judgment of Walton, J., sitting with a jury.

The plaintiffs in this action on the 18th of August, 1904, served a writ on each of the three defendants, the special endorsement being as follows: "The

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

plaintiffs' claim is £337 18s. 4d. for work and labour done for and at the request of the defendants for advertising the wrestling competition at the Royal Albert Hall, Kensington Gore, on the 2nd of July, 1904. . . .

A summons was then taken out by the plaintiffs under ord. 14, r. 2, and the plaintiffs' affidavit did not displace the *primâ facie* implication that the defendants were being sued as joint debtors.

The defendant Topakyan, having entered an appearance, took no further part in the proceedings, but the defendants Kevorkian and Marler filed affidavits showing cause.

The summons came on for hearing before Master Wilberforce, who gave leave to sign judgment against the defendant Topakyan, and liberty to the defendants Kevorkian and Marler to defend.

The plaintiffs signed judgment against the defendants Topakyan, and proceeded to trial against the remaining defendants; the plaintiffs succeeded in their action.

The defendants appealed.

Warren, for the appellants.—I take the preliminary point of law, that proceedings against the present appellants were barred by reason of the fact that judgment has been signed against one joint debtor. Ord. 14, r. 5 has not altered the old rule of law laid down in *King* v. *Hoare*, 13 M & W. 494, and *Kendall* v. *Hamilton*, 4 App. Cas. 504. See the recent cases of *Morel Bros. & Co. (Limited)* v. *Westmoreland, Earl of*, 51 W. R. 290, [1903] 1 K. B. 64, affirmed 52 W. R. 353, [1904] A. C. 11; *McLeod* v. *Powell*, [1898] 2 Ch. 295, 46 W. R. Dig. 133. The latter case is indistinguishable from this. [COLLINS, M.R.—It is distinguished by the fact that proceedings were not there taken under ord. 14, r. 5, and on p. 300 of the report you will find Byrne, J., clearly reserves the point.] The plaintiffs could have made themselves quite safe by not signing judgment against Topakyan whom they knew to be a man of no financial resources.

Hohler and *C. M. Pitman*, for the respondents, were not called upon.

THE COURT (COLLINS, M.R., and ROMER and MATHEW, L.JJ.) dismissed the appeal.

COLLINS, M.R. In the course of these proceedings judgment was signed under ord. 14, r. 15, against one of three joint debtors. It was contended that that was a release of the others. I agree that under general conditions that contention would prevail. But the Judicature Act prevents the operation of the general rule of law in those cases in which ord. 14, r. 5 applies. Proceedings were taken under order 14, and the machinery of ord. 14, r. 5, came into play. [His lordship read the rule set out above.] That is the rule applicable to this case and enabled the plaintiffs to sign judgment without prejudice to their rights against the present appellants. The appeal on this point fails.

ROMER, L.J.—It was intended by the rule to allow a plaintiff to obtain an interlocutory judgment against one of the co-contractors and still proceed with the action against the others. I think that was pointed out by Byrne, J., in *McLeod* v. *Powell*, where he held that the rule in question would not apply to the case before him, but his observations show that he considered that if the rule had been applicable, then judgment agaist one co-contractor would have been no bar to proceedings against the others. The same view was expressed by Lord Davey in *Morel Brothers* v. *Westmoreland*; on p. 15 he says: "I am disposed to think that if the proof had established a joint liability, the plaintiffs would not have been prejudiced by signing judgment under order 14 against one of the joint debtors. I think that they might then go on and show that the other debtor was also a joint debtor." I have no doubt about the true construction of the rule, and I think, therefore, the appeal fails.

MATHEW, L.J., I have nothing to add.

Appeal dismissed.

Solicitors for appellants, *Valpy, Peckham, & Chaplin.*

Solicitor for defendant, *T. W. Wood-Roberts.*

High Court of Justice.

Chan. Div. Swinfen Eady, J. — May 26, 30.

VILLAR v. GILBEY. (a.)

Will—Construction—Devise to sons "born in the testator's lifetime"—Divesting clause—Children en ventre sa mère—*Practice of conveyancers.*

A testator by his will gave and devised certain hereditaments to his brother, A. R., for life, remainder to A. R.'s two eldest sons, then living, one after the other, remainder to the third, fourth, and every son or sons of A. R., and he further declared that any such third or fourth son, born in the testator's lifetime, should not take a larger interest in the said estates than for life with remainder to his issue in tail. At the death of the testator, A. R. had only two sons, but two weeks after the death of the testator a third son, W. B. R., was born. A. R. and the two eldest sons having died, the question arose whether W. B. R. took an estate tail or only one for life.

Held, that the clear intention of the testator must be given effect to, that the words "born in my lifetime" meant exactly what they said, and that W. B. R., having not been born within the prescribed time, took an estate tail.

Action.

The testator, George William Rush, by his will dated the 22nd of June, 1854, gave and devised certain hereditaments to his brother, Alfred Rush, for life, with remainder to his brother's eldest son, Alfred George A. Rush, for life, with divers remainders in tail, remainder to his brother's second son, George Acland G. Rush, for life, with remainders in tail. And in default of such issue he gave and devised the same hereditaments unto the third, fourth, and every other son and sons of the body of his said brother Alfred Rush, severally, successively, and in remainder one after the other according to priority of birth, and to the heirs of the body and bodies of such son and sons lawfully issuing. And the testator declared that any third or other son or sons of his said brother born in the testator's lifetime should not take a larger interest in the said estates than for life only, with remainder to his issue in tail.

The testator died on the 18th of September, 1854, and a third son, William Beaumaurice Rush, was born to his brother on the 9th of October, 1854. The testator's brother, Alfred Rush, died, and his second and third sons both died also without having had issue. William Beaumaurice Rush became insolvent, and an action was brought by a person who claimed under a disentailing deed executed by his trustee in

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

bankruptcy for a declaration that his interest under the will was an estate tail, and not merely one for life. The defendant to the action was the purchaser of the interest of the fourth son of the testator's brother under the will. The question was whether William Beaumaurice Rush took an estate tail or only an estate for life under the will.

Eve, K.C., and *R. J. Parker*, for the plaintiff.

They cited *In re Wilmer's Trusts, Moore* v. *Wingfield*, 51 W. R. 395 and 609, [1903] 1 Ch. 874, [1903] 2 Ch. 411.

Micklem, K.C., and *Wace*, for the defendant.

They cited *Trower* v. *Butts*, 1 S. & St. 181, and referred to Davidson's Precedents (3rd ed.), vol. 4 (Wills), p. 391.

Eve, K.C., replied.

Cur. adv. vult.

May 30.—SWINFEN EADY, J., delivered the following written judgment: [After stating the facts as set out above, it continued:] William Beaumaurice Rush is still living, and the question is, Did he take under the will in the events which happened an estate tail, or only a life estate? Although not actually born until three weeks after the testator's death, is he to be deemed to have been "born in the testator's lifetime" within the meaning of the will? Construing the will according to the primary or natural meaning of the words used, it is clear that William B. Rush was not born in the testator's lifetime, but twenty-one days after the testator's death. No doubt it has been held that for the purpose of taking under or fulfilling the condition of a gift, a child *en ventre sa mère* will come within such words as child or issue "living" or "born" at a certain time (*Trower* v. *Butts*, 1 S. & St. 181; *In re Burrows, Cleghorne* v. *Burrows*, 43 W. R. 683, [1895] 2 Ch. 497); but considerations of this kind do not arise in the present case, where the only result of holding that the child was born at the testator's death would be to reduce his interest from an estate tail to a life estate. Again, in considering the rule of law as to remoteness, and deciding a question of perpetuity, a child *en ventre sa mère* at the testator's death, and subsequently born, is considered as a "life in being" at the testator's death: *Long* v. *Blackall*, 7 Term Rep. 100; *In re Wilmer, Moore* v. *Wingfield*, 51 W. R. 395 and 609, [1903] 2 Ch. 411. But no such question arises here. If the language of the will had referred to any third or subsequent son "born in the testator's lifetime or in due time after his decease," William B. Rush would clearly have taken only an estate for life, with remainders in tail; and such remainders would have been perfectly valid, and would not have infringed the rule of law as to remoteness. I have only to consider what the testator meant. Did he mean actually born in his lifetime, or did he mean born in his lifetime or in due time after his death? In my opinion he meant exactly what he said, and there is no rule of law compelling me to hold that by the phrase "born in his lifetime" he included a child not born in his lifetime, but three weeks after his death. The practice of conveyancers has not been uniform with regard to the provisions of the clause in wills reducing to life tenancies the estates tail of persons born in the testator's lifetime, made tenants in tail by the will. In Davidson's Precedents (3rd ed.), vol. 4 (Wills), p. 391, there is a proviso that no person *en ventre sa mère* at the testator's decease shall be considered as born in the testator's lifetime, with reference to the operation of the clause reducing an estate tail to a tenancy for life; but a note appears on p. 392 that the proviso is probably superfluous. In other books of precedents the proviso does not find any place. In any case, it is not, in my opinion, necessary. The true construction of the clause in question is to confer an estate tail on all persons born after the testator's decease, by the will made tenants in tail; and this estate is not reduced to a life estate merely because, although born after the testator's death, they are nevertheless born within the period of gestation. There will be a declaration as asked by the statement of claim.

Solicitors, *Reed & Reed*, for *Reed & Co.*, Taunton; *Bailey, Shaw, & Gillett.*

Chan. Div. Warrington, J. June 21.

In re CHIC (LIMITED). (a.)

Company — Winding up — Practice — Debentures — Receiver and manager—No surplus assets—Petition to wind up—Just and equitable—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* (5)—*Companies Winding-up Rules*, 1903, *r.* 186.

Since the Company Winding-up Rules, 1903 (*containing rule* 186), *were made, it is no longer a rule of practice that a petition to wind up a limited company must in all cases contain an allegation of available assets from which the petitioner has a reasonable probability of obtaining something in the event of a winding up. If it is desirable that a company should be wound up, an order may be made, although the petitioner can derive no advantage from the assets.*

The business of a company was being carried on by a receiver and manager appointed by its debenture-holders. All the assets were charged by the debentures, and were insufficient to pay what was due upon the debentures. A judgment creditor presented a petition to have the company wound up by the court compulsorily.

Held, that the company was a mere nominis umbra, *and that it was desirable that it should be wound up, and the order was made under section* 79, *sub-section* (5), *of the Companies Act*, 1903.

This was a petition to wind up the above company presented by Messrs. Harrison, trading as Harrison & Sons, who were judgment creditors of the company for £924 odd recovered by them in an action in March, 1904.

The company had issued debentures to the amount of £47,000, which were outstanding, and upon which £578 was due for interest. The debentures were charged upon the undertaking of the company and all its property, both present and future, including uncalled capital.

Immediately upon execution being threatened by the judgment creditors, on the 21st of May, 1904, the debenture-holders appointed a receiver, who carried on the business of the company (which was the publication of the paper called *Chic*), and incurred liabilities on behalf of the company to the amount of £1,360 10s. 11d.

In September, 1904, the debenture-holders removed the receiver, and appointed R. T. Carr receiver and manager of all the property comprised in the debentures. R. T. Carr carried on the business, and incurred further liabilities to the extent of £2,752, which were still outstanding.

The assets of the company consisted of the goodwill of the paper called *Chic*, certain office furniture, and certain book debts, estimated at about £800.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

J. W. Manning, for the petitioners.—The business is being carried on, not for the company at all, but for the debenture-holders. The purpose for which the company was constituted is gone, and it is just and equitable that it should be wound up. The rule of practice that the petitioner must show that he will derive some benefit from the winding up no longer applies in all cases, as is shown by rule 186 of the Companies Winding-up Rules, 1903.

Ashton Cross, for the company.—The assets are not sufficient to pay the debentures, and consequently judgment creditors have no interest in obtaining a winding-up order: *In re London Pressed Hinge Co. (Limited)*, 53 W. R. 407, [1905] 1 Ch. 576. It is against the settled practice of the court to make an order for winding up under such circumstances: Practice Note, [1902] W. N. 77.

WARRINGTON, J.—The only answer to the petition is that all the assets of the company are charged by the debentures, and are not sufficient to pay them, and that there will be no assets to administer in a winding up. It is said that the company is being kept on foot not for the purpose of carrying on the business for which it was constituted, but for other purposes, and that it is carrying on a similar business for the benefit of somebody else. The order asked is said to be the only way of getting rid of this *nominis umbra*. If the order is made at all it must be made under sub-sections (4) or (5) of section 79 of the Companies Act, 1862. It is clear that the company is unable to pay its debts. It has been the practice, and Buckley, J., at one time laid down a practice rule that every petition must contain an allegation that the company has surplus assets, and it has been the general rule not to make a winding-up order unless the petitioner shows a reasonable probability that he will get something. It must, however, be borne in mind that by rule 186 of the Companies Winding-up Rules, 1903, where a company against whom a winding-up order has been made has no available assets, the official receiver may not incur certain expenses without the direction of the Board of Trade. That rule seems to contemplate a state of things in which it may be desirable to make a winding-up order, even when there will be no surplus assets. Before I state what I propose to do, I will refer to the decision of Buckley, J., in *In re The London Pressed Hinge Co. (Limited)*, not as an authority for the course I intend to take, but as an expression of opinion by a learned judge of great experience in these matters. Buckley, J., in that case called attention to what he called "the injustice" that a company could incur any amount of debts, and that directly a creditor tried to enforce payment of his debt the debenture-holders could take possession of the whole of the assets, and carry on the business without being under any liability for the debts of the company. That is the state of things in the case before me. The business is really the business of the debenture-holders. I think that it is "just and equitable" under section 79, sub-section 5, of the Companies Act, 1862, that this company should be wound up. It is true that the petitioning creditors cannot show that they will get any advantage from a winding up; but this is a special case in which I think that I ought to make the usual compulsory winding-up order.

Order for winding up compulsorily.

Solicitors, *Claremont & Haynes; H. Nelson Paisley.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) } May 3, 4; June 1.

WEST RAND CENTRAL GOLD MINING CO. v. THE KING. (a.)

International Law—Crown—Conquered state—Annexation—Petition of right—Demurrer—Liabilities of conquering state.

A conquering state is not bound by any general rule of international law to fulfil the obligations of the conquered state.

Demurrer to petition of right (trial at bar).

The petition of right in this case was presented by the West Rand Central Gold Mining Co., and it alleged that two parcels of gold of the value of £3,804 had been seized by the officials of the South African Republic on the 2nd of October, 1899.

No reference was made in the petition to any right or alleged right under which the Transvaal Government seized the gold, but it was stated that "the gold was in each case taken possession of by and on behalf of and for the purposes of the then existing government of the said Republic, and that the said government, by the laws of the said republic, was under a liability to return the said gold, or its value, to your suppliants. None of the said gold has been returned to your suppliants, nor did the said government make any payment in respect thereof."

The petition then alleged that a state of war commenced at five p.m. on the 11th of October, 1899, that the forces of the late Queen conquered the republic, and that by a proclamation of the 1st of September, 1900, the whole of the territories of the republic were annexed to and became part of her then Majesty's dominion, and that the government of the republic ceased to exist. The petition next averred that by reason of the conquest and annexation her Majesty succeeded to the sovereignty of the Transvaal Republic, and became entitled to its property; and that the obligation which vested in the government of that state was binding upon his Majesty the King.

The Crown demurred to the petition.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Henry Sutton*, for the Crown.—The act complained of is an act of state, and the question involved is one of purely international law; the petition therefore disclosed no issue of right which the courts of this country are competent to determine: *Cook* v. *Sprigg*, [1899] A. C. 527, at p. 579; *Nabob of the Carnatic* v. *East India Company*, 1 Ves. 371; *Elphinstone* v. *Bedreechuhad*, 1 Knapp P. C. 316; *Secretary of State for India* v. *Kanochee Boye Sahaba*, 13 Moo. P. C. 22; *Doss* v. *Secretary of State for India*, L. R. 19 Eq. 504; *Rustomjee* v. *Reg.*, 24 W. R. 428, 1 Q. B. D. 487, and 25 W. R. 333, 29 Q. B. D. 69.

Lord Robert Cecil, K.C., J. A. Hamilton, K.C., Theobald Mathew, and *A. M. Talbot*, for the suppliants.—First, by international law, the sovereign of a conquering state is liable for the obligations of the conquered state; secondly, international law formed part of the law of England; and, thirdly, rights and obligations which were binding upon the conquered state must be protected, and were enforceable by the municipal courts of the conquering state.

Various passages from Hall, Hallick (Baker's ed.), Calvo, Heffter, and Huber were cited, and the following

(a.) Reported by D. R. CHALMERS HUNT, Esq., Barrister-at-Law.

cases were referred to: *Triquet* v. *Bath*, 3 Burr. 1478; *Heathfield* v. *Chilton*, 4 Burr. 2016; *Dower* v. *Huntingfield*, 11 Ves. jun. 283; *Reg.* v. *Keyn*, 2 Ex. D. 68, 25 W. R. Dig. 87; *Hall* v. *Campbell*, 2 Cowp. 209; *United States* v. *Prioleau*, 2 Hem. & Mill. 559; *United States* v. *Macrae*, 17 W. R. 764, L. R. 8 Eq. 69; *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489; *Frith* v. *Reg.*, R. 7 Ex. 365, 20 W. R. Dig. 61.

Lord ALVERSTONE, L C.J., in delivering the judgment of the court, referred to *Gautret* v. *Egerton*, L. R. 2 C. P., at p. 374, and said that upon all sound principles of pleading it was necessary to allege what must, and not what might be the cause of action, and unless the obligation alleged in the present instance arose out of contract, which had not been alleged in the petition, it was clear that no petition of right could be maintained. Discussion on this point, however, was academical, as the Attorney-General, on behalf of the Crown, had consented that the court should deal with the case as if any necessary amendment had been made. The proposition, however, that by international law the conquering country was bound to fulfil the obligations of the conquered state could not, on principle, be sustained. The broad proposition which had been advanced on behalf of the suppliant company almost answered itself; for there must have been in all times contracts made by states before conquest such as no conqueror would ever think of carrying out or agree to carry out. Various writers upon international law had been cited, and the opinions of those writers had doubtless done, and would continue to do, valuable service in helping to create the opinion by which the range of the consensus of civilized nations was enlarged. But these pronouncements must nevertheless be regarded rather as the embodiments of their views as to what ought to be, from the ethical standpoint, the conduct of nations *inter se*, rather than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in a qualified sense, law. The court would adopt the language of Lord Russell of Killowen in his address at Saratoga in 1896: "What, then, is international law? I know of no better definition than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another."

When making peace the conquering sovereign could make any conditions he thought fit respecting the financial obligations of the conquered country, and it was entirely in his option to what extent he would adopt them. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that, although the sovereign, when making peace, might limit the obligations to be taken over, and if he did not do so they were all taken over, and no subsequent limitation could be put on them. What possible reason could be assigned for such a distinction? They could see no reason why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the government of the conquered state. Whatever view might be taken of the opinions of the writers on international law, they were, in their judgment, inconsistent with the law as recognized for many years in the English courts. That law was clearly stated by Lord Mansfield in *Hall* v. *Campbell*. As to the proposition that international law formed part of the law of England, any doctrine invoked must be one really binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence. This was not so in this case. The other proposition, that the claim of the suppliants could be enforced by petition of right, brought out in the strongest relief the difficulties which existed in the way of the suppliants.

Demurrer allowed.

Solicitor for the Crown, *The Solicitor to the Treasury.*

Solicitors for the suppliants, *Waltons, Johnson, Bubb, & Whatton.*

K. B. Div.
(Kennedy and Ridley, JJ.) May 18, 29.

AUSTIN FRIARS STEAM SHIPPING CO. (*Appellants*) v. STRACK (*Respondent*).
SAME (*Appellants*) v. STRACK AND OTHERS (*Respondents*). (a.)

Ship—Seaman—Contract for service—Increase of risk—Carrying contraband of war—Termination of voyage by capture—"Loss of the ship"—Right to wages—Damages—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 158.

A British seaman signed ship's articles to serve on an ordinary trading voyage on a British ship between ports in the East for two years, the engagement to end at a port of discharge in the United Kingdom or certain ports on the Continent of Europe. While the ship was in the East, after the outbreak of war between Russia and Japan, she was chartered by the owners for six months to carry railway materials from Japan to Korean ports, and was captured by one of the belligerents and confiscated by a Prize Court. The owners knew, but the seaman did not, that railway materials had been declared contraband of war. The crew were sent back to London, and suffered hardships on the journey.

Held, that as the shipowners had broken the agreement by altering the character of the voyage, and the ship was captured owing to the wilful action of the owners in carrying contraband of war, the voyage was not terminated "by reason of the loss of the vessel" within the meaning of section 158 *of the Merchant Shipping Act*, 1894, *and therefore the seaman was entitled to wages up to the date of his arrival in London.*

Quære, *whether in any case the capture of a ship confiscated for carrying contraband of war would be included in the word "loss" in section* 158 *as terminating the voyage before the date contemplated in the agreement.*

These were two cases stated by an alderman of the City of London upon the hearing of two summonses taking out by the respondents, who had been members of the crew of the steamship *Cheltenham*, against the appellants, who had previously been owners of the vessel.

The question was whether the respondents were entitled to certain wages and damages claimed by them under the circumstances mentioned below:

In the first case, on the 10th of September 1904, the respondent Strack had taken out a summons under section 164 of the Merchant Shipping Act, 1894, claiming from the appellants £35 2s. 2d., balance of wages alleged to be due to him as a seaman on board the steamship *Cheltenham* from the 24th of November, 1903, to the 30th of August, 1904, and continuing wages up to the date of final settlement under section 134 of the Merchant Shipping Act, 1894.

The appellants admitted the respondent's claim up to the 2nd of July, 1904, and judgment was given for that sum, and the appellants were ordered to pay the balance of wages up to the 30th of August, 1904—namely, £9 13s. 4d., and costs.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

In the second case the respondents claimed damages for each man for breach of the contract of employment contained in the ship's articles.

The material facts set out in the case were as follows:

The respondent on the 24th of November, 1903, signed on the articles of *The Cheltenham*, then at Bremerhaven, to serve as boatswain on the said vessel at the rate of £5 per month.

The said articles of agreement, so far as is material, were as follows:

"The several persons whose names are hereto subscribed and whose descriptions are contained herein, and of whom five are engaged as sailors, hereby agree to serve on board the said ship in the several capacities expressed against their respective names on a voyage from Bremerhaven *via* port in Bristol Channel to Colombo and (or) any ports or places within the limits of 75deg. N. and 63deg. S. latitude, trading in any rotation, and to end at a final port of discharge in the United Kingdom or Continent of Europe between the Elbe and Brest inclusive. Period not to exceed two years' trading and time to reach the United Kingdom or Continent if vessel so bound direct at end of trading term. If above trading ends, from any cause except wreck, or if such time expires while vessel is abroad and not bound direct for United Kingdom or Continent as stated, the crew agree to ship in any other British vessel provided by the master (bound direct for United Kingdom or Continent) at not less than the same rate of wages. It is agreed that when British seamen shipped in the United Kingdom are discharged on the Continent as above the master 'shall furnish the means of sending them back' (with maintenance) to the nearest port in the United Kingdom served by regular steamers, and the crew agree to such port as the port in the United Kingdom to which they may be so sent back. The crew further agree at master's option to proceed from the port of final discharge as above to a port in the United Kingdom for loading or otherwise."

The Cheltenham left Bremerhaven on the 25th of November, 1903, and, after loading a cargo of coals at Barry, arrived at Colombo on the 10th of January, 1904. Thence she proceeded to Rangoon, where she arrived on the 26th of January, and loaded a cargo of rice, and sailed for Yokohama on the 9th of February, where she arrived on the 7th of March, 1904. Early in February, 1904, war was declared between Russia and Japan. On the 12th of that month a Royal Proclamation announcing that fact appeared in the *London Gazette*, and on the 19th of February, the 1st of March, the 18th of March, and the 22nd of March there appeared various notices as to contraband of war in the *London Gazette*, which were produced.

On the 11th of March, 1904, *The Cheltenham* was chartered by the appellants to Messrs. Makino & Umeura, contractors for the Chemulpo Railway Co., for the term of six calendar months, to be employed in trading between Muroran and Otaru and Japan coast ports and Chemulpo and Southern Korean ports in such lawful trades as the charterers or their agents should direct. *The Cheltenham* then made several voyages between Japan and Korea, carrying various descriptions of railway material which had been declared contraband of war by the Japanese and Russian Governments. Whilst at Yokohama, between the 17th and 19th of March, the respondent endeavoured to obtain information as to what was contraband of war, a letter being written by one of the crew to the German Consul at Yokohama for information on the subject, but no reply was received. This was the only step taken by respondent or any of the crew to ascertain if the cargo was contraband of war.

On the 2nd of July, 1904, whilst proceeding from Otaru to Fusan, in Korea, with a similar cargo, *The Cheltenham* was captured by the gunboat *Gromoboi*, belonging to the Russian Vladivostok Squadron. A prize crew was put on board and she was taken as a prize of war to Vladivostok, where she arrived on the 4th of July. On the 7th of July a prize court was held at Vladivostok and the vessel and her cargo were confiscated. The decision of the prize court was declared to the captain and crew of *The Cheltenham* on the 11th of July. The appellants did not appeal from such decision.

There was no vessel at Vladivostok in which the crew could be sent home, and the captain at once applied to the proper authority at Vladivostok to have them sent home *via* St. Petersburg. This was ultimately arranged; and on the 29th of July the captain and the respondent and the rest of the crew left Vladivostok *via* the Trans-Siberian Railway for St. Petersburg, where they arrived on the 18th of August. On the 23rd of August they left St. Petersburg as passengers in the steamship *Kursa*, and arrived in London on the 30th of August, 1904. The travelling expenses and maintenance of the respondent were provided partly by the Russian Government and partly by the appellants until the arrival in London. At St. Petersburg the respondent was offered his wages up to the 2nd of July, 1904, the date when *The Cheltenham* was captured. This was refused. Subsequently he was offered his wages up to and including the 30th of August, 1904, the date of arrival in London. This offer was also refused by the respondent, who intimated his intention of claiming damages for breach of contract contained in the ship's articles. The respondent did not know that *The Cheltenham* was carrying such cargo as was within the declaration of Russia and Japan as to contraband of war. The appellants' agent, the master of the ship, did know, but did not communicate his knowledge to any of the crew. An account of wages, made up to the 30th of August, 1904, was made up by the master and given to the respondent in accordance with section 132 of the Merchant Shipping Act, 1894, showing a balance due to the respondent of £35 2s. 2d. On the 1st of September, 1904, the respondent and other members of the crew of *The Cheltenham* issued a summons under the Employers and Workmen Act, 1875, as amended by section 11 of 43 & 44 Vict. c. 16, claiming damages against the present appellants for breach of the agreement contained in the ship's articles for the voyage in question. The matter came before the same magistrate, sitting as a court of summary jurisdiction, at the Guildhall Justice-room on the 9th of September, 1904; and he found that the appellants had committed a breach of the said agreement, and awarded the respondent and the other members of the crew the sum of £10 each as damages for breach of the said agreement. On behalf of the respondent it was contended that he was still on the articles and was entitled to wages as a debt to the 30th of August, 1904, and to continuing wages under section 134 of the Merchant Shipping Act from determination of the voyage until a final settlement. The following authority was referred to as showing that a seaman was entitled to wages for a period during which he was not actually engaged as a seaman—viz., *Beal* v. *Thompson*, Dowling 299. On behalf of the appellants it was contended (1) that the respondent's right to wages terminated with the capture of the vessel on the 2nd of July, 1904, or at latest on the 11th of July, 1904, when the decision of the prize court was

known, the vessel being "lost" within the meaning of section 158 of the Merchant Shipping Act, 1854, immediately she was seized. (2) That, having recovered judgment for damages for breach of the said agreement, he could not be entitled to wages under the agreement after the date of the breach thereof. The magistrates held that, as after the 30th of August, 1904, there was a *bonâ fide* dispute within the meaning of section 134 of the Merchant Shipping Act, 1894, the respondent was not entitled to wages after that date. He decided that he was entitled to wages up to that date, and adjudged the appellants to pay him the balance from the 2nd of July, 1904, to the 30th of August, 1904—viz., £9 13s. 4d., and the sum of £16 16s. for costs. The question of law for the opinion of the honourable court was whether the magistrate was right in holding that the respondent was entitled to wages up to the 30th of August, 1904.

The second case stated that on the 1st of September, 1904, a summons was issued by the respondent and eighteen others, who were members of the crew of the steamship *Cheltenham*, against the appellants (who are the owners) under the Employers and Workmen Act, 1875 (as amended by 43 & 44 Vict. c. 16, s. 11), claiming £10 damages for each man for breach of the agreement contained in the ship's articles. The case was heard on the 9th of September, 1904, when the appellants were ordered to pay to each of the respondents the sum of £10 as damages and one sum of £10 10s. for costs. The facts proved in this case were the same as in the first case, with the following addition: The travelling expenses of the respondents from Vladivostok were paid partly by the Russian Government and partly by the appellants. In addition to certain provisions supplied by the captain to each of the seamen they were also provided by the appellants with a sum of one rouble per day for the first five days of the journey to St. Petersburg, and afterwards with one rouble 25 copeks per day in order to purchase food, but which sums the respondents complained were not sufficient to get them one good meal a day, in consequence of the scarcity of provisions. The respondents complained at the trial of the sleeping accommodation on the railway and of the difficulty of obtaining sufficient food during the journey, and afterwards of the accommodation and food at St. Petersburg. The respondents contended that there had been in law a breach of the agreement contained in the articles and they were entitled to damages in consequence of such breach. They did not claim damages in the nature of wages, as the appellants had offered the respondents their wages up to the 30th of August, but only for the risks and privations the respondents had endured by reason of the breach of contract. It was argued that the appellants' action was illegal, but that, whether it was illegal or not, the appellants had broken their contracts with the respondents in exposing them to risks they had not contracted for. The case of *The Justitia*, 12 P. 145, was referred to. It was further contended that the respondents declined to take their wages, as to have done so would have precluded their taking these proceedings, and section 136 of the Merchant Shipping Act, 1894, in support of that contention was referred to.

On behalf of the appellants it was contended that there was nothing illegal in carrying contraband of war; that the vessel was lost within the meaning of section 158 of the Merchant Shipping Act, 1894, immediately she was seized; and that the agreement was then put an end to, and that there was no breach of contract. The case of *The Friends*, 4 Ch. Rob. 143, was referred to.

The respondents, in reply, contended that loss only meant destruction by perils of the sea or capture by the king's enemies, and that the appellants had brought about the loss by their own acts.

The magistrate held that in law there had been a breach of the agreement by the appellants. He found that the respondents had sustained injury in consequence, and assessed the damages at £10 in respect of each man. The questions for the opinion of the court were—(1) Whether on the facts above stated the magistrate was right in holding that the appellants had committed a breach of contract and the respondents were entitled to recover damages? and (2) whether he was right in holding that the respondent Strack was entitled to wages up to the 30th of August, 1904?

Scrutton, K.C., and *Dawson Miller*, for the appellants.—By section 158 of the Merchant Shipping Act, 1894, when the services of a seaman under signed articles end by reason of the wreck or loss of a ship or from his inability or unfitness to proceed on the voyage, he is entitled to wages up to the time of such termination, but not for any longer period. Therefore, if there was a "loss" of the ship here within the meaning of that section there has been no breach of agreement, and no damages after that date can properly be demanded. "Loss" in that section is distinguished from "wreck" and includes everything that deprives the owner of the possession of the vessel and frustrates the adventure. It is not illegal to carry contraband: *Ex parte Chavasse, In re Grazebrooke*, 13 W. R. 627, (1865) 34 L. J. Bank. 17. The case of *The Justitia*, (1887) 12 P. D. 145, 35 W. R. Dig. 191, does not apply, for there was in that case a clear breach of the agreement, whereas here the voyage was in accordance with the agreement, and the loss arose in the course of legal trading.

Robson, K.C., and *J. H. W. Pilcher*, for the respondents.—The voyage here was entirely beyond the scope of an ordinary trading voyage for which the men signed on for. It involved greater risks and greater perils. By carrying contraband unknown to the crew the appellants committed a breach of their agreement with the men and became liable in the circumstances to pay damages. The decision in *The Justitia*, (1887) 12 P. 145, 35 W. R. Dig. 191, does not apply to this case, and the men are entitled to be paid wages up to the date of their arrival in London: *Burton* v. *Pinkerton*, 15 W. R. 1139, (1867) L. R. 2 Ex. 340; *O'Neil* v. *Armstrong, Mitchell, & Co.*, 43 W. R. 554, [1895] 2 Q. B. 70, 418. The capture was not a "loss," and even if it were it would be a loss brought about by the appellants' own wrongful act, and even they could not claim to be relieved thereby from liability.

Dawson Miller replied.

Cur. adv. vult.

May 29.—The judgment of the COURT (KENNEDY and RIDLEY, JJ.) was read by

RIDLEY, J.—These were two cases stated for the opinion of the court by an alderman of the City of London sitting at the Guildhall Justice-room, the first relating to a claim for wages made by a seaman under the Merchant Shipping Act, 1894, and the latter to a claim for damages in respect of the same employment made by him and the others under the Employers and Workmen Act, 1875, as amended by 43 & 44 Vict. c. 16, s. 11. The facts proved or admitted were as follow: [His lordship then stated the facts substantially as they are set out in the two cases respectively, and continued:] It was argued for the appellants that the ship when she was taken was "lost" within the meaning of section 158 of the Merchant Shipping Act, 1904, and that Strack was, therefore, entitled to wages only up to that date—

that is to say, the 2nd of July, 1904. By that section, "When the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship. . . . he shall be entitled to wages up to the time of such termination, but not for any longer period." It seems to us very doubtful whether the word "loss" would in any case include a capture such as this, which is not in the same category as wreck, fire, or stranding, or such terminations of a voyage as are brought about by the perils of the sea. But, however that may be, it seems clear that the section was not intended to include cases where the service terminates not owing to capture by the king's enemies, but from the wilful action of the captain and owners, and not resulting either directly or indirectly from any peril or hurt affecting the ship itself or preventing the continuance of the voyage. The case of *O'Neil* v. *Armstrong, Mitchell, & Co.*, 43 W. R. 554, [1895] 2 Q. B. 70 and 418, was referred to in the argument, and appears to us to have a decided bearing upon the question before us. In that case the plaintiff shipped as fireman in a torpedo-boat constructed for the Japanese Government by the defendants for a voyage to Yokohama. The ship left the Tyne on the 31st of July, 1894, and war was declared between China and Japan on the 3rd of August. The plaintiff became aware of this, and at Aden, after a proclamation had been read on board warning the crew against any breach of the Foreign Enlistment Act, 1870, he and his fellow sailors left the ship and were sent home by the Board of Trade. The plaintiff sued for balance of wages and for damages for non-fulfilment of the contract. The nominal defendants accepted responsibility for the satisfaction of the plaintiff's claim to the extent of the liability, if any, of the captain of the vessel. It was held in the Queen's Bench Division and in the Court of Appeal that the plaintiff was entitled to recover both wages and damages, inasmuch as the defendants admitted responsibility for the captain of a vessel whose owners (represented for the purpose of the action by the defendants) had by the declaration of war altered the character of the voyage during its continuance, and exposed the plaintiff and crew to dangers greater and other than those originally anticipated. It was not a case in which something had occurred beyond the control of either party, such as was *Appleby* v. *Myers*, 14 W. R. 835, (1866) L. R. 1 C. P. 615, 35 L. J. C. P. 293, by which the voyage had been terminated, but a case in which its discontinuance resulted directly from the action of the owners. There the risk was altered because after the outbreak of hostilities the Japanese vessel of war became liable to capture by the enemy, and for that outbreak of hostilities the owners were liable. In the present case the risk was altered because after the outbreak of hostilities between Japan and Russia the captain, acting for and as agent for the owners, and therefore the owners, undertook a venture materially different from the character of the voyage in regard to which the seaman's contract was made. They knew (although the crew did not) that railway material had been declared to be contraband when they chartered the vessel for the voyages, on one of which she was seized and captured: see *Burton* v. *Pinkerton*, 15 W. R. 1139, L. R. 2 Ex. 340. It is true that the carrying of contraband is not illegal (*Ex parte Chavasse, In re Glazebrook*, 13 W. R. 627), but merely exposes the neutral who engages in such a venture to the risk of seizure and confiscation; but the question does not turn upon the legality or illegality of the voyage and its object, but upon whether, after its inception, the risk and danger is materially varied by any alteration in its conditions for which the owners are responsible. It seems clear that, when the owners engaged in carrying cargo which they knew to be contraband, they did so alter the condition of the voyage. That was the cause of its termination, and not a loss of the ship within the meaning of section 158 of the Merchant Shipping Act. In *O'Neil* v. *Armstrong, Mitchell, & Co.* the plaintiff was entitled by the articles to the lump sum of £30 on arriving at Yokohama, and having received a portion of that sum on account, the court gave him judgment for the balance. Upon this contract Strack was entitled to be paid at the rate of £5 a month till his arrival in the United Kingdom—that is to say, the 30th of August. We are of opinion that the magistrate's decision was right. There was no jurisdiction, in the view which we have already expressed as to the breach of the contract to award damages (see *The Justitia*), and we see no reason, considering the hardships involved in the homeward journey, in holding that the amount awarded in the present case is in point of amount unreasonable.

The appeals will therefore be dismissed in both cases.

Solicitors for the appellant, *Botterell & Roche.*

Solicitors for the respondents, *Pattinson & Brewer.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — May 22.

EVERALL v. BROWN. (a.)

County court—Remitted action—Costs—Discretionary power of county court judge to deprive successful party of costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113.

In an action remitted to the county court under section 65 *of the County Courts Act,* 1888, *which provides that in the case of remitted actions "the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts," the county court judge has the same discretion under section* 113 *over the costs in the county court as if the action had been commenced in that court.*

Appeal by the plaintiff from an order of the judge of the Ludlow County Court depriving him of costs in the following circumstances.

The action was originally brought under order 14 on a specially indorsed writ in the High Court, to recover £40, the balance of the price of some cows which the plaintiff had sold to the defendant. The master ordered judgment to be signed by the plaintiff for £21 18s. 9d., and gave the defendant leave to defend as to the balance—£8 1s. 3d.; and remitted the action as to the balance to the county court, where the question raised by the defendant's counterclaim was directed to be tried.

The case having been remitted accordingly, the learned county court judge found that the plaintiff was entitled to judgment for £8 1s. 3d., and the defendant on his counterclaim to judgment for £7 8s. 9d.

As the plaintiff had thus only recovered 12s. 6d. in addition to the judgment already obtained in the High Court, it seemed to the learned judge that he had a discretion as to costs, and that the proper way to exercise it was to award none.

From this decision as to costs the plaintiff appealed.

W. J. Disturnal, for the plaintiff.—In the case of a

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

remitted action a county court judge has no discretion, as under sections 65 and 113 of the County Court Act, 1888, costs follow the event. Moreover, in giving costs the judge ought to consider the fact that in these proceedings the sums recovered under this judgment and that in the High Court together amount to the sum of £30, and that entitles the plaintiff to an order for costs on the High Court scale. Separate judgments ought to have been entered on the claim and the counterclaim, and not one judgment for the balance.

White v. *Headland's Patent Electric Storage Battery Co.*, 47 W. R. 273, [1899] 1 Q. B. 507, was referred to.

Micklethwaite, for the defendant.—In *Aston Tube Works (Limited)* v. *Dumbell*, 52 W. R. 444, [1904] 1 K. B. 535, the court assumed that the county court judge had a discretion as to costs in the case of remitted actions. Lord Alverstone, L.C.J., there said: "It must, I think, be admitted that, if the action is an action in the county court, the judge has discretion under section 113. In my opinion the action, when transferred to the county court, must be conducted in the same way and with the same consequences as if it had been commenced in that court; and section 113 applies." That is a decision which, it is submitted, governs the present case. It is supported also by *Spencer* v. *Foster*, [1905] 1 K. B. 434, where it was held that the county court judge had power to amend particulars of claim by substituting a claim for unliquidated damages for the amount indorsed on the writ.

Lord ALVERSTONE, L.C.J.—In my judgment this appeal fails. If there is a discretion in the county court judge to make the order which he did, I see no reason for interfering with the exercise of it. The question is whether the judge had a discretion. The point is indirectly referred to in *Aston Tube Works (Limited)* v. *Dumbell*, and I think, if it had been intended that the judge should in remitted actions be deprived of the discretion given to him by section 113, clearer words than those of section 65 would have been used for that purpose. In *Spencer* v. *Foster* it was decided that the county court judge had powers of amendment in a remitted action, and, that being so, it would be a strong thing to hold that he had no discretion as to costs.

The words of section 65 as to the costs being allowed on the scale for the time being in use in the county courts mean, in my judgment, that the taxing officer was to tax the costs according to the scale allowed. It is contended that that section is imperative both as to the scale and also as to the allowance. I do not accept that view. It is nothing more than a direction to the taxing officers as to the scale which they shall apply in taxing the costs, if costs are allowed at all, and if not special direction is given by the court that they shall apply some other scale. It does not in any way fetter the discretion of the judge. This seems clear from the latter words in the section—"and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court." The words there used are the same—"shall be allowed." It is not suggested that with respect to those proceedings the High Court had not a discretion over the costs. In the *Aston Tube Works case* I expressed the opinion that where a case was remitted the judge in the county court has the same discretion under section 113 as if the action had been commenced in that court. And Wills, J., in his judgment also proceeded upon the assumption that the judge had discretion. But although that opinion was *obiter* I adhere to it now. I desire only to add that in the present case the costs in the High Court were dealt with by the judge prior to remittal, and therefore the only costs upon which the county court judge exercised his discretion were those in reference to the proceedings in his own court.

KENNEDY, J.—I am of the same opinion. In the circumstances the county court judge thought that this was a case in which he ought to disallow any costs on either side. The question before us is, Was he entitled to do that? I think he was. I agree with what my lord said in *Aston Tube Works (Limited)* v. *Dumbell*. I think the language of section 65 was not intended to interfere with the discretion of the judge over costs of that part of the proceedings which took place in his court. This is not one of those cases "otherwise provided for" within section 113. All I think section 65 means is that where no special direction is made the costs of the portion of the proceedings in the High Court shall be taxed on the High Court scale and those proceedings in the county court upon the county court scale.

RIDLEY, J.—I agree. I think the county court judge had a discretion.

Appeal dismissed.

Solicitors for the plaintiff, *Jaques & Co.*, for *C. B. Cottam*, Ludlow.

Solicitor for the defendant, *W. C. Tyrrell*, Ludlow.

K. B. Div.
(Kennedy and Ridley, JJ.) April 10.

FAULKNER v. REX. (*a.*)

Criminal law—Previous conviction—Arraignment—Error—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 116.

The prisoner was indicted at quarter sessions for attempting to commit a larceny; and a subsequent count in the indictment charged a previous conviction. The prisoner was arraigned upon and pleaded to both counts. Objection was taken on his behalf that the arraignment contravened section 116 *of the Larceny Act*, 1861, *which provides that on an indictment for an offence after a previous conviction the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and that until he be found guilty of that offence he shall not be called on to plead to the charge of the previous conviction. The recorder adjourned the trial to the next sessions. At that sessions there was no fresh arraignment, but the former pleas of the prisoner were treated as standing. He was, however, given in charge of the jury on the first count only, and was found guilty and sentenced upon that count.*

Held, that, although the arraignment did not take place at the sessions at which the prisoner was tried, and although the fact of the previous conviction was not disclosed to the jury by whom he was convicted, yet the fact that the arraignment did not comply with the provisions of section 116, *was such a substantial defect as could not be cured by verdict; and accordingly that the conviction should be quashed.*

Writ of error.

The prisoner was charged at the Birmingham Quarter Sessions, held in February, 1904, on an indictment containing three counts. The first count charged him with having, on the 8th of December, 1903, unlawfully and feloniously attempted to steal £1 18*s.*, the moneys of Albert Grove; the second charged an offence under section 7 of the Prevention

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

of Crimes Act, 1871—namely, that on the 20th of February, 1899, he was convicted at the Birmingham Quarter Sessions of felony, and a previous conviction for felony was then proved against him, and that afterwards, within seven years after expiration of the sentence passed on him for the last of such crimes—to wit, on the 8th of December, 1903, he was found in the shop of the said Albert Grove under such circumstances as to show that he was about to commit larceny of the moneys of Albert Grove. The third count charged that previously to the commission of the misdemeanour charged in the first count—to wit, in July, 1902, he was convicted of felony at the Stafford Quarter Sessions.

The prisoner was arraigned upon all three counts at the same time, and pleaded not guilty to all three. He was given in charge to the jury upon the whole indictment, and the trial proceeded until the whole of the evidence had been given; and then, before the jury considered their verdict, the prisoner's counsel objected to the validity of the arraignment as being contrary to the provisions of section 116 of the Larceny Act, 1861. The assistant recorder upheld the objection and discharged the jury and the case was remitted for trial to the next sessions. On the 17th of May, at the Easter Sessions, the prisoner was again brought up for trial before the recorder. He was not freshly arraigned, nor was any fresh plea taken, and he was given in charge to the jury upon the first count only. The jury convicted the prisoner, and he was sentenced on the first count. He subsequently sued out a writ of error, assigning as error appearing upon the record that the provisions of section 116 of the Larceny Act, 1861, had been contravened inasmuch as he was arraigned and called upon to plead, and did plead, to the three counts in the indictment at one and the same time.

By section 116 of the Larceny Act: "In any indictment for any offence punishable under this Act committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction it shall be sufficient after charging the subsequent offences to state that the offender was at a certain time and place or at certain times and places convicted of felony or of an indictable misdemeanour punishable upon summary conviction as the case may be without describing the previous felony, misdemeanour, offence or offences . . . And the proceedings upon any indictment for committing any offence after a previous conviction shall be as follows—that is to say, the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty . . . the jury shall be charged in the first instance to inquire concerning such subsequent offences only, and if they find him guilty . . . he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment."

H. H. Joy, for the prisoner, as *amicus curiæ*.—The words in section 116 are perfectly general, and are not confined to cases punishable under the Act. The fact that the arraignment was not in the presence of the jury makes no difference, as the section is imperative. The first arraignment was admittedly bad.

He cited *In re Penfold*, 50 W. R. 671, [1902] 1 K. B. 547.

J. G. Hurst, for the Crown.—Section 116 of the Larceny Act is limited to offences punishable under the Act. In any case this is a merely formal defect which is cured by verdict.

KENNEDY, J.—In my view this application must succeed. The prisoner was charged upon an indictment containing three counts. The first count charged the misdemeanour of attempting to commit larceny. The second charged that after two convictions for felony he was found in the prosecutor's shop under such circumstances as to show that he was about to commit larceny, thereby committing an offence under section 7 of the Prevention of Crimes Act, 1871. While the third count charged that before the commission of the misdemeanor in the first count mentioned he had been guilty of felony.

He was arraigned on all three counts, and pleaded not guilty to them all. At the trial counsel for the prisoner took objection to the arraignment. The deputy recorder allowed the objection, discharged the jury and remanded the prisoner to the next sessions, where the prisoner was again brought up for trial, this time before the recorder. There was no fresh arraignment, and the prisoner was treated as having pleaded guilty to the whole indictment, but was given in charge to the jury upon the first count only. Under these circumstances the prisoner has moved to have the conviction quashed, and, in my opinion, the application ought to succeed on the grounds set out in the writ of error. To the general rule laid down by section 116 of the Larceny Act, that no mention shall be made of the previous conviction, there is, so far as I know, only one exception—namely, where the previous conviction is a necessary ingredient in the offence, as is the case with the offences created under section 7 of the Prevention of Crimes Act: *R.* v. *Penfold*. But in all other cases the provisions of section 116 must be followed, and the neglect to follow them entitles the prisoner to have the conviction quashed upon writ of error. A defect of that kind cannot be cured by verdict. It is further said that section 116 of the Larceny Act does not apply to this, as that section, it was said, is confined to offences punishable under the Act. I do not agree that its application is so confined. The words are quite general, and include the offence charged here. The conviction must therefore be quashed.

RIDLEY, J.—I agree. In the absence of a fresh arraignment and a fresh plea the defect in the proceedings at the first trial is one that cannot be got rid of. The language of the section is express, and we are not entitled to disregard a noncompliance with its provisions merely because we may think that no practical injustice has been done.

Conviction quashed.

Solicitor for the prosecution, *J. E. Hill*, Birmingham.

Prob. Div. & Adm. Div. Divorce. } Jan. 17; June 2, 7.

HUNTER v. HUNTER (THE KING'S PROCTOR SHOWING CAUSE). (*a*.)

Divorce—Intervention—King's Proctor—Suppression of facts—Matrimonial Causes Act, 1857, *s.* 31—*Discretion of court.*

The Court held that the mere non-disclosure by a petitioner before a decree nisi *of material facts within the meaning of section* 31 *of the Matrimonial Causes Act*, 1857, *is not sufficient to disentitle such petitioner to the discretion of the court in making absolute the decree nisi. It observed that the facts suppressed must be of such a nature as would have made the court act differently than it did at the trial.*

Alexandre *v.* Alexandre, 2 *P. & D.* 164, *followed.*

This was a motion on behalf of the King's Proctor

(*a*.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

for rescission of a decree *nisi* obtained on the 23rd of April, 1904, by the petitioner.

The parties—Isabel Hunter and William Henry Joseph Hunter—were married on the 19th of July, 1884. On the 27th of June, 1903, the wife filed a petition for divorce on the grounds of her husband's desertion since 1891, and adultery.

On the 4th of November, 1904, the King's Proctor filed his plea, alleging (*inter alia*) that the petitioner had committed adultery with one Charles Turner on the steamship *Anito* during July, August, and September, 1889, and that she had given birth to a child by him at Hull on the 26th of May, 1890. Adultery was also charged down to the 16th of April, 1891, at Hull.

The petitioner in her answer pleaded that at the time she committed adultery she believed her husband to be dead.

At the hearing of the petition before the late President the petitioner admitted that on the 14th of July, 1891, she had gone through a ceremony of marriage with a man named Thomas Overstall, and that after his death in a railway accident she had, on the 22nd of December, 1892, again gone through a ceremony of marriage with William Robert Ashton. She further stated that at those dates she believed her husband to be dead. The late President had accordingly exercised his statutory discretion in her favour and pronounced a decree *nisi*.

Jan. 17.—*Willis*, for the King's Proctor.—The petitioner having concealed the fact of her adultery with Turner, she should not now be entitled to the favourable discretion of the court: *Roche* v. *Roche*, [1905] P. 142.

Willock, for the petitioner.—The motion should be dismissed. By not traversing the petitioner's answer that she believed her husband to be dead, the King's Proctor admits it, and such an answer is a bar to the intervention.

GORELL BARNES, P.—Strictly, the King's Proctor should join issue by delivering a reply, and he must have leave to do so, as the case cannot properly be disposed of in its present form. The case can then be set down and disposed of.

June 2.—At the hearing of the intervention,

Willock, for the petitioner, cited *Burdon* v. *Burdon*, [1901] P. 52, 49 W. R. Dig. 53; *Symons* v. *Symons*, [1897] P. 167, 45 W. R. Dig. 46.

Willis, for the King's Proctor, contended that in *Roche* v. *Roche* it had been held that the suppression of any facts, whatever those facts might be, was a ground for rescinding a decree.

GORELL BARNES, P.—That is contrary to all previous cases, and would be a new ground for refusing decree. Collusion is an absolute bar, but material facts depend on their materiality. It does not seem to be in accordance with what Lord Penzance held thirty-five years ago in *Alexandre* v. *Alexandre*, 2 P. & D. 264, 18 W. R. Dig. 4. The facts suppressed must be of such a nature as would have made the court act differently than it did. *Roche* v. *Roche*, must have been decided on its own special facts.

Cur. adv. vult.

GORELL BARNES, P., in delivering a considered judgment, after reviewing the facts of the case, said that the purely legal question which remained to be decided was whether the mere fact that the adultery of the petitioner had been suppressed was sufficient of itself to require the court to rescind the decree? He (the learned President) would not have experienced any substantial difficulty about the point were it not for the case of *Roche* v. *Roche*. But *Alexandre* v. *Alexandre* was the leading authority on the subject, and was a much stronger one than the present, for in that case there had been deliberate falsehood. He did not know whether that had been referred to in *Roche* v. *Roche*. The only acts which could deprive a petitioner of a decree were those set out in 20 & 21 Vict. c. 85, s. 31, and section 7 of 23 & 24 Vict. c. 144. [The learned President here read the sections.] Continuing, he said that that amounted to saying that if a petitioner so acted as to withhold from the court facts which if disclosed would have led the court to have acted differently than it had acted, such conduct would prevent a decree from being pronounced. The concluding words of section 7, "or otherwise as justice may require," in the latter Act, pointed to the conclusion that if it was just and proper that a decree should be granted it was not a case for the discretion of the court. The section gave no new ground for depriving a petitioner of relief, and that view had been acted upon in *Alexandre* v. *Alexandre*, *Symons* v. *Symons*, *Burdon* v. *Burdon*, *Haradine* v. *Haradine*, *Times*, June 3, 1904.

If a decree was rescinded merely because facts had been withheld from the court, it would become necessary to state what facts must be disclosed, and it was impossible to draw such a line, for if the mere keeping back of facts were sufficient, a difficulty would arise in deciding how much or how little would be sufficient to rescind a decree. It was not necessary to say that fraud was essential in order to stop a decree from going through, nor was any court bound to abide by a decree *nisi* obtained by fraud, nor was it necessary to determine what should be done in a case of deliberate fraud, although if he had to decide in such a case he thought that he should follow *Alexandre* v. *Alexandre*. These considerations seemed to lead to the conclusion that if all the facts had been made known to the court this was a case in which the decree would have been granted. He had dealt with the case at some length because of the decision in *Roche* v. *Roche* but he now felt himself in a position to say that the present case was one in which, all the facts being known to the court, the petitioner was entitled to her decree. He therefore held that the intervention failed, but he also considered that the King's Proctor had been fully justified in having all the facts investigated and laid before the court, and that the petitioner must bear the costs of the intervention.

Solicitor, *King's Proctor*.

House of Lords.

From C. A. (England). April 14.

YORKSHIRE MINERS' ASSOCIATION AND OTHERS *v.* HOWDEN AND OTHERS. (*a.*)

Trade union—Application of funds to unauthorized purposes—Action by individual member—Injunction—Form of order—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-section* 3.

An action is maintainable by a member of a trade union to restrain the union from dealing with its funds in a manner contrary to its then existing rules. Such an action is not prohibited by section 4, *sub-section* 3, *of the Trade Union Act*, 1871.

Decision of the Court of Appeal ([1903] 1 *K. B.* 308, 51 *W. R. Dig.* 162) (Lords Davey *and* James of Hereford *dissenting*) *affirmed, but form of order varied.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Appeal from the decision of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.).

The action was brought by the respondent, Howden, a miner and a member of the appellant association, and others, to restrain the association, its general treasurer, and the treasurers of its branch associations, from misapplying the funds of the association and dealing with them in contravention of the rules of the association, and an injunction was granted.

The question here dealt with was whether it was competent for an individual member of a trades union to bring such an action.

The facts and statute are, so far as is necessary, referred to in the judgments.

Rufus Isaacs, K.C., and *Danckwerts, K.C.* (*Compston* with them), for the appellants.

Atherley Jones, K.C., and *R. E. L. Vaughan Williams*, for the trustees.

Montague Lush, K.C. (*H. T. Waddy* and *H. W. W. Wilberforce* with him), for the respondent.

Danckwerts, K.C., in reply.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—In this case the plaintiff, a member of the Yorkshire Miners' Association, a trades union registered under the Act of 1871, complains that the funds of the society are being diverted from their proper object, and seeks by injunction to prevent that misapplication.

It appears to me that the sole question in this case is whether the plaintiff is at liberty to bring the action, or whether the action is one which is prohibited by the provision in the Act of 1871 which provides that nothing in the Act shall enable any court to entertain any legal proceedings with the object of directly enforcing or recovering damages for the breach of any of the following agreements; and then the agreements are inserted which the courts are in effect prohibited from directly enforcing. But for the differences of judicial opinion which have arisen upon the construction of this provision, it would have been, to my mind, enough to say that this action does not seek directly to enforce any one of the agreements referred to in the statute, or to seek damages for their breach; but, inasmuch as the question has been raised and argued at great length, I do not feel at liberty to dispose of it in so summary a manner.

The question is not a new one. It was raised twenty-three years ago before Fry, J., and in my judgment rightly decided. Fry, J., says, upon the exact question which is here in debate—*Wolfe* v. *Matthews*, 30 W. R. 838, 21 Ch. D. 194: "An order that the defendant should pay money to the plaintiff would be a direct enforcement of the agreement for the application of the funds, but all that is sought here is to prevent the payment of the money to somebody else. Either that is no enforcement of an agreement at all or it is an indirect enforcement."

I cannot escape from this reasoning, nor do I see any inconsistency between that decision and the case before Sir George Jessel; and a long line of judicial decisions has recognized the distinction which the learned judge himself pointed out, and the decision given by Sir George Jessel. I am bound, however, to say that if that decision ever came up for review I think it would have to be considered whether it does not strike the word "direct" out of the statute.

I do not think that, if this provision is out of the way, the plaintiff's claim can be seriously contested. That the proposed use of the funds which he seeks to restrain is a flagrant violation of their own rules seems to me to be proved, and the language and object of section 4 of the Act seems to me not at all what the argument on the other side assumes it to be. That argument seems to asume that the object of the enactment was to keep the trades unions out of the jurisdiction of the court altogether. I do not think it does anything of the kind. It recites with great care what the courts are not to interfere with, and that exemption from their jurisdiction is very precisely limited.

It seems to me that it would have been a very colourable concession to the trades unions if the Legislature had left their funds, which under the arrangement made constituted a trust for particular purposes, without any protection against those entrusted with the distribution of their funds. That the court should not interfere with their distribution according to their own rules when such distribution was within the purposes of the trust is one thing, but that there should be no recourse to the courts where it is threatened to divert them is another thing.

What can be the object of registering, as is required by section 3, the purposes for which the funds are available? Its trustees are the persons in whom their property is vested. What is there to prevent the operation of the ordinary law which protects trust property from being diverted from its proper objects?

Of course, there is nothing except the section to which I have referred; and surely that section cannot mean that because the preservation of the property in trust is one that indirectly will benefit the beneficiaries, that therefore it is a suit for enforcing one of the recited agreements which certainly in their terms are inapplicable.

I therefore move your lordships that the appeal be dismissed with costs.

Lord MACNAGHTEN.—I cannot help thinking that if the plaintiff had only taken the trouble to indicate in his writ or in a statement of claim the ground of his complaint, and if, instead of laying his case before a jury, he had resorted to a tribunal more familiar with the subject, and perhaps better fitted to deal with it, some confusion and a good deal of delay and expense would have been avoided.

The case in itself, when understood, is, I think, simple enough. Was the matter of which the plaintiff, as a member of the Yorkshire Miners' Association, complains beyond the powers of the association? Was the plaintiff in his isolated position—one member of the association standing alone—entitled to sue? Is the fact that the association is a registered trade union a bar to relief in such an action? These, I think, are the only questions to be considered, and there is only one of them, as it seems to me, that give rise to any difficulty.

The Trade Union Act, 1871, requires that the rules of every registered trade union shall contain provisions in respect of the several matters mentioned in the first schedule to the Act. Among those matters are included "the whole of the objects for which the trade union is established," and "the purposes for which the funds thereof shall be applicable." Now the rules of the Yorkshire Miners' Association as registered set forth in plain and distinct language the objects of the association, and the purposes for which its funds may be applied. Clause 3, sub-section (*j*), declares that the whole of the money received by the association shall be applied in carrying out the objects specified in the foregoing sub-sections in accordance with the rules. In an earlier clause (clause 1) there is an express direction that the funds of the association shall not be appropriated to any other use. It is therefore beyond the powers of the association to apply its funds, or any part of them, to any purpose not authorized by its rules.

Was, then, the payment of strike money in the present case authorized by the rules of the association? On this point your lordships did not think it necessary to call upon the respondent. The question is fully discussed and completely disposed of by the opinion of the learned judges in the Court of Appeal, and I have nothing to add to what they said. Then if the action of the association, which was challenged by the plaintiff, was beyond the powers of the association, it seems clear, apart, of course, from any objection arising under the Act of 1871, that in an unincorporated society like this any single member suing alone would have a right to resist it, and to call upon the court to interpose by injunction. That was established in this House in the case of *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712, and is, I apprehend, beyond question.

So far it is all plain sailing. The difficulty, such as it is, is found in the Act of 1871. But the difficulty, if I may presume to say so, is, I think, not so much in the language of the Act as in the language of the learned judges who have expounded it. The commentaries are in fault rather than the text.

The Act of 1871 relieves trade unions from consequences which would otherwise result from the purposes of the union being in restraint of trade. That circumstance by itself is not to render void or voidable any agreement or trust. But on the other hand this concession to modern ideas is not to make all trade union contracts enforceable at law. Nothing in the Act is to "enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of" any of the several agreements which the enactment goes on to specify.

Now, the first question that arises on this part of the enactment is, what is the meaning of the expression "directly enforcing"? I cannot think that the Legislature intended to strike at proceedings for directly enforcing certain agreements, leaving untouched and unaffected all proceedings (other than actions for damages) designed to enforce those particular agreements indirectly. To forbid direct action in language that suggests that the object of the action so forbidden may be attained by a side wind seems to me somewhat of a novelty in legislation. I venture to think that the word "directly" is only put in to give point to the antithesis between proceedings to enforce agreements directly and proceedings to recover damages for breach of contract which tend, though indirectly, to give force and strength to the agreement for breach of which an action may be brought. However, I need not dwell on this point, for it seems to me that for the present purpose the result must be the same whatever meaning or effect may be attached to the expression "directly."

The agreements which the court is not at liberty to deal with are arranged under five headings or classes. The first class comprises a set of agreements with which it would be obviously inexpedient or impossible for the court to deal. In the second class is included any "agreement for the payment by any person of any subscription or penalty to a trade union." One would expect to find next some such clause as this—"any agreement for the payment to any member of any benefit secured by the rules of the trade union"—following the language of the second clause of the first schedule to the Act. If that had been the language we should have had a clause pointing to a personal benefit conferred on a member, which is what Vaughan Williams, L J., takes sub-section 3 (*a*) to be. It no doubt includes that, but I think it goes much further. The words are: "(3) Any agreement for the application of the funds of a trade union—(*a*) to provide benefits to members." At first sight it is not very easy to see why the clause took this shape. I cannot help thinking that it comes from the apprehension which the leaders of the workmen then felt, of the extreme danger to their combinations which might result from any attempt to separate the funds of the union, distinguishing between those collected or intended for benevolent purposes and those collected or intended for ordinary trade purposes.

Then I come to the question, what was the "object" of the present litigation? Was it to enforce an agreement for the application of the funds of the union to provide benefits to members? I should say certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorized by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined. But the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds of the union was sought or desired. The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer those funds, or to apply them for the purposes of providing benefits to members.

I am aware that in expressing this view I am dissenting from the opinion of Sir George Jessel in the case of *Rigby* v. *Connol*, 28 W. R. 650, 14 Ch. D. 482. In that case, after referring to section 4, sub-section 3 (*a*), of the Act of 1871, which is quoted accurately by the learned judge, or it may be by the reporter, his lordship makes the following observations:

"I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement; in fact, it is in substance enforcing the specific performance of it, nothing more or less."

There I think the learned judge departs rather widely from the language of the enactment. If the Act had said that no court should enforce an agreement to provide benefits for members, there would have been an end of the matter. But the Act does not say that, or anything like it. It is not every trade union agreement that the court is forbidden to enforce. The effect of Sir George Jessel's decision, in conjunction with the other cases of unenforceable contracts specified in the Act, makes trade union agreements one and all alike unenforceable. There is really nothing left. The Act, however, proposes only to strike at certain agreements, leaving the jurisdiction of the court untouched as to everything else.

The proceedings which the plaintiff has instituted do not, I think, involve the administration of the funds of the Yorkshire Miners' Association collected for benevolent purposes or the application of those funds to provide benefits to members. Nor was the litigation, as it seems to me, instituted with that object. In substance, it was really little or nothing more than an application to the court to determine the true construction of certain rules which, as the plaintiff contended, had been misconstrued by the executive of the association.

I need hardly point out how disastrous it might be to the funds of this union, and to trade unions generally, if there were no means of preventing the managers and masters of the union from diverting its funds from their legitimate and authorized purposes.

One word as to the form of the order under appeal. I think it is most objectionable, and I trust it will not form a precedent. Even at this late hour I should prefer that the order should be varied by prohibiting directly and in terms, either in the form of a declaration or in the form of an injunction, the diversion of the funds of the union to the particular purpose which the court holds to be unauthorized. This proposed variation, if your lordships should accept it, would, of course, make no difference in the costs of the action, which, I think, should be borne by the appellants both here and below.

LORD DAVEY.—The plaintiff in this action is an individual member of a trade union registered under the provisions of the Trade Union Act, 1871, and he sued the association, the general treasurer, and the two treasurers of the branches concerned for an injunction to restrain them from misapplying the funds of the union, and dealing with the same contrary to the rules of the said association and the provisions contained therein. The misapplication complained of is the payment of strike pay to certain members of the union who were on strike under circumstances which did not entitle them, according to the rules of the union, to the receipt of that benefit.

I have come to the opinion that this action cannot be maintained by the plaintiff. The question turns on the proper construction to be put on the language of section 4 of the Act of 1871. By section 3 of that Act it is enacted that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. The language is not quite accurate, but I think the meaning and effect is to enable such actions to be brought on any agreement or trust affecting the union, or the rights of the members *inter se*, as might have been brought if the purposes of the union were free from the objection that they are in restraint of trade. By section 4, however, it is enacted that nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements—namely (*inter alia*), "(3) any agreement for the application of the funds of a trade union—(*a*) to provide benefits to members, subject to a proviso that nothing in the section is to be deemed to constitute any of the before-mentioned agreements unlawful." By section 8 all the real and personal property of the trade union is vested in trustees; and "(9) the trustees, or any other officer of the trade union who may be authorized to do so by the rules thereof, are empowered to bring or defend any action, suit, prosecution, or complaint in any court of law or equity, touching or concerning the property, right, or claim to property of the trade union." It is not denied that this action could not be maintained under the common law. The question, therefore, comes to be whether it is authorized by the provisions of section 3 of the Act, as qualified by the provisions of section 4.

I assent to the very just observation made by Mr. Lush in the course of his able argument, that one should endeavour to give a meaning to every word in a statutory enactment. And I will endeavour to do so in construing the words of the section in question. I am of opinion that "an agreement for the application of the funds of a trade union to provide benefits to members" means an agreement to the benefit of which the members as such are entitled, and not merely a particular agreement with the individual who sues. Such an agreement is to be found in the rules by which the association is governed. These rules, in fact, form the social contract between the members, and every person on becoming a member accedes to them and is bound by them, and on the other hand is entitled to whatever benefits are thereby secured for members. The particular rules in this case are those numbered 64 and 65, which prescribe the conditions under which a member may become entitled to what I have called "strike pay." Rule 3 (*j*) prescribes that "the whole of the moneys received by this association shall be applied to carrying out the foregoing objects according to rules." But even if there were not this rule I should be of opinion that rules 64 and 65 are exclusive, or (in other words) that according to their true construction they mean that strike pay shall not be given except under the prescribed conditions, as well as that it may be given under those conditions. And I think that the negative stipulation is just as truly and as much part of the agreement for application of the funds to provide benefit to members as the affirmative stipulation. The next question is, What is the "object" of this proceeding? I am of opinion that this must be discovered from a consideration of the relief sought, the grounds upon which it is sought, and the right of action of the plaintiff which entitles him to that relief. I do not think that any court is entitled to look outside the proceedings themselves, as Mr. Lush invited us to do, and consider what were the motives of the plaintiff, or those who are promoting the action, or the ulterior purposes or consequences which they hope to attain by means of the action. Such an inquiry would, in my opinion, be wholly inadmissible in applying this section. Now, I cannot doubt that the object of this action is to enforce what I have called the negative stipulation in the agreement, and that it is in fact and in truth for specific performance of the agreement. In *Lumley* v. *Wagner*, 1 De G. M. & G. 604, Lord St. Leonards could not compel Miss Wagner to sing for Mr. Lumley, but he could prevent her from singing elsewhere in breach of her agreement. Is it doubtful that the court was thereby directly enforcing the performance of the agreement in the only manner in which it could be enforced by a court of equity? The words are not, I will observe, to enforce the application or distribution, but to enforce an agreement for those purposes. This is an action for compelling the council and other officers of the union to observe and govern themselves by the terms of the agreement contained in the rules; and I am at a loss to understand what right of action the plaintiff had, except on the allegation that the payments sought to be restrained were contrary to the rules. This writ in fact is properly framed on that hypothesis. It is, of course, easy to say that the action is in one aspect for the execution of a trust, and not for enforcing the agreement. The association not being an incorporated body, the appointment of trustees and the powers given to them are the machinery provided by the Act for carrying out its purposes. The trustees, however, have no powers of management. No complaint is made against them, and they were not even originally defendants to the action. They were only added in the Court of Appeal with the intention of getting over a technical defect, whether effectually or not I will discuss presently. The real defendants are the association itself and its executive officers representing the majority of the members opposed to the views of the plaintiff, and the only injunction asked for by the writ was against them. I cannot regard the trustees when added to the record otherwise than as merely formal and passive defendants, and I do not think that the addition of the names of the trustees to the record has had the effect of converting the action into a trust action, which it clearly was not as it

action was originally framed. The trust is but the machinery devised for securing the performance of the agreement and the other purposes of the association, and if you are entitled to treat an action like the present one as one for the execution of a trust and not for the direct enforcement of the agreement, there is no conceivable case (at least I cannot think of one) coming within the description in section 4 (3) (*a*) of which you might not say the same, and the enactment would become quite inoperative. The form of the action would not affect the substance of it, but in this case the form expresses the substance.

It will be clear from what I have said that, in my opinion, the object of this action is that of directly enforcing the agreement in the rules. I wish to give full force and effect to that word "directly," and I think it means this: Where the primary object of the action is to enforce the agreement, and the right of the plaintiff to maintain the action is founded on his right to have the rules observed, I think that the action must be deemed to be one for directly enforcing the agreement. But where the right of action is of a different character, and the construction and effect of the rules (if it comes in at all) only comes in as evidence in support of the particular relief claimed, I think that the action would not be one for "directly" enforcing the agreement. I will illustrate my meaning thus: I am disposed to think that the trustees might have maintained this action against the original defendants under the powers given to them by section 9 of the Act. In this union the trustees must be members, but it is not necessary under the Act that they should be so. They would sue as owners of the property of which they are the statutory owners and guardians. In an action to recover or protect the property of the union the construction or effect of the rules might not come into question at all; as, for instance, where the action was against a treasurer or other executive officer who set up a claim to the ownership of the property or money in question or threatened to deal with it as his own. But in other cases the rules might be material, but only as evidence in support of the claim. In such cases I think the object of the action might properly be described as only indirectly for enforcing the agreement.

It is a satisfaction to me to know that the opinion which I have come to has the support of Sir George Jessel in *Rigby* v. *Connol* and Denman, J., in *Duke* v. *Littleboy*, 28 W. R., p. 977. In *Rigby* v. *Connol* the plaintiff alleged that he had been wrongfully expelled from a trade union, and claimed a declaration that he was entitled to participate in the enjoyment of the property and effects of the trade union and in its right, privileges, and benefits, and for an injunction to restrain the defendants from excluding him. Sir George Jessel dismissed the action. In his judgment the learned judge said: [The noble and learned lord then quoted the words already quoted by Lord Macnaghten.]

And after pointing out that the rules contained stipulations in restraint of trade, he added: "If nothing in the Act, therefore, will assist the plaintiff, he must still be in the position of a member of an illegal association coming to a court of justice to assist him to enforce his rights under that illegal association. If that is so, it is impossible for me, and I do not think it ever was intended by the Legislature, looking to the terms of the Act of Parliament, to enable the courts to interfere on behalf of the members of these societies for the purpose of getting relief *inter se* with respect to rights and liabilities contrary to the Act."

I cannot myself see any distinction in principle between an injunction to restrain the exclusion of the plaintiff from a right to participation in the property, and one to restrain the removal or diversion of the property in which he claims to participate. *Rigby* v. *Connol* has been followed by the Court of Appeal in *Chamberlain's Wharf (Limited)* v. *Smith*, 49 W. R. 91, [1900] 2 Ch. 605.

In *Duke* v. *Littleboy* the action was by the executive council of a trade union association against the executive officers and trustees of a branch of the society for an injunction to restrain the defendants from dividing funds belonging to the central society amongst members of the branch contrary to the rules. The central executive had refused to sanction a strike by members of the branch.

It was attempted to distinguish the case from *Rigby* v. *Connol* on the same grounds as have been argued before your lordships. Denman, J., held that was too great a refinement when you looked at the true object and the words of the Act, and he concluded his judgment in these words: "*Rigby* v. *Connol* was an action to restore a member. This is to prevent funds being dealt with in any other manner except according to the rules, and I think it would be frittering away the meaning of this clause if I were to put any other construction upon it than that this is a proceeding to directly enforce an agreement for the application of the funds of a trade union to provide benefits for members."

On the other hand, *Wolfe* v. *Matthews* is relied on by the respondents, and has been followed in the courts below. In that case the plaintiffs sued, on behalf of themselves and other members of a trade society, to restrain the defendants from carrying out an amalgamation with another society, and pleaded that the defendants intended, unless restrained by injunction, to pay money out of the funds to the amalgamating society. Fry, J., held that the judgment of Sir George Jessel did not apply to the case. He said: "An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the moneys to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement. To take a simple case, if there is a contract by A. to pay £100 to B., that contract is directly enforced by a judgment of the court directing A. to pay to B.; and the contract is only indirectly enforced, if at all, by a judgment restraining A. from paying the money to someone else. It is only by a stretch of language that such an order can be said to enforce A.'s contract; the utmost that can be said is that it is then more than likely that A. will pay to B."

I never differ from Sir Edward Fry without great hesitation, but in this case I must frankly say that I do not follow his reasoning. Of course, a creditor cannot restrain his debtor from disposing of his money until he has recovered judgment and issued execution. But if the learned judge means by his illustration an earmarked bag of sovereigns which A. has contracted to deliver to B. and no one else, I take the liberty of saying that an action to restrain A. from delivering it to a third person could clearly be one for directly enforcing the agreement, and that seems to me the only way of making the illustration relevant to the case then before the court. The learned judge cannot have meant that an order for payment to the plaintiffs was the only mode of directly enforcing the agreement, and he appears to me to ignore the existence of the agreement that benefits should be given to members according to the rules, and not otherwise. It is not, however, stated in the report that the amalgamation complained of was alleged to be *ultrà vires*, and it may be that the

action was founded only on the allegation that the amalgamation would be prejudicial to the plaintiffs by diminishing the funds applicable for their benefit. If so, the learned judge's reasoning is intelligible, and his illustration would be relevant. But in that case the decision would be wholly irrelevant to the question now before your lordships.

In the Scotch case of *Trustees of the Amalgamated Railway Servants* v. *Motherwell Branch*, 7 Ct. of Sess. Cass. 867, it appears from the statement of the case to have been on a closed record, but one of the learned judges speaks as if the only interdict granted was to keep things *in statu quo* until the rights of the parties should be ascertained. It was, however, an action by trustees under section 9, to which, I think, different considerations may apply. If and so far as it is a decision against the opinion I have already expressed on the construction of the Act, I think it was wrongly decided.

I gather from Stirling, L.J.'s, judgment that he also felt some difficulty as to the respondent's right to maintain this action. But he thought that the analogy of the procedure in the Chancery Division, by which a shareholder is allowed to sue for his individual interest where the company refuses to sue to restrain the commission of an act which is *ultrà vires* the company, ought to be applied to trade unions. I have some doubt whether, having regard to the wide language in which the objects of the society are stated in rule 3, and the power of the members to alter the rules, the acts complained of were *ultrà vires* the association or more than a breach of the regulations which the majority of the members might condone. But I will assume the former view is the correct one. The suggestion of the learned Lord Justice then seems to bring you back to the point from which I started, whether an action by an individual shareholder to restrain a breach of the agreement contained in the rules respecting benefits to members is not such an action as is described in section 4 (3) (*a*) of the Act.

I must apologise for having troubled you at such great length, but as I have the misfortune to differ from the unanimous judgment of the court below and from the majority of your lordships, I thought it my duty to state the reasons for the opinion I have formed fully, even at the risk of trespassing on the patience of your lordships.

In my opinion the appeal should be allowed, and the action dismissed with costs here and below.

LORD JAMES OF HEREFORD.—I have entertained considerable doubts as to the decision that should be arrived at in this case, but in the result I have come to the conclusion that the appellants are entitled to succeed in their appeal.

The circumstances under which this action has been instituted have already been fully stated to your lordships, and I shall only briefly refer to them.

The first question to be determined is whether section 3 of the Trade Union Act of 1871 prevented the action under discussion from being brought.

That Act amounted to a very charter of legal existence. Before the passing of it, trades unions had no legal recognition. The Act effected it, but at the same time did not afford access to the public legal tribunals for all purposes. For some purposes the trade unions were left to determine their own differences, and so section 4 provided "that nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements: . . . (3) An agreement for the application of the funds of a trade union (*a*) to provide benefits to members, or (*b*) to furnish contributions."

Mathew, L.J., in his judgment, terms this section "a remarkable relic of prejudice." It was rather the result of great legislative timidity. If the legalization of trade unions could no longer be resisted, a modified legalization only, the Legislature said, should be conferred upon them. The courts of law should not be called upon to enforce certain rights of members amongst each other. Trade unionists must manage their own internal affairs as best they could amongst themselves.

Now your lordships have to determine whether the plaintiff's action was duly brought before the court, or whether it comes within the prohibition contained in section 4 of the Act of 1871.

We must first ascertain the purposes for which the action was instituted.

The record affords us but little assistance. Save the writ, there are no pleadings. But from the writ we gather that the action was brought by the plaintiff, as a member of a registered trade union, against that union and its officers, for the purpose of restraining them by injunction from misapplying the funds of the association contrary to its rules and the provisions contained therein.

But the plaintiff, on his evidence given at the trial before Grantham, J., stated that he had brought the action because, being entitled to the benefit of the funds of the trade union, he desired to protect them and have them used in a right way and according to the rules of the association. The plaintiff also based his claim for an injunction on the ground that the defendants wrongly applied the funds of the association, and intended to apply them in making payments to members of the union who had struck work, and that such strike was contrary to the rules of the association.

In order to sustain the case the plaintiff had to rely upon the rules of the union. These rules form the constitution of the association, and by these terms all the members of it are bound. Both the member's contributions and the benefits he is to receive are contributed by, and dealt with, under these rules, of which Nos. 2, 3, 62, and 64 are the principal in relation to this case.

Rule 2 states: "These rules shall be for the government of the association and the protection of the members." Rule 3 sets out the objects for which the union was established:

"(*a*) To raise funds for mutual help.

"(*c*) To secure the fines and wages bargained for by the members, and to protect members when unjustly dealt with by the masters or managers.

"(*g*) To provide a weekly allowance for the support of members and their families who may be locked out or on strike.

"(*h*) An allowance to all full members, half members, and members' wives at death who are financially on the books.

"(*j*) The whole of the moneys received by the association shall be applied to carrying out the foregoing objects, subject to the rules."

Then rules 64 and 65 provide for the conditions under which a strike might be constituted and carried on.

Now these rules appear to me to constitute an agreement between the members of the union to the effect that it shall be carried on in accordance with the terms and conditions set out in such rules.

It now remains to be determined whether the suit thus instituted is a legal proceeding with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members.

In substance the plaintiff is seeking to prevent the defendants from breaking the rules of the union

— that is, from breaking the agreement created by those rules. He bases his claim to interfere upon the fact he is entitled to participate in the distribution of the funds according to the rules. Vaughan Williams, L.J., says: "The plaintiff does not claim to participate in the funds. There is no question as to his right to participate. He claims only to restrain misapplication of the funds." I do not think that this is correct. It is true that the plaintiff does not claim any immediate payment of money to him. But he does claim that he has the right to participate in the union funds under circumstances that may arise, and it is to protect such right of full participation that he has brought this action. His whole contention is that if the defendants continue improperly to expend the funds for strike purposes, he, the plaintiff, might be prevented from fully participating in them, according to his right under the agreement contained in the rules.

In order to secure the maintenance of the fund the plaintiff has no other weapon than the enforcement of the agreement. If he were to say, Give me so much money under the rules, it is admitted that that would be an enforcement of the agreement; equally so, I think, if he says, Put so much money by to protect my rights within the rules. Then if he says, Stop spending money in breach of the rules so that you may not deprive me of my rights, is he not equally enforcing the agreement? It cannot, I think, be said that in order to bring the action within section 4 the claim must necessarily be for money to be at once paid to the plaintiff; and if this be not the extent of the limitation, I think the present action comes within the true and correct reading of the action. I do not forget that the word "directly" is to be found in section 4 of the Act, and that effect has to be given to it. But this action appears to me to seek to "directly" enforce an agreement. The assertions on which the action is based are certainly direct. "I, the plaintiff, and you, the defendants, have entered into an agreement; you are about to break that agreement; I seek to prevent you, and I do so by asking the court to enforce it."

Your lordships' attention has already been called to the authorities bearing upon this case. On the one hand the judgments of Sir George Jessel in *Rigby* v. *Connol* (where the plaintiff sought to restrain the trade union from expelling him), followed by that of Denman, J., in *Duke* v. *Littleboy*, are cited in support of the defendants' contention, whilst the plaintiff can rely upon the judgment of Fry, J., in *Wolfe* v. *Matthews*, and upon the judgment in the Scotch case of *Amalgamated Society of Railway Servants*.

In my opinion, the judgment of Sir George Jessel, which has been recognized by the Court of Appeal in *Chamberlain's Wharf* v. *Smith*, bears directly upon the question now before your lordships. That learned judge said: "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their fines and subscriptions, and I restrain the society from preventing that participation. It seems to me that it is directly enforcing the agreement; in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

In my opinion there is no valid distinction between a suit to prevent the plaintiff from being deprived of participation in the funds by excluding him from membership and a suit to prevent his being deprived of such participation by virtue of the funds being wrongly taken away and wrongfully applied to other purposes.

For these reasons I have arrived at the conclusion that this action comes within section 4 of the Act of 1871, and cannot be maintained. This view renders it unnecessary that I should deal with other points raised in the case. My judgment is thus in favour of the allowance of the appeal.

Lord ROBERTSON.—I am of opinion that the judgment appealed against is right.

My construction of the statute is that adopted by the Court of Appeal, and I cannot usefully add to what has been said by the learned judges there and by my noble and learned friends in this House in support of that view.

Lord LINDLEY.—Before the Trades Union Act, 1871, was passed, trades unions were unincorporated societies, not recognized as legal, and in that sense, at least, they were held to be illegal on the ground that their objects were to restrain freedom of trade and were against public policy. Neither courts of law nor courts of equity would recognize or enforce the rules of such societies or the trusts on which their funds were held. By the Act in question trades unions were freed from the illegality which was the consequence of being regarded as against public policy (section 2). Their rules and trusts can no longer be treated as invalid by reason of their being in restraint of trade (section 3). They may be illegal or unenforceable on some other ground, and if they are, the Act of 1871 does not in any way legalize them or affect them.

But the Act of 1871 does more for trades unions than remove the consequences of being regarded as illegal societies; it allows them to a great extent to manage their own affairs free from the control of the ordinary courts of the country (section 4), and enables them to register themselves under a name (sections 13, 14, and First Schedule), and to obtain summary redress against their officials in cases of misconduct (section 12).

Further, it enables them to hold property by trustees (section 8), and enables the trustees to sue and be sued in respect of such property (section 9).

One thing, however, the Act of 1871 did not do. It did not incorporate trades unions even when registered under the Act with a name. A trade union holds property by trustees; but, not being incorporated, there is no one legal person or entity in whom the beneficial interest in the property of a trade union is vested. The beneficiaries are its members collectively and severally. This is plain from section 8, which vests the property of every registered trade union in trustees for the use and benefit of such trade union and the members thereof. A trade union is, and its name is only a convenient designation for, an unincorporated society of individuals, and this observation must not be lost sight of on the present occasion. Prior to the decision of this House in *Taff Vale Railway* v. *Amalgamated Society of Engineers*, 50 W. R. 44, [1901] A. C. 426, it was doubtful whether a registered trade union could sue or be sued in its registered name. The House decided that it could be so sued in an action for damages committed by its agents. But care was taken in that case to point out that a trade union is not an incorporated society, although it may be sued in its registered name.

The Trade Union Act, 1871, contains a carefully framed scheme to enable trade unions to acquire, and to hold, through the medium of trustees, funds for the benefit of their members who, as already observed, are expressly mentioned in section 8. Unless something can be found in the Act to the contrary, the natural legal inference would be that the ordinary equitable machinery for preserving the trust property and for executing the trusts on which it is held would be available for the members.

Upon this point there is a valuable recent decision by Farwell, J. (*Stevens* v. *Chown*, 49 W. R. 460, [1901] 1 Ch. 894), where the older authorities will be found.

But it is said that section 4 of the Act of 1871 expressly excludes the jurisdiction of the courts from interfering in this case. I confess I cannot adopt this conclusion. Before turning to the section let me remind your lordships what the object of this action is, and what the judgment appealed from really does.

The action is not to enforce a contract between the plaintiff and the defendants; its object is to vindicate a right to property. All trusts, except those created by statute or by will, may be said to be created by a contract between the parties to the instrument creating the trusts. But those trusts can be enforced in equity by any person entitled to the benefit of them. A suit by a *cestui que trust* against his trustee is not what is usually understood as a proceeding to enforce an agreement; if it were, the suit could only be maintained by some person who was a party to the agreement creating the trust.

But, further, the object of this action is not to distribute funds held in trust for the members of the trade union nor to obtain payment of any money out of them, nor in any way to administer those funds. The plaintiff, who is a member of the trade union, and who is beneficially interested in its funds, complains that those who have control of them threaten and intend to apply them to purposes not authorized by the rules of the association; and the whole object of the action is to obtain an injunction to restrain that intended misapplication of the funds. The order appealed from does this, and, when properly understood, does no more. Owing to the absence of pleadings, and to the fact that the order was drawn up by someone not accustomed to the forms used in the Chancery Division, the order is not in terms directed to the specific misapplication sought to be restrained but is in quite general terms. But this is of no real importance when once the true object of the action is understood. The order is not a first step to ulterior proceedings with a view to administration. The action is at an end, except as regards this appeal and any breach of the injunction granted.

Such being the object of the action and the effect of the order appealed from, let us see what there is in section 4 of the Act which excludes the jurisdiction of the court to entertain the action.

The words are: "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements."

Pausing here for a moment, the words just quoted suggest the following observations. The section extends not only to courts of law but also to courts of equity; secondly, the section does not prohibit any court from exercising in any case any jurisdiction which it could have exercised before the Act passed; the section simply prevents any court from extending its jurisdiction and interfering in cases in which the Act would authorize interference if it were not for the direct prohibition contained in the section; and thirdly, no legal proceeding which might be taken if the section did not prohibit it is prohibited, except a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of the specified agreements. The word "directly" is important, and limits the application of the section. Legal proceedings for other purposes than those specified are not prohibited, although they may indirectly affect agreements on which no action can be brought.

Passing now to the agreements specified, those numbered 1, 2, 4, and 5, may be disregarded as clearly inapplicable to the present case. The third is the only one which has to be considered. The words are: "An agreement for the application of the funds of a trade union—(*a*) to provide benefits to members; or (*b*) to furnish contributions . . .; or (*c*) to discharge any fine. . . ."

I am myself quite unable to see that these words include such an action as that which has been brought in this case. The object of this action is not directly to enforce any agreement for the application of the funds of the trade union in any of the ways specified under the third head. The object of the action is not to apply the funds, but to preserve them for future application; and to my mind this action is no more struck at by section 4 than is an action brought by the trustees for the recovery of the funds of the trade union from some person wrongfully in possession of them.

The question for decision is not new. It came before Fry, J., in 1882 in *Wolfe* v. *Matthews*, 30 W. R. 838, and was decided in accordance with the above view, and, so far as I know, this case has never been questioned, and has always been considered right. A similar view was taken of the Act of Scotland in *Amalgamated Society of Railway Servants* v. *Motherwell Branch* and *Wolfe* v. *Matthews*.

It is not in conflict with any other decision, unless it be *Duke* v. *Littleboy*, decided by Denman, J., in 1880, but the object of the action in that case was wider than it was in *Wolfe* v. *Matthews*, and wider than it is in this case.

The cases in which the court has refused to restore expelled members—namely, *Rigby* v. *Connol* and *Chamberlain's Wharf (Limited)* v. *Smith*—are also distinguishable. The object of the action in each of those cases was directly to establish and enforce the plaintiff's rights as a member of the trade union to the benefits conferred by the rules on the members.

Considering the object of the action, it appears to me competent for any member who has a beneficial interest in the funds of the union to sue to prevent their application to purposes not warranted by the rules as they stand. It is true the rules may be altered (see rules 2 and 12), but it does not follow that the court ought not to enforce the trust created by them as they stand. Stirling, L.J., has fully dealt with this point, and I agree with him.

Upon the question whether the application of the funds of the society which has been restrained was authorized by the rules, I do not think it necessary to add anything. The strikers from the first were legally in the wrong, and they never got right. They cannot bring themselves within the rules 64 or 65.

The appeal fails on all points, and ought to be dismissed with costs.

I agree to the suggested form of the order.

Appeal (with a variation as to the form of order as suggested by Lord Macnaghten) dismissed.

Solicitors for the appellants, *Corbin, Greener, & Cook*, for *Raley & Sons*, Barnsley.

Solicitors for the trustees, *Marsh, Sherwood, & Hart*, for *Carrington & Co.*, Barnsley.

Solicitors for the respondent, *Steadman & Van Praagh*, for *Arthur Neal*, Sheffield.

Court of Appeal.

From P. D. & Ad. Div. (Collins, M.R., and Romer, L.J.) June 26.

"THE HAVERSHAM GRANGE." (a.)

Ship—Damage—Collision—Injured ship damaged by second collision—Ship dry docked for repairs—Apportionment of expenses of dry docking.

The plaintiffs' ship was injured by a collision with another ship, and the owners of the latter ship admitted liability for 50 per cent. of the damage sustained. It was necessary to dry dock the plaintiffs' ship to repair the damage caused by that collision. Before the ship was taken into dry dock she received further injuries through collision with the defendants' ship, for which the defendants admitted liability. It was necessary to dry dock the plaintiffs' ship in order to repair the damage caused by the second collision. The ship was taken into dry dock and both sets of damage were repaired at the same time. The time occupied in repairing the damage caused by the first collision considerably exceeded the time occupied in repairing the damage caused by the second collision, and the ship was not detained in dock longer than it would have been detained if the damage caused by the first collision had alone to be repaired.

Held, upon the authority of Marine Insurance Co. *v.* China Transpacific Steamship Co., 35 *W. R.* 169, 11 *App. Cas.* 573, *that the plaintiffs were entitled to recover from the defendants a proportionate part—viz., one-half—of the expenses of dry docking the ship during the time that the damage caused by the second collision was being repaired, but that they were not entitled to recover any sum for demurrage.*

Appeal from an order made by Sir Gorell Barnes, P., affirming the report of the registrar.

On the 25th of December, 1904, the steamship *Maureen* was coming up the Thames when she collided with the steamship *Caravellas* and sustained damage on her port side. The owners of *The Caravellas* admitted liability for 50 per cent. of the damage sustained by that collision. In order to repair that damage it was necessary that *The Maureen* should go into dry dock, and the repairs would have taken twenty-two days to do. On the 26th of December, 1904, before *The Maureen* had been put into dry dock, *The Haversham Grange* collided with her and damaged the starboard side of *The Maureen*. The owners of *The Haversham Grange* admitted liability for that damage. *The Maureen*, even if she had been an undamaged ship, would have had to dry dock to repair that damage, and the repairs would have lasted six days. *The Maureen* went into dry dock, and both sets of damage were repaired at the same time. The damage done by *The Haversham Grange* did not detain *The Maureen* in dry dock for a longer time than she would have been detained if the damage done by *The Caravellas* alone had to be repaired.

Upon the reference before the registrar as to the damages, the owners of *The Maureen* claimed from the owners of *The Haversham Grange* a proportionate part of the expenses of dry docking—viz., three days' expenses, and also three days' demurrage.

The registrar disallowed both these items on the ground that they were not damage which resulted from the collision with *The Haversham Grange*.

The President affirmed the decision of the registrar.

The plaintiffs appealed.

F. Laing, K.C., and *Dawson Miller*, for the plaintiffs.—A proportionate part of the expenses of dry docking are recoverable from the defendants: *Marine Insurance Co.* v. *China Transpacific Co., The Vancouver*, 35 W. R. 169, 11 App. Cas. 573. It was necessary to dry dock the vessel for the purpose of repairing each set of damage. *Ruabon Steamship Co.* v. *London Assurance*, 48 W. R. 225, [1900] A. C. 6, and *The Acanthus*, [1902] P. 17, 50 W. R. Dig. 161, were distinguishable, because in those cases the owners merely took advantage of their vessel being in dry dock to have, in the one case a survey of the vessel made, and in the other case bilge keels fitted to her, and it was held that the owners were not liable to contribute towards the expenses of dry docking. Secondly, three days' demurrage ought to have been allowed.

Maurice Hill (*Butler Aspinall, K.C.*, with him), for the defendants.—The defendants were wrongdoers and were only liable for the consequences of their wrongful act. They injured a damaged ship, which at the time of the injury was bound to go into dry dock for repairs. The defendants' wrongful act did not cause the ship to go into dry dock, and therefore the expenses of dry docking were not incurred in consequence of the wrongful act. *The Vancouver* was a case between shipowners and underwriters upon a policy of insurance, and it has no application to an action to recover damages for a tort. [He was not called upon on the question of demurrage.]

Laing, KC., in reply.—A wrongdoer cannot be in a better position than an underwriter.

COLLINS, M.R.—This is an appeal from a judgment of the President upon the question whether or not one of two independent tortfeasors—I call them tortfeasors because it has been pressed upon us that they are tortfeasors—is entitled to say that the damage for which he is liable must be measured by excluding altogether the expense to which the injured vessel was put in going into dry dock, because she must necessarily have gone into dry dock to repair the injury caused by an earlier collision. The facts were that the plaintiffs' ship was coming up the Thames when *The Caravellas* came into collision with her, which necessitated her going into dry dock. Afterwards *The Haversham Grange* collided with her and damaged her, though the damage was not nearly so great as that caused by the earlier collision. The ship had to be put into dry dock, and both sets of damage were repaired at the same time. The plaintiffs contend that they are entitled to recover from the defendants, the owners of *The Haversham Grange*, as part of the damages, their proper proportion of the expenses of dry docking. The defendants contend that the plaintiffs are not entitled to recover any part of the expenses of dry docking, because at the time of the collision with *The Haversham Grange* the plaintiffs' ship was a damaged ship and was bound to go into dry dock to repair that damage whatever happened, and that therefore no part of the expenses of dry docking is attributable to the collision with *The Haversham Grange*, those expenses being attributable to the first collision. The question is, which contention is the right one. The learned President, affirming the report of the registrar, held that no part of the expenses of putting the ship into dry dock or of the use of the dock ought to be allowed as against the defendants. Upon considering the whole matter I have come to the conclusion that the principle laid down in *The Vancouver* covers this case. It seems to me that, according to the well-known practice in Admiralty, all that we have to ascertain is what ought to be taken as the cost of repairing the damage done by the wrongdoer. Un-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

questionably this was a tort, and a tortfeasor is liable for the damage done by him, whether the ship is repaired or not. But practically the damages recoverable are the cost of the repairs rendered necessary by the damage done. The right of the shipowner is to recover all the cost of repairing the damage caused by the wrongful act. The result of the two wrongs in the present case was that the damaged ship had to go into dry dock. Some apportionment of that expense has to be made, and it was laid down in *The Vancouver* that, so far as there was a common factor in the case and to the extent of the time occupied in common in repairing the mischief caused by the two ships in default, that expense ought to be apportioned. In my opinion, what I said in *Ruabon Steamship Co.* v. *London Assurance*, 46 W. R. 417, [1898] 1 Q. B. 722, as to the principle laid down in *The Vancouver* is right, subject to one qualification. I there said: "I think the principle of that case is that, where repairs in respect of damage for which underwriters are liable have been executed simultaneously with repairs as to which the owner is uninsured, and an expense has been incurred which would have been necessary for either purpose alone, such expense is not to be wholly attributed to one set of repairs alone, but forms a factor in the cost of each, and must therefore be divided between them in some proportion, which *primâ facie* would be equally. The problem really is to find the cost at which each set of repairs has been executed. Each has been executed at a less cost, because there is a common factor in the expenses which has enured to the benefit of both, and, in stating an account of the cost of each, the person carrying out the repairs would be bound to debit each set with a proportion of the common items. This is a perfectly simple and intelligible principle, and applies to this case." I adhere to that statement, subject to this qualification, that the repairs must be such that the shipowner has no alternative but to have them executed. It does not apply where the shipowner simply avails himself of the opportunity of the ship being in dry dock to have something done to her. I find this statement of the principle in Lord Brampton's judgment in *Ruabon Steamship Co.* v. *London Assurance*: "Since the decision of *The Vancouver case* . . . it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of a ship in order to render her in a condition to justify a prudent owner in sending her again to sea—one of such operations being to effect repairs for the cost of which underwriters are responsible, the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, and neither of such operations could be performed unless the ship were dry docked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry docking; in such cases the cost of docking and all dock dues during the period the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it." There is no doubt in the present case that it was essentially necessary for the two operations of repair to be performed upon the ship, and neither of the operations could be performed without dry docking the ship. The conditions laid down in the above passage are, therefore, fulfilled. The case, therefore, comes directly within the principle laid down in *The Vancouver*.

It is said, however, that *The Vancouver* dealt only with the case of insured owner and underwriter, whereas this is a case of tortfeasors. No complication arises here as to contribution between joint tortfeasors. The two tortfeasors are independent tortfeasors. The argument comes to this, that a tortfeasor is in a position different from and better than an underwriter. I confess that I fail to realize that distinction. When once one arrives at this, that the measure of liability is the cost of repairing the damage done, it becomes a mere matter of arithmetic, and the principle laid down in *The Vancouver* is applicable. It is impossible, in making that calculation, to exclude the fact that it was necessary for the ship to go into dry dock to execute the repairs merely because owing to some earlier damage it was already necessary for her to go there. A tortfeasor is bound to make good the damage done, and he is in the same position as a person who is bound to indemnify another. The principle of *The Vancouver* applies, and the common factor in these expenses must be divided proportionately between the two ships in default. The decision of the learned President upon this point must be reversed.

With regard to the claim for three days' demurrage, the ship was detained in dry dock during the whole time for the purpose of executing the repairs rendered necessary by the first collision. The repairs rendered necessary by the collision with *The Haversham Grange* were executed simultaneously, and those repairs did not detain the ship in dock at all. Upon this point the learned President was right.

ROMER, L.J.—I am of the same opinion. Two sets of damage were occasioned to this vessel by two collisions. The collision with *The Haversham Grange* came second. After both collisions the vessel was taken into dry dock. While she was there the damage caused by the two collisions was repaired. It is clear to me that the vessel was taken into dock for the purpose of repairing both sets of damage, so that the defendants cannot say that the docking was not done for the purpose of repairing the damage for which they were liable. The defendants were liable for the damage caused by the second collision, and the dock was used for the purpose of executing the repairs rendered necessary by that collision. Therefore the dock was used for two purposes, each of which was necessary for the repair of the particular injury. So far as the common days used for the repair of both sets of damage are concerned, the expense of those days must be divided between each. That seems to be the principle laid down in *The Vancouver* and in *Ruabon Steamship Co.* v. *London Assurance*, and most explicitly in Lord Brampton's judgment in the latter case. It is said that because the injury inflicted by *The Haversham Grange* was second in point of time, a special privilege attaches on that account to *The Haversham Grange*—that, inasmuch as the plaintiffs' vessel would have had to go into dry dock in any event to repair the damage done by the first collision, and as the repairs rendered necessary by the second collision did not detain her in dock beyond the time occupied in repairing the damage caused by the first collision, the first tortfeasor was liable to pay all the expenses of dry docking, and that the defendants were not liable to pay any part of those expenses. In other words, inasmuch as the injury inflicted by *The Haversham Grange* was second in point of time, the defendants ought to have the full benefit of the ship going into dry dock without paying anything towards it. I cannot agree. That cannot, in my opinion, relieve them from the obligation to pay a due proportion of the expenses of dry docking. I agree with my lord upon the question of demurrage.

Appeal allowed in part.

Solicitor for the plaintiffs, *C. E. Harvey.*

Solicitors for the defendants, *William Crump & Son.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 8.

ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL. (*a.*)

Inland revenue—Income tax—Deduction of tax—Interest on stock—Land charged with payment of interest—Right to deduct tax paid on annual value of land—"Payable out of profits or gains brought into charge"—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 60, *Schedule A, No. IV., r.* 10; *s.* 102—*Customs and Inland Revenue Act,* 1888 (51 *&* 52 *Vict. c.* 8), *s.* 24, *sub-section* 3.

The London County Council raised money on loan by the creation and issue of Metropolitan Consolidated Stock, which stock and the dividends thereon were charged on the lands, rents, and property of the council, and in addition the stockholders had the security of the rates. The council were in receipt of an annual income of £837,000 *in cash, consisting of rents and interest on loans, on which income tax was paid under Schedules A and D of the Income Tax Acts. They were also possessed of lands and buildings, which they occupied themselves, of the annual value of* £118,000, *and on this annual value they paid income tax under Schedule A. The annual interest on the Metropolitan Consolidated Stock was* £1,371,000. *The council used the whole of their cash income of* £837,000 *towards the payment of this interest, and they made up the deficiency out of the rates. On paying the interest to the stockholders they deducted income tax thereon.*

Held, that the council were entitled to retain for their own use so much of the income tax thus deducted as would recoup them not only the tax which had been paid on the sum of £837,000, *but also the tax which they had paid on the sum of* £118,000, *the annual value of the lands and buildings occupied by them.*

Judgment of Channell, J. ([1904] 2 *K. B.* 635), *affirmed.*

Appeal from the judgment of Channell, J., on an information by the Attorney-General against the London County Council ([1904] 2 K. B. 635).

The question was whether the London County Council, when they deducted income tax on paying the interest on the Metropolitan Consolidated Stock, were entitled to retain for their own use so much of the amount so deducted as was sufficient to recoup them the income tax paid by them under Schedule A of the Income Tax Acts upon land occupied by them.

The London County Council were in receipt of an annual income derived from interest on loans, rents, and other income taxed for income tax under Schedules A and D. The income so received by them for the year ending the 31st of March, 1901, amounted to £837,728 10s. 5d., and on that amount income tax was duly paid. They were also possessed of certain lands and buildings, which they occupied themselves, of the annual value of £118,306 6s. 1d., and upon this annual value they paid income tax under Schedule A. They also possessed a large source of income in their power of rating, which was practically unlimited.

The London County Council, or their predecessors, the Metropolitan Board of Works, had from time to time under their statutory powers borrowed large sums of money, and in respect thereof had created capital stock, called the Metropolitan Consolidated Stock. This stock and the dividends thereon were, by statutory authority, to be charged indifferently on the whole of the lands, rents, and property belonging to the county council, and on all moneys raised by rates and on an improvement fund; and all moneys required for payment of the dividends on the stock and for the redemption of the stock were to be raised out of the improvement fund and the metropolitan consolidated rate. The interest payable to the stockholders on the total amount of the stock for the year ending the 31st of March, 1901, was £1,371,633 6s. 9d. In order to pay this interest the county council had, to the extent to which it exceeded their cash income—viz., £837,728 10s. 5d., to resort to their power of rating to make up the deficiency—viz., £533,904 16s. 4d. The county council, on paying the interest to the stockholders, deducted the income tax thereon, pursuant to section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888.

The matter in dispute was to what extent the county council were accountable to the Crown for the sum so deducted by them, as having collected it from the stockholders on the Crown's behalf, and to what extent they were entitled to retain it for their own use. The county council admitted that they were accountable to the Crown for the tax on the sum of £415,598 10s. 3d., being the amount by which the entire interest exceeded the total annual value of their property, which consisted of the two sums of £837,728 10s. 5d. and £118,306 6s. 1d. But they contended that they were entitled to retain to their use the tax on the two last-mentioned sums. It was decided in the case of *London County Council v. Attorney-General,* 49 W. R. 686, [1901] A. C. 26, that they were entitled to retain the tax on the sum of £837,728 10s. 5d. The question to be decided in this case was whether they were also entitled to retain the tax on £118,306 6s. 1d., in order to recoup themselves for the tax which they had paid to the Crown upon that sum under Schedule A.

The county council relied on section 60 of the Income Tax Act, 1842, Schedule A, No. IV., r. 10, which enacts as follows: "Where any such lands, tenements, or hereditaments are subject or liable to the payment of any rent-charge . . . or other rent or annual payment thereupon reserved or charged, the landlord, owner, or proprietor by whom any deduction shall have been allowed as aforesaid, and the owner or proprietor being also occupier and charged with the said duties, shall deduct and retain out of every such rent-charge . . . or other rent or annual payment aforesaid, so much of the said duties or payments on account of the same . . . as a like rate . . . on such rent-charge . . . or other rent or annual payment aforesaid . . . shall by a just proportion amount unto."

By section 102 of the Act of 1842 income tax is chargeable on all annuities, yearly interest of money, or other annual payments, under Schedule D, provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of the Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction or from which a deduction has been made, shall be authorized to deduct out of such payment the proportional income tax: "Provided always, that where any creditor on any

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

rates or assessments not chargeable by this Act as profits shall be entitled to such interest, it shall be lawful to charge the proper officer having the management of the accounts with the duty payable on such interest."

The Customs and Inland Revenue Act, 1888, s. 24, sub-section 3, provides as follows: "Upon payment of any interest of money or annuities charged with income tax under Schedule D and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to her Majesty, and recoverable as such accordingly."

Channell, J., held that the county council were entitled to retain the tax on the sum of £118,306 6s. 1d.

The Crown appealed.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Rowlatt,* for the Crown.

Sir Edward Clarke, K.C., Dickens, K.C., and *Ryde,* for the London County Council.

Cur. adv. vult.

June 8.—COLLINS, M.R., read the following judgment of the court: We do not think that there is any dispute as to the legal principles applicable to this case. The puzzle is one of arithmetic. The London County Council are in actual occupation of property the annual value of which is £118,000. The whole of their property, including that of which they are themselves in occupation, is charged with the payment of the Metropolitan Consolidated Stock, the annual interest on which far exceeds the annual value of all their property. The deficit has to be supplied out of the rates. The London County Council have been assessed to income tax under Schedule A in respect of the annual value of the property so occupied by the council themselves, and have duly paid it. They claim to retain an equivalent amount out of the sum deducted for income tax from the dividends paid to the holders of the Metropolitan Stock. The Crown disputes their right to such retention, and claims a sum of £5,913. Channell, J., has decided against the Crown, who now appeals. The Crown contends that the case falls under the last proviso in section 102 of the Income Tax Act, 1842, and is covered by the decision of the Court of Session in Scotland in *Aberdeen Commissioners* v. *Russell,* 17 Rettie, 942. It is said on behalf of the Crown that the interest in this case has been paid out of the rates, in respect of which no income tax has been paid, and there is therefore no more right in the council to keep in their own pockets the amount retained from the dividends than there was in the case cited, and that in both cases the public authority merely collected for the Crown, and cannot discharge themselves except as provided by section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888, by showing that the payment of dividend was itself made out of profits or gains brought into charge, which in the circumstances they cannot do. The contention on the other side is that the case is distinguishable from *Aberdeen Commissioners* v. *Russell,* inasmuch as in that case the borrowed money, which represented the cost of the buildings assessed, was not charged upon the buildings, but only upon the rates, whereas here there is a charge upon the property itself for interest greatly exceeding its annual value; that in point of fact there was no taxable annual value in the property at all in the hands of the council inasmuch as the charge far exceeded the benefit enjoyed; and that therefore the council, in recouping themselves, as they have done, to the amount that they had been compelled to pay under Schedule A, could not be called upon to hand the sum back to the Crown, who had already received from them an equivalent sum under Schedule A, to which they had no right. It is clear from the decision of the House of Lords in *London County Council* v. *Attorney-General* that income tax under Schedule A can be deducted as well as under Schedule D, and it is equally clear from section 60, rule No. IV., sub-rule 10, as explained by Lord Davey in that case, that the real income of an owner of incumbered property is the annual income of the property less the interest on the incumbrance, and that the Crown cannot demand the tax twice on the same income. It follows therefore that the Crown, having received income tax once under Schedule A on the full annual value of the property in question, can have no possible right to receive it a second time. It is true, as contended by the Crown and pointed out by Channell, J., that the London County Council have in fact been obliged to find out of the rates the sum of £118,000, which is treated as the annual value of their occupation, and that in that sense the dividend out of which income tax has been deducted has been paid out of a fund not "brought into charge" within section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888. But it was out of that fund that they had already paid the income tax assessed on them under Schedule A, and the substance of the matter is that there is no further sum due from them to the Crown. The appeal must be dismissed.

Appeal dismissed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitor for the defendants, *W. A. Blaxland.*

High Court of Justice.

Chan. Div. Kekewich, J. } April 12, 13, 14; May 10.

BONNARD v. DOTT. (a.)

Money-lending—Business—"Primary object"—Company promoting—Advancing money—Bonus of shares—Impecunious person—"Harsh and unconscionable bargain"—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 6.

When a lender is in the habit of lending money to impecunious persons who are engaged in promoting companies and taking shares in such companies from them by way of bonus for so doing, without the money so advanced being necessarily lent to facilitate the promoting of such companies, such a lender is a "money-lender" within the meaning of the Money-lenders Act, 1900.

Where the amount of such bonus has no ascertainable relation to the accommodation rendered, but is fixed arbitrarily with more regard to the necessities of the borrower than the risks which the vendor runs, the court will order the transactions to be reopened, on the ground that they are "harsh and unconscionable."

Witness action.

The plaintiff sought to set aside certain transactions

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

in regard to loans which he had had from the defendant on the ground that they were harsh and unconscionable under the Money-lenders Act, 1900.

The defendant described himself as a colliery proprietor, a director of public companies, and a speculator in mining shares. He had no office of his own, but had a seat in his brother's office. He was not registered as a money-lender under the Act of 1900, and alleged that his money-lending was only incidental to and in connection with his company promoting and speculation in shares, and that he was not a "money-lender" within the meaning of the Money-lenders Act, 1900.

By section 6 of that Act: "The expression money-lender . . . shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include . . . (*d*) any person *bonâ fide* carrying on the business of banking or insurance, or *bonâ fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money."

The plaintiff was a company promoter and an undischarged bankrupt.

In 1903, being in need of money, the plaintiff borrowed £50 from the defendant, and subsequently further sums were advanced by the defendant to the plaintiff, the total sums so borrowed amounting to £940.

For these advances the plaintiff gave the defendant various promissory notes and bills of exchange. These notes and bills were renewed from time to time, and ultimately, in June, 1904, the plaintiff gave the defendant two promissory notes for £840 and £200 at two months, making together a sum of £1,040, the £100 in excess of the debt being a cash bonus to the defendant. In addition the plaintiff also gave by way of bonus or consideration for these loans and renewals, 1,100 shares in the Manica Copper Co. (Limited) and 3,700 shares in the Daylesford Gold Mine (Limited), and an undertaking to deliver 4,800 shares in the Victorian Cornish Gold Mines (Limited). The plaintiff valued these shares at £5,000, but the defendant disputed this valuation and alleged that these shares were practically valueless at the time he received them.

The plaintiff now brought this action for relief under the Money-lenders Act, 1900, on the ground that the transactions were harsh and unconscionable, and praying that they might be reopened, and that he might be relieved from payment of any sum in excess of what might be adjudged by the court to be fairly due from him to the defendant for principal, interest, and costs, and claimed an order for the return to him of the shares and the undertaking to deliver on his submitting to pay what should be adjudged to be fairly due from him to the defendant.

P. Ogden Lawrence, K.C., Gore-Browne, K.C., and *Vernon*, for the plaintiff.—The defendant is a money-lender as defined by the Act, and does not come within the exceptions mentioned in section 6. His business was really money-lending, and not dealing in shares. These transactions are harsh and unconscionable having regard to the relations between these parties, the necessities of the plaintiff, and the fact that he was wholly in the defendant's power, and the fact that these bonuses as given have no ascertainable relation to the value of the advances made.

Robson, K.C., and *J. B. Mathews*, for the defendant.—These advances were all made in connection with companies which the plaintiff was promoting, and with trafficking in shares. The defendant is within exception (*d*) of section 6 of the Act. Having regard to the risks run by the defendant the bonuses which he received were not excessive, and the court will not interfere.

April 15.—KEKEWICH, J.—On the first question I find that the defendant had lent money again and again, and he wrote letters according to the usage of money-lenders as to the manner born, but that of itself is not sufficient to constitute the defendant a money-lender within the meaning of the Act. To come within the Act he must not merely be a man who lent money, but a man whose business it was to lend money. Was the defendant's business that of money-lending? When asked in the witness box to describe his various businesses he enumerated three. He said that his first business was that of colliery proprietor. That was not naturally connected with money-lending. His second business, he said, was that of director of public companies, but he did not inform the court of what class of companies he was director or what he did in that capacity. I am not sure whether that can be properly described as a business at all. His third business, he said, was that of speculator in mining shares, especially of West Australian shares, and in connection with that business he said that he had from time to time lent money. Assuming that to be so, the defendant might come within the exception (*d*) in section 6. [His lordship read the exception in question, and continued:] That was the defendant's contention. He said: "I carry on the business of speculating in shares of companies, and in connection with that business I from time to time lend money. I do not carry on the business of money-lender." Now I have before me the evidence of a great many gentlemen to whom the defendant had from time to time lent money. I take these cases merely as samples, and I assume that all other cases which have been brought to my notice are of a similar character. They are all of a certain class. The defendant depended upon the character of these transactions to support the view that he came within the exception mentioned in clause (*d*) of section 6 and was not a money-lender. He alleged that he lent money to promoters of companies and in connection with the companies which were being promoted, and that that was the only way in which he lent money. The defendant has no office of his own, but he had a seat in an office belonging to his brother, and he went about the city calling on persons who required assistance and who were concerned in promoting companies, and therefore came within the purview of what he called his business. It was possible that there might be strictly a business such as the defendant described—viz., advancing moneys to persons engaged in floating companies for the purpose of enabling them to float the companies in which they were interested and acquiring the necessary shares. That is just conceivable, though practically speaking I do not think it probable. The defendant wishes the court to understand that that was the only way in which he lent money. But on the evidence I do not find one single transaction of that kind. What the defendant has done is to lend money to persons who, like the plaintiff, were impecunious and wanted money for their own private purposes. It is true that in every case the borrower was concerned in company promoting and was willing to give to the defendant a bonus in shares or an interest in the company which he was promoting as compensation for money advanced, but in every case the money was lent to an impecunious person and was not necessarily lent to facilitate the business of promoting companies. There was no evidence to show that the defendant took pains to see that the money was applied to any such purpose. He advanced money to the needy

borrower and took by way of bonus shares or an undertaking to give shares in some company in which the borrower was interested. He was not carrying on the business of trafficking in shares and lending money in connection therewith, but was carrying on the business of a money-lender and acquiring shares in connection with that business. [His lordship reserved judgment on the rest of the case.]

May 10.—Having concluded at the trial that the defendant carries on business as a money-lender within the meaning of the Act of 1900 (a conclusion which further reflection has abundantly confirmed), it now remains to consider whether the circumstances attending the bargain or series of bargains with the plaintiff are such as to justify the court in reopening the transactions between them. This, of course, depends on the application to the facts of the provisions of the first section of the Act. It is well in the first instance to have clearly before one's mind the positions of plaintiff and defendant and their relation to one another. First as regards the defendant. He describes himself as a director of public companies and a speculator in shares, especially mining shares, and of those more particularly West Australian mining shares. He goes about the city calling on those who need his assistance (they seldom or never call upon him), but preferring, if not exclusively selecting, those who are engaged in promoting companies or have such an interest in their promotion as gives them a title to shares. He advances such men money to meet their urgent needs, taking from them bills over short periods, and by way of remuneration a bonus in the shape of shares. His knowledge acquired as a director and speculator must be invaluable to him in determining what shares he will accept and how many will make a bonus adequate to the advance in each particular case. It may be taken for granted that as he demands no security and is always dealing with impecunious people he satisfied himself before completing a transaction that the shares offered as a bonus have at least a reasonable promise of ultimate value. He keeps a considerable balance available at his bank; but, as usual with his fraternity, always insists on the difficulty of finding the money required, and lends only a small sum at a time. He is urgent in his demands for repayment at the appointed time and does not hesitate to take proceedings to enforce his rights. Turn to the plaintiff. He may be a shrewd man of business, but up to the date of the fall of the curtain on the drama which has been represented before me he has not been successful. He is an undischarged bankrupt constantly in need of money to meet his ordinary expenses, quite at a loss to defray the cost of a sudden demand for medical attendance on his wife and daughter, and, to use his own language, "helpless," "simply in despair," and "beside himself." In November, 1900, he became the tenant to the defendant of an office at the nominal rent of £125, payable monthly. From the first he was unable to pay the rent, and in June, 1901, he commenced borrowing. From that time forward until September, 1904, he continued to borrow, and on each occasion he gave bills which were from time to time renewed. Throughout the period he had no means of meeting, and apparently no prospect of meeting those bills, but it was necessary for him to go on borrowing and renewing, because a rupture with his creditor, the defendant, would have taken him again into the Bankruptcy Court and deprived him of the hope throughout entertained, that the shares which he had or which were coming to him would ultimately prove valuable. His only business seems to have been of this character—viz., he was engaged with others in the promotion of companies, such promotions being effected by forming syndicates. These syndicates brought out the promoted companies, and in remuneration for their services obtained allotment of a large number of shares in such companies, which in due course were distributed among the members of the syndicates. Sometimes there was delay in the allotment, sometimes in the distribution, but time and patience were always required for the realization of the shares. It goes without saying it, that when once these two men were brought together one was entirely under the influence and control of the other. It was the business of the defendant to keep the plaintiff afoot, and it was the urgent need of the plaintiff to be kept on foot on any terms. It was, of course, quite possible for the business of lending and borrowing to be transacted between them on fair terms; but the temptation was great on the one side to exact harsh terms, and there could be no power of resistance. [His lordship referred to the evidence and found as a fact that there was proof of severe and repeated pressure, and continued:] Bearing in mind that the plaintiff had no means of payment, no reasonable prospect of having such means, and no security to offer, the defendant would have been justified in asking or accepting large bonuses, and one must not readily conclude that those actually asked for and accepted were excessive. Before considering whether they were excessive or not, it is well to inquire how they came to be given, because the defendant insists that it was the voluntary act of the plaintiff, and that there was no exaction on his part. It may well be, and probably is, true in the first instance at least, the plaintiff offered a bonus in shares, and the offer may have been made without any suggestion on the part of the defendant. I doubt, however, whether any such offer could be strictly termed voluntary, and I am certain that there was no voluntary offer in the later transactions. Even if the amount of the bonus was fixed by the plaintiff, I have no doubt that it was so fixed because he well knew that nothing less would satisfy the defendant, and that the question whether the amount of any particular bonus was fixed by one or other is merely one of words and not of substance. The bonus given in each case was the price at which the defendant was prepared to furnish the required accommodation. The serious question is whether the bonuses were excessive—that is, out of proportion to the advances made and the risks incurred by the defendant. If the shares were really valueless—that is, if no money could be obtained for them, and there was no reasonable prospect of obtaining any money for them—there can be no question of excess. You cannot arrive at any product by multiplying nothing even indefinitely. It is absurd to suppose that the shares were valueless in this sense. No one can conclude from the correspondence and evidence that the defendant advanced money or renewed bills from mere good nature; he did it as a matter of business. He may have committed gross mistakes in calculation, but he must have calculated that sooner or later he would get something out of the shares, and he must have believed, as of course he hoped, that these mining companies would ultimately prove successful in the sense that their shares would become valuable. On the other hand, it is impossible to believe that the plaintiff would have given away so large a number of shares if he could have then disposed of them at a price which would have brought him sufficient to satisfy his urgent needs, including that of meeting the defendant's demands. The plaintiff has endeavoured to show that the shares, or some of them, were saleable, if not in the market, by negotiation; and no doubt transactions in the

shares took place from time to time. They may be assumed to be valuable now and to have been valuable before writ issued; but I cannot satisfy myself from the evidence that any of the shares were valuable at any particular time covered by the transactions in question in the sense that the shares given as bonus could have been disposed of at a price capable of ascertainment. I am pressed on behalf of the plaintiff with a subscription for Manica shares for a gentleman in good financial position, but it is impossible to accept that subscription as indicating the price obtainable for the shares by any person desiring to dispose of them, and I doubt whether it was really a commercial transaction. On the other hand, it is reasonably clear that the shares had throughout a speculative value, by which phrase I mean that to those who made it a business to speculate in mining shares and to learn the position of mining companies and their properties, those shares possessed the attraction of prospective merit of which there was reasonable anticipation. And I have no doubt that at the dates of the later transactions between the plaintiff and defendant this anticipation was more and more reasonably entertained. The defendant, then, was receiving his largest bonus just when those of earlier dates were promising to be remunerative and there was less reason to insist on them. I believe the plaintiff's evidence, which is consistent with the correspondence and all the circumstances, that the defendant required as a condition of financial assistance a liberal participation in shares. I cannot say that the shares given by way of bonus on any particular transaction were worth a certain amount. I cannot fix their value even approximately, and therefore I cannot conclude that the value of the bonus was out of proportion to the accommodation rendered, but my view is that the defendant demanded and exacted a bonus fixed arbitrarily for his own purposes and without any stated ascertainable proportion to the accommodation rendered. He took advantage of the plaintiff's necessities to insist on appropriating to himself a large number of shares which he hoped and believed would ultimately (and he could afford to wait) turn out to be a successful speculation. Under these circumstances I should be prepared to hold that the amounts charged for these bonuses were "excessive" within the meaning of the Act, but I recognize a difficulty which may press on others more than on myself in the construction of the word "excessive." It may be said to connote a datum point or line, and as I am unable to fix any such point or line it may be said that there is none which is capable of being exceeded. But I have no hesitation in holding that the transactions were "harsh and unconscionable," and that therefore they ought to be re-opened.

It remains to be considered on what terms this should be done. The plaintiff admits having of the defendant sums amounting to £940, and on the last renewed transaction he gave the defendant promissory notes or bills (I am not certain which) for £1,040. The additional £100 represented, according to the plaintiff's statement, a cash bonus to the defendant. That standing alone is not unreasonable, and seeing that the defendant will have to give up the shares he ought to be allowed to retain this. The plaintiff must therefore pay £1,040.

Then comes the question at what rate interest ought to be calculated on the advances. In *Saunders* v. *Newbold*, 53 W. R. 162, [1905] 1 Ch. 260, I allowed the money-lender interest at the rate of ten per cent. and with that the Court of Appeal expressed no dissatisfaction, though perhaps under the circumstances of that particular case it was sufficiently generous. The circumstances here are entirely different, and it would be wrong to compel a money-lender to accept interest at that rate on loans made to a needy person without security. The plaintiff must therefore pay at the rate of twenty per cent., and if the amount cannot be agreed on an account must be directed. The shares must be released. I have not in the above judgment referred to any authorities, because they are of little or no use except as indicating the general view which guides the court, and there is no case the facts of which are at all like this one. The most recent case is *Saunders* v. *Newbold* already mentioned. There is a short note on that in the April number of the *Law Quarterly Review*. With the criticism in that note, not excepting the concluding remarks, I on reflection concur.

It follows that the counterclaim fails, and I think it better altogether to avoid the question raised thereon—viz., whether, insomuch as the defendant is a "money-lender" within the meaning of the Act and has not complied with the provisions of the Act respecting registration, he is competent to sue for debt incurred in a moneylending transaction. The defendant must pay the costs of the action and counterclaim.

Solicitors, *John Vernon, Son, & Stephen; Morton & Patterson.*

Chan. Div.
Warrington, J. } April 3, 4, 14.

ROBINSON PRINTING CO. (LIMITED) v. CHIC (LIMITED). (a.)

Company — Debentures — Receiver — Assets charged by receiver—Receiver agent of debenture-holders—Personal liability of debenture-holders and receiver—Principal and agent.

Debenture-holders were given power to appoint a receiver to take possession of the assets, carry on the business, sell the property, make any arrangements he should think advisable in the interests of the debenture-holders, and apply moneys received to certain specified purposes. But the debentures did not provide that the receiver was to be the agent of the mortgagors. A receiver appointed under this power made an agreement with the plaintiffs whereby he assigned to them book debts of the company in consideration of their doing certain work for the company. Subsequently the debenture-holders appointed another receiver in the place of the first one. The new receiver repudiated the agreement, but offered by letter to pay the plaintiffs for certain work. The work was done but not paid for.

Held (*following* In re Vimbos (Limited), 48 *W. R.* 520, [1900] 1 *Ch.* 470), *that the receiver was the agent of the debenture-holders; that he had authority to pledge the assets in priority to the debentures; that the agreement was a valid assignment of book debts paid to the receiver during his agency so far as was necessary to secure payment to the plaintiffs; that the plaintiffs were, therefore, entitled to have the money received in respect of these debts paid over to them; that the debenture-holders were themselves personally liable to pay the plaintiffs the amount due to them; and that the second receiver was, by the terms of his letter, personally liable to pay for the work thereby ordered.*

This was an action brought against Chic (Limited) for work done, against the receiver of the assets of Chic (Limited) (appointed by holders of debentures of that company), and against the debenture-holders themselves.

The plaintiffs claimed a charge on all advertising

(a.) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

book-debts belonging to Chic (Limited), or to the receiver until the account due to them by the company was paid, and they also claimed that the receiver and the debenture-holders were personally liable to pay the amount due.

The two main questions for decision were, first, whether the plaintiffs were entitled in priority to the defendants O'Malley, Fuller, and Mustart, holders of debentures in the defendant company, to receive certain moneys due from advertisers in a paper called *Chic*; and, secondly, whether the three defendants were personally liable for the moneys due to the plaintiffs.

In May, 1904, the plaintiffs were printing *Chic* for the company upon certain terms expressed in a letter of the 5th of March, 1904. The company had issued debentures to the amount of £4,700, and they were then all held by O'Malley and Fuller; Mustart had since acquired some. The debentures were all in the same form, and contained a charge on the undertaking of the company and on all its property present and future, including its uncalled capital for the time being. The conditions indorsed contained the following material provisions: "(6) The principal moneys hereby secured shall immediately become payable (*a*) if the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing to the company calls in such principal moneys; or (*b*) if an order is made or an effective resolution passed for the winding up of the company. (7) At any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures had concurred in such appointment. And a receiver so appointed shall have power (1) to take possession of the property charged by the debentures; (2) to carry on or concur in carrying on the business of the company; (3) to sell or concur in selling any of the property charged by the debentures; (4) to make any arrangement or compromise which he shall think expedient in the interests of the debenture-holders. And all moneys received by such receiver shall, after providing for the matters specified in the first three paragraphs of sub-section 8 of section 24 of the Conveyancing and Law of Property Act, 1881, and for the purposes aforesaid be applied in or towards satisfaction *pari passu* of the debentures. The first three paragraphs of sub-section 8 of section 24 of the Conveyancing Act, 1881, are as follows: "The receiver shall apply all moneys received by him as follows—namely, (1) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and (2) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and (3) in payment of his commission and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee."

The principal moneys having become payable, the defendants O'Malley and Fuller, on the 21st of May, appointed one Ramsay Colles to be receiver on behalf of the debenture-holders. Colles accordingly took possession of the undertaking and assets of the company and proceeded to carry on the business, the plaintiffs continuing to print the paper.

On the 26th of July a large sum was due to the plaintiffs, and they held some dishonoured cheques and bills of Colles; there was another bill falling due and Colles had no funds to meet it. Under these circumstances the plaintiffs refused to go on printing the paper, or even to deliver the issue of the 30th of July, unless they were paid, and on the 26th of July, 1904, the defendant O'Malley and Colles saw Robinson, a representative of the plaintiffs, with a view to inducing them to continue to print and to deliver the issue of the 30th of July. The result was the writing to the plaintiffs by Colles and O'Malley of the following letter: "Referring to our conversation with your Mr. Robinson this morning I am willing and hereby agree to assign you all advertising book-debts belonging to Chic (Limited), or to me as receiver for the debenture-holders, and I further agree to assign and hereby authorize you to collect the revenue from advertisements in the present week's issue of the paper and each week hereafter until your accounts, both present and future, are cleared. It is understood that the said accounts are collected in the name of Chic (Limited), and that you appoint me one of your agents at 3, Arundel-street, Strand, to receive and give receipts on your account, such remittances to be sent daily to you or paid to your order. As consideration herefor you agree to deliver copies (*sic*) present week's issue immediately, and to deliver all future copies punctually to time arranged, also that you arrange to take up the bills and drafts at present outstanding. It is understood that the amount of the printing and paper (which paper you will supply for the present) will be covered by the advertisement revenue of each issue subject to arrangement or costs of collection. Any difference or dispute as to the meaning or construction of this letter is to be referred to the arbitration of such arbitrator as is agreed upon by Mr. Thomas Robinson and Mr. Wm. O'Malley, M.P., or in the event of any disagreement by the president for the time being of the London Chamber of Commerce. (Signed) Ramsay Colles, receiver for the debenture-holders. I concur in the above arrangement, W. O'Malley." The plaintiffs thereupon consented to deliver, and did deliver, the current issue, and continued to print until the occurrence of the following events:

On the 27th of September the defendants O'Malley, Fuller, and Mustart appointed the defendant Carr to be receiver and manager of the business of the company, and of all its property and effects comprised in the debentures, in the place of Colles.

On the 28th of September the defendant Carr wrote the following letter to the plaintiffs: "Chic (Limited), —I beg to inform you that I have been appointed receiver for the debenture-holders in the above-named company. I also beg to inform you that the letter given to you on the 26th of July last, charging the book-debts of Chic (Limited) to your company, is irregular and cannot be recognized by me, and I have to request you not to make application for any of the said book-debts. The work which you have in hand for the next issue—7,000 copies and 600 posters—I shall be prepared to pay for on the papers being delivered at Arundel-street on Tuesday morning next." The work in hand was duly delivered; but the defendant Carr failed to pay the cost thereof, amounting to £63 0s. 8d., but with his defence he had paid that sum into court with a denial of his liability. The writ was issued on the 14th of October, 1904, and application was made for a receiver of the advertising book-debts. This was refused, but by an order of the Court of Appeal dated the 24th of November, 1904, the defendant Carr was appointed receiver of the advertising book-debts belong to Chic (Limited) existing on the 26th

of September, 1904. The defendant Carr had carried in an account as receiver under this order, and from that account it appeared that at the date of the issue of the writ he had received a sum of £17 17s. in respect of debts becoming payable before the 27th of September.

Levett, K.C., and *Eustace Smith*, for the plaintiffs.

H. Terrell, K.C., and *J. Ashton Cross*, for the company and the debenture-holders.

W. J. L. Ambrose, for the receiver.

WARRINGTON, J., having stated the facts as above, and from whose judgment they are set out, said: The plaintiffs contend, first, that they are entitled to a charge in priority to the debentures on all the advertising book-debts covered by the letter of the 26th of July, with necessary ancillary relief, including payment by the defendant Carr of the £17 17s. as moneys of the plaintiffs in his hands at the date of the issue of the writ. They contend, secondly, that the three debenture-holders are personally liable for the moneys due to the plaintiff on the footing that Colles was their agent and had authority to pledge their credit to the plaintiffs. They also contend that Carr is personally liable for the £63 0s. 8d. The plaintiffs' first contention involves the consideration of the position of the receiver appointed under the debentures, whose agent he was, and what was the extent of his authority, and, also, the true construction and effect of the letter of the 26th of July. First, then, as to the position of the receiver. There is no general rule of law which is of any assistance. In *Jefferys v. Dickson*, (1866) 14 W. R. 322, L. R. 1 Ch. 183, 190, Lord Cranworth, L.C., said: "A receiver who has been appointed by a mortgagee under the ordinary power for the purpose is in possession as agent, not of the mortgagee, but of the mortgagor, and it cannot be that the mortgagor, if his agent is receiving and misapplying the rents, has no means of calling him to account without paying off the mortgage. It may be that he could not make the mortgagee party to a bill against the receiver without offering to redeem; but if that be so it must follow that he might file a bill against the receiver alone, treating him as his agent, bound to account for all his receipts after keeping down the interest due to the mortgagee. And this may well be; for though it is the mortgagee who in fact appoints the receiver, yet in making the appointment the mortgagee acts, and it is the object of the parties that he should act, as agent for the mortgagor. He, as agent for the mortgagor, appoints a person to receive the rents, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions are supposed to emanate, not from the mortgagee, but from the mortgagor, and the receiver, therefore, in the relation between himself and the mortgagor, stands in the position of a person appointed by a deed to which the mortgagee was no party." The Lord Chancellor is there dealing with a receiver appointed under the ordinary power—that is to say, either by the mortgagor himself in pursuance of provisions in the mortgage deed, or by the mortgagee under similar provisions, or under the Act then subsisting—namely, Lord Cranworth's Act. In all these cases there was an express provision that the receiver should be the agent of the mortgagor: see the remarks of Rigby, L.J., in *Gaskell v. Gosling*, [1896] 1 Q. B. 669, 692, 44 W. R. Dig. 132. This case, therefore, and, for similar reasons, *Owen & Co. v. Cronk*, [1895] 1 Q. B. 265, 43 W. R. Dig. 147, and *Gosling v. Gaskell*, 46 W. R. 208, [1897] A. C. 575, are of no assistance to me in deciding the question now before the court. I now turn, therefore, to the construction of the debenture, and notice the following points: The receiver is appointed receiver of the property charged. His appointment is to be as effective as if all the debenture-holders had concurred. He is to have power not only to take possession of the property and to carry on the business, but he is to sell the property comprised in the debentures. He may make arrangements in the interests of the debenture-holders; and, finally, any moneys in his hands are to be applied in satisfaction of the debentures. If he exercises his powers to sell it must be by virtue of and for the purpose of realizing the charge created by the debentures. The business is carried on for the sole benefit, so far as the provisions of the document are concerned, of the debenture-holders, and in my opinion, having regard to all the points I have mentioned, he is their agent. I think he is also for some purposes the agent of the company, and certainly to such an extent as may be necessary to enable him to exercise the powers conferred upon him by the debenture. I am glad to be supported in the view that the receiver is the agent of the debenture-holders by the judgment of Cozens-Hardy, L.J., in *In re Vimbos (Limited)*.

Next, as to the extent of the receiver's authority. Appointed as he was by the debenture-holders as their own agent, and authorized to make such arrangements as he might think expedient in their interests, I am of opinion that he had authority to pledge the assets in priority to their charge, if, as in the present case, he thought it desirable so to do to ensure the effectual carrying on of the business, and, further, so far as the authority of the company was required to make such charge effectual, he had their authority.

I now come to the letter of the 26th of July. If I am right in the views I have expressed, the receiver had power to dispose of debts due to the company, and the date of his appointment, and those subsequently becoming due to himself as agent of the debenture-holders during the continuance of his agency, but he would have no authority to dispose of debts becoming due to a subsequent receiver. In my judgment the true effect of the letter of the 26th of July is to assign in equity to the plaintiffs the debts of which he had power to dispose to such an extent as was necessary to secure payment of the moneys then due and thereafter to become due to them. The plaintiffs are therefore entitled to a declaration substantially in accordance with paragraph 1 of the claim—namely, to receive the advertising book-debts belonging to Chic (Limited), or to the receiver for the debenture-holders, and to revenue from advertisements until the account due is paid, limited to debts existing on the 27th of September, 1904, and to ancillary relief. Secondly, as to the personal liability of the debenture-holders. The receiver is their agent; he is authorized by them to carry on a business on their behalf and for their benefit; according to principles of law recognized in *Cox v. Hickman*, (1860) 8 H. L. C. 268, 304, 306. The principals are in such a case liable for debts properly incurred in the ordinary course of the business in question. The original contract of the 5th of March was, I think, determined by the change of personality involved in the appointment of the receiver, and the subsequent employment of the plaintiffs was a fresh contract between them and the receiver, and they are entitled to look to the debenture-holders for payment. As regards Mustart, however, I do not see how he can be liable for any debt incurred before he became a debenture-holder. There must therefore be an order against the defendants O'Malley and Fuller to pay to the plaintiffs the amount of their claim when ascertained, and

against the defendant Mustart a similar order confined to so much of their claim as arose since he became a debenture-holder.

As to Carr, the letter of the 28th of September contains, in my opinion, a personal promise to pay, and the £63 0s. 8d. must, therefore, be paid out to the plaintiffs. The defendant Carr has also admitted by his account that he had in his hands at the date of the writ £17 17s., which, according to the views I have expressed, should have been paid to the plaintiffs. There must be an order on him to pay this sum. I do not see how I can make any distinction in the matter of costs, and there must be an order on the defendants generally to pay the costs.

Solicitors, *Claudius George Algar; H. Nelson Paisley.*

Chan. Div.
Warrington, J. } April 6.

CORPORATION OF SUDBURY *v.* EMPIRE ELECTRIC LIGHT AND POWER CO. (LIMITED). (*a.*)

Electric lighting—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *s.* 11—*Contract by undertakers—Local authority named as undertakers—Provisional order—Transfer of powers—Consent of Board of Trade—Local government.*

A corporation obtained a provisional order for the supply of electrical energy within their district. They entered into an agreement with the defendant company which provided that the company should construct all necessary works for the manufacture, supply, and distribution of electricity within the area of supply, and should manufacture, distribute, and supply electricity therein. Nothing in the agreement was to be deemed to transfer to the company any powers which the corporation were by the order or by the Electric Lighting Acts, 1882 *and* 1888, *prohibited from transferring. No application was made to the Board of Trade to sanction this agreement. The company did not construct the works, and the corporation brought an action against them for damages for breach of contract.*

Held, that the first part of section 11 *of the Electric Lighting Act,* 1882, *only authorized a corporation which had obtained a provisional order for the supply of electricity to enter into contracts for the construction of works and for the supply to itself of electricity. That the second part of the section prohibited corporations and others who had obtained orders from transferring them or divesting themselves of any legal powers given to them, or any legal liabilities imposed on them by the Act or the orders, without the consent of the Board of Trade. That the agreement was on its true construction a transfer of the duties and liabilities of the plaintiff corporation to the defendant company, and that it was therefore prohibited by the section and could not be enforced.*

In 1900 the Corporation of Sudbury obtained a provisional order from the Board of Trade authorizing them to supply electrical energy within their district, and confirmation was obtained by the Electric Lighting Orders Confirmation Act, 1900.

By clause 2 of that order the provisions contained in the schedule to the Electric Lighting (Clauses) Act, 1899 (with the exception of sections 83 and 84 of that schedule), were incorporated with the order.

Clause 3 provided that the undertakers, for the purposes of the order and within the meaning of section 2 of the schedule to the Act of 1899, were the corporation.

By clause 5, subject to the provisions incorporated with the order, the undertakers were specially authorized to break up streets not repairable by the local authority.

Clause 6 stated that the names of the streets throughout which the undertakers were to lay mains within two years after the commencement of the order were mentioned in the third schedule to the order.

Clause 7 said that the maximum prices which might be charged by the undertakers, as mentioned in section 32 of the schedule to the Act of 1899, were those stated in the 4th schedule to the order.

And by clause 9 the order was to come into force upon the day when the Act confirming the order was passed.

On the 18th of October, 1902, the corporation wrote to the Board of Trade that they desired to enter into an agreement with a company for carrying out the order and asked their sanction.

On the 23rd the board replied that they did not appear to have any authority to sanction such an arrangement, and subsequently asked to be informed of the terms of any arrangement made.

On the 30th of May, 1904, the corporation entered into an agreement with the defendant company, which recited the order, and that under section 11 of the Electric Lighting Act, 1882, the corporation had power to contract with the company on the terms thereinafter contained.

Clause 4 of the agreement provided that the company were to pay all the expenses. The corporation were to be under no obligation to pay any money, and were to be in the same position as regards pecuniary liability as if the order could be and had been lawfully transferred to the company with the consent of the Board of Trade, and the corporation had been discharged from all liability.

Clause 14: In breaking up the streets the company were to observe the provisions of the Electric Lighting Acts as if they, and not the corporation, were the undertakers under the order; and they were to indemnify the company against any compensation expenses caused in that way.

Clause 27 provided that nothing in the agreement was to constitute a lease or partnership or general agency between the parties, or "to transfer to the company any powers or to create any relationships between the corporation and the company which the corporation are prohibited from transferring or creating by the order and the Electric Lighting Acts, 1882 to 1888, and particularly by section 11 of the Act of 1882, the intention being for the corporation to give to the company every facility in their power for carrying out this agreement without transferring or assigning any of their powers or duties under the order."

The material clauses of the agreement are set out in the judgment of Warrington, J.

No application was made to the Board of Trade to sanction this agreement.

The company never commenced the construction of the works, and on the 14th of October, 1904, the corporation served them with formal notice to enter into the bond (provided in clause 7) within twenty-one days, and warning them that if this were not done they would, under clause 28, determine the agreement and enforce payment of the £2,000 provided in clause 7 as security for carrying out the provisions of the agreement.

The notice was not complied with, and the corporation brought this action against the company for a

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

declaration that the agreement had been validly determined by the corporation, and that the sum of £2,000 was payable by the company to them as liquidated damages.

The company set up (*inter alia*) the defence that by the agreement the corporation purported to transfer to them the powers and liabilities given to and imposed on them by the provisional order and the Electric Lighting Acts, and that the agreement, having been entered into by the corporation without the consent of the Board of Trade as required by section 11 of the Act of 1882, was null and void.

E. P. Hewitt and *F. E. Farrer*, for the plaintiffs.—The refusal of the Board of Trade to sanction the contract of 1902 was understood to mean that an agreement of this sort did not require their sanction, provided the powers and liabilities of the corporation were not transferred to the company so as to bring it within the latter part of section 11 of the Electric Lighting Act, 1882. This agreement was carefully drawn with the express object of not transferring any of these things to the company.

G. Cave, K.C., *J. Rolt*, and *Tyldesley Jones*, for the company, were not called upon to argue.

WARRINGTON, J.—This is an action brought by the Corporation of Sudbury against an electric supply company, to recover damages for breach of an agreement dated the 30th of May, 1904. The defence is that the agreement was an illegal agreement, one into which the corporation were prohibited from entering by the 11th section of the Electric Lighting Act, 1882. In the year 1900 the Corporation of Sudbury were promoting a provisional order intended to confer upon them the power of lighting their borough by electricity. The Electric Lighting (Clauses) Act of 1899 contains in its schedule the regulations and provisions which prior to that time were usually inserted in the electric lighting orders. There is one point which comes up in every part of those regulations, and that is the distinction between cases in which the local authority are the undertakers and cases in which persons other than the local authorities are undertakers. That is a distinction which has a prominent part in the schedule to the Electric Lighting (Clauses) Act, 1899. It is clear, therefore, that Parliament in dealing with these matters drew a strong distinction between the class of cases in which the local authority itself undertakes the duty of lighting its town or district and where the duty is undertaken for its own profit by some outside person or company.

Now I will read the 11th section of the Act of 1882, on which this question turns. The first part of it deals with one, and one only, of the two classes of cases which I have just mentioned—namely, that in which the local authority is the undertaker. It provides this: "Any local authority who have obtained a licence, order, or special Act for the supply of electricity may contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply, or for the supply of electricity within any area mentioned in such licence, order, or special Act, or in any part of such area; but no local authority, company, or person shall by any contract or assignment transfer to any other company or person or divest themselves of any legal powers given to them, or any legal liabilities imposed on them by this Act, or by any licence, order, or special Act, without the consent of the Board of Trade." Now, what is really the meaning of the first part, which relates to local authorities only? What does it empower them to do? It first describes the person to whom the authority is to be given as the local authority who have obtained an order for the supply of electricity. Now that means an order for the supply by itself to its district of electricity; and it enables that authority to contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply—that is, for a supply by the local authority. It is still the local authority who are the persons supplying the electricity. All that this part of the section enables them to do is to contract with persons for the construction of works and the execution and maintenance of works enabling the local authority to carry out their undertaking of supplying electricity. That is the first thing. The next sentence relates to a different matter. It may be that the local authority find it convenient not themselves to construct generating stations and so forth. In that case they may make contracts with other persons for the supply of the electricity. That only means that the local authority who are the undertakers may buy the current in bulk or in some other way according to the terms of the contract from the outside person or company.

The second part of the section, which deals not only with local authorities but with both the classes to whom provisional orders may be granted, prohibits the undertakers by any contract or assignment from transferring to another company or person, or divesting themselves of any legal powers given to them or any legal liabilities imposed on them by the Act without the consent of the Board of Trade. Now take the case of a local authority. It seems to me that the section means that the power which the provisional order gives to the local authority of itself supplying the district with electricity is not without the consent of the Board of Trade to be put into the hands of any other company or person.

I now come to the facts of this particular case. The Sudbury Corporation got their order, and it was confirmed by Act of Parliament on the 25th of June, 1900. They could not, or were unwilling to, carry out the supply to the borough themselves, and after considerable delay, on the 30th of May, 1904, they made the agreement in question. That agreement recites that the corporation, being the local authority, have obtained a provisional order, and that it was confirmed, and that "in pursuance of the powers granted in that respect by section 11 of the Electric Lighting Act, 1882, the corporation have power to contract with the company for the execution and maintenance of the works needed for the purposes of the supply of electricity within the area mentioned in the order and for the supply of electricity therein on the terms and conditions hereinafter contained." That follows the exact words of section 11. Whether they have the power to contract for the things which they there mention "on the terms and conditions hereinafter contained" is the question I have to determine.

Then the agreement provides, by clause 1, that the company are within a certain date to "commence to construct, erect, provide, and equip all necessary works, and provide and lay and fix all necessary things for the manufacture, supply, and distribution of electricity within the area of supply," and to complete the same in accordance with the order, the Acts, and the regulations of the Board of Trade within a certain period.

Then: "From that date and until the purchase by the corporation hereinafter mentioned, or the determination of this agreement under the powers or in the circumstances herein mentioned, will manufacture, distribute, and supply electricity for, to, and within the said area of supply, and the several persons, companies, and bodies who shall be entitled to the same

for use therein, and will during the continuance of this agreement and until such purchase continue such manufacture, distribution, and supply, and in all of the said matters aforesaid, and in all other respects as between the company and the corporation, carry out the provisions of the said order as fully as if the company were the undertakers thereunder, except as in this agreement is otherwise provided." By the terms of that clause, if there was nothing else in the agreement, it seems to me plain that not only is the company to construct the necessary works and supply the electricity, but they are to carry on the business. They are to do that which the provisional order authorized the corporation to do. Then clause 3 is somewhat important: "The company shall, whilst they manufacture and supply electricity in the said area under this contract, be entitled for their own benefit to the revenue and receipts to be derived from the installation and supply of electricity within the said area of supply," thus apparently realizing that they might be unable to treat themselves as regards third persons as the undertakers. Then the clause goes on to provide that if legal proceedings are required the corporation shall take them, but that the moneys that may be received by the corporation in respect of electricity supplied by the company under this agreement "shall be held by the corporation to the use of and be paid to the company: subject nevertheless to the deductions of any costs or expenses incurred in respect thereof or due to the corporation in respect of any other matter under this agreement."

Then comes clause 4, which is a very important clause: "The company shall pay all costs, charges, and expenses whatsoever of and in connection with the manufacture, supply, and distribution of electricity within the said area and of the collection and recovery of the revenue and receipts arising from the sale of electricity—and all rates, taxes, assessments, outgoings, duties, charges, impositions, and liabilities whatsoever, it being the true intent and meaning of these presents that (subject to the provisions of clauses 8 and 9 hereof) the corporation are not by reason of these presents or of anything herein contained or done or omitted hereunder to be under any obligation to pay any money whatever or to incur any liability to any one, and are to be in the same position as regards pecuniary liability as fully and effectually as if the order could be and had been lawfully transferred to the company with the consent of the Board of Trade and the corporation had been discharged from all liability thereunder." Now, if words mean anything they mean that as between these parties the corporation intended to transfer or to do that which would have the same effect (perhaps that is the better way of putting it) as a transfer with the consent of the Board of Trade.

His lordship, after referring to a number of other clauses and passing over a number of clauses as being unimportant, read clause 22: "The company shall conduct and manage the said business of manufacture, distribution, and supply so as not to cause any injury, loss, damage, or nuisance or annoyance to persons or property whether in the neighbourhood of the works or otherwise, and so as not to render the corporation liable to any injunction or order or to render the said supply liable to be stopped by any injunction or order," and so on, again treating the business as being that of the company and not of the corporation. Clause 26 is also of importance. That provides: "The corporation hereby authorize the company to give, if necessary, in the name of and as agents for the corporation, all notices which by the order are authorized or required to be given to public and local authorities and to persons, companies, and consumers for the purpose of and in accordance with the order. If any notice has to be served by or through the corporation the company shall draw up the same and all necessary plans and forward the same to the corporation, and the corporation will then serve the same accordingly and the company will pay any expense incurred by the corporation in relation thereto." Then, again, any power which the corporation have of giving notices is by the clause transferred to the company. [Referring to clause 27, set out above, his lordship said:] It is an attempt by the parties to get out of the difficulty which the whole tenor of the agreement has created. It seems to me, if you take the agreement as a whole and see that it does transfer "powers or duties under the order," it is impossible to give any effect to a statement by the parties that nothing shall be deemed to do so. If the agreement does transfer them it does transfer them. That clause is merely a statement that as between themselves, so far as they are capable of contracting, it shall not be treated as transferring or assigning any of their powers or duties. If the agreement in fact does it, I do not think I can give any effect to the declaration that they do not intend to do it.

The agreement is a very long one, but there is nothing else I need refer to except the last clause, and only to the provision that the corporation may after a certain time compulsorily purchase not only the buildings, machinery, lines, plant, and so on, but the goodwill of the business. If anything were wanted to confirm the remarks which I made on the first clause of the agreement, it is supplied by this last clause. It is obvious that the idea of both parties was to transfer the entire business of supplying electricity to the town of Sudbury from the corporation, who had obtained parliamentary powers, to the company, and to do so without the consent of the Board of Trade.

That makes it unnecessary to consider any further question. This agreement is prohibited by the Act and cannot be enforced. Therefore the action must be dismissed with costs.

Solicitors, *Belfrage & Co.*, for *W. Bayly Bennett*, Town Clerk of Sudbury; *Le Brasseur & Oakley*.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) — May 13.

JELKS v. HAYWARD.
HACKNEY FURNISHING CO., CLAIMANTS. (a.)

County court—Hire-purchase agreement—Wrongful seizure by high bailiff of goods taken in execution.

A hire-purchase agreement contained a clause whereby the owners had the right, without previous notice, to determine the hiring and retake possession of the furniture if it should at any time be seized in execution. It was seized in execution by the high bailiff of a county court, and, no claim having been made, it was sold and delivered to the purchaser, and the proceeds paid into court. Interpleader proceedings were taken by the owners, who only heard of the seizure after the sale was complete, and the execution creditor during those proceedings admitted the title of the claimants, who gave a notice

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

claiming damages against the high bailiff for alleged conversion of the furniture by selling it.

Held, that the claimants, inasmuch as they were entitled to possession of the furniture from the time of its being taken in execution, could recover damages from the high bailiff by reason of his act of conversion in selling.

Appeal from the decision of the judge of the Southend County Court.

By a hire-purchase agreement dated the 25th of March, 1904, in respect to certain articles of furniture, the claimants (Hackney Furnishing Co.) agreed with the defendants that they should have the right to determine the hiring and retake possession without notice in the event of the said furniture being taken in execution.

On the 7th of June the high bailiff levied execution upon the defendant's goods, including the said furniture, under a warrant of execution dated the 1st of June issued in respect of the plaintiffs' judgment debt recovered on the 18th of April.

On the 18th of June the goods were sold under the execution and proceeds paid into court. The claimants heard of this matter for the first time on the 19th of June, and on the 21st of June gave formal notice claiming the proceeds.

Upon the application of the high bailiff an interpleader summons was issued, and in the course of the proceedings taken thereon the judgment creditor admitted the title of the claimants. They then gave notice under ord. 27, r. 8, of the County Court Rules claiming damages from the high bailiff for that he "seized and took away the goods and chattels, the property of the claimants, and converted them to his own use."

The learned county court judge gave judgment for the claimants, and the high bailiff appealed.

Montague Lush, K.C. (*Edge* with him).—The crucial point in the judgment of the learned county court judge is where he holds that by the seizure the hirer lost all right of property and possession in the goods, and that therefore the sale was tortious. That is erroneous (1) under the hiring agreement, (2) under the County Courts Act, 1888. The important clause of the agreement is clause 7. The high bailiff did not commit a conversion by seizure. There was no termination of the hire till after the seizure. The goods were in the custody of the law for the purpose of the sale, and the high bailiff cannot commit a tort by sale: County Courts Act, 1888, s. 156. The high bailiff seized the hirer's goods. At the moment of the seizure the claimants had no right to the possession of the goods. Therefore there was no tort by the seizure, and as there is a statutory duty to sell there cannot be a tort by selling. In *Crane* v. *Omerod*, [1903] 2 K. B. 37, 51 W. R. Digest 44, the point was not taken that the original seizure of the high bailiff was lawful; it was conceded that it was wrongful. The reasoning in *Goodlock* v. *Cozens*, 45 W. R. 369, [1897] 1 Q. B. 348, applies to the present case.

W. de B. Herbert (*Foote, K.C.*, with him), for the respondents.—Immediately the high bailiff seized the goods the respondents were entitled to their possession: *Florence* v. *Mullinson*, 3 Q. B. D. 484. They were therefore entitled to maintain trover. In *Pain* v. *Whittaker*, (1824) Ry. & Mood. 99, there was no defeasance clause, and in *Dean* v. *Whittaker*, 1 C. & P. 347, there was no sale. *Manders* v. *Williams*, 4 Exch. 339, shows that the tort was committed by the sale and delivery. *Goodlock* v. *Cozens*, 45 W. R. 303, [1897] 1 Q. B. 348, and *Crane* v. *Omerod* turned upon the opening words of section 156 of the County Courts Act, 1888. [KENNEDY, J., referred to *Bradley* v. *Copley*, 1 C. B. 685.] In that case there was no demand for possession, and no right to seize the goods till default in payment and demand.

Lancashire Wagon Co. v. *Fitzhugh*, 6 H. & N. 502, was also referred to.

Edge, in reply.—The respondents were not entitled to take possession until they had exercised their option under clause 7 of the agreement. That they did not do.

Lord ALVERSTONE, L.C.J.—I have come to the conclusion that we ought not to interfere with the decision of the learned county court judge. The right to the possession of the furniture depended upon the terms of the hire-purchase agreement. I adhere to the view which we expressed in *Crane* v. *Omerod* that there is no special privilege in favour of a high bailiff which does not apply in the case of a sheriff. Apart from the question raised under section 156 of the County Courts Act, 1888, it is contended that proceedings against the high bailiff are not maintainable, because although the property was in the claimants, the goods were held under an agreement which gave the claimants the right to determine the hiring and retake possession without notice upon their being seized in execution. After considering the authorities dealt with by the county court judge in his judgment, I have come to the conclusion that in this court we must hold that if the high bailiff sells goods of which the owner is entitled at the time of sale to retake possession he is liable in trover. It is unnecessary for me to deal at length with the string of cases cited, because the county court judge fully recognizes that if it were a mere question of seizing the goods and holding them the high bailiff might be protected, inasmuch as up to a certain point the owner of the goods was not entitled to possession. I need only refer to the passage of Bayley, J., in *Dean* v. *Whittaker* in which he said that the sheriff might have sold the interest of the judgment debtor in the goods. Having recognized that to be the law, the county court judge dealt with the cases of *Bradley* v. *Copley* and *Manders* v. *Williams*. To my mind the effect of the decision in the latter case is that if at the time of the sale the owner is entitled to take possession the sale is an act of conversion as against him, and I am unable to see that the right to sue in trover depends upon any notice to the sheriff or the high bailiff. It is a branch of the general law that the sheriff seizes and sells goods at his peril, and I see no reason why a county court bailiff is in any better position in that respect than the sheriff. Reference was also made to *Bradley* v. *Copley*, which, when carefully examined, seems to me to differ from *Manders* v. *Williams*, because although there had been a sale there had been no demand entitling the owner of the goods to resume possession. That must, I think, be the true distinction between the cases, because in *Manders* v. *Williams* Parke, B., when dealing with *Gordon* v. *Harper*, 7 T. R. 9, and *Bradley* v. *Copley*, recognized that a person not entitled to possession cannot maintain trover, and then went on to say that inasmuch as the owners of the casks were entitled to their possession when they were empty the right of possession reverted to them, and the person in whose actual possession they were was in the position of a mere bailee during pleasure and the action could therefore be brought by the bailor. It has been suggested during the present argument that the fact that the hirer was going to pay for the goods made a distinction, and that the rule was not the same where the person in possession was not a gratuitous bailee during pleasure. In my opinion that fact cannot make any real difference

if by the terms of the hiring agreement there is the right to take possession.

Reliance was placed upon the sections of the County Courts Act, 1888, dealing with the rights and duties of high bailiffs; but no particular section could be pointed out affording any protection other than section 156, which was discussed in *Goodlock* v. *Cozens*. I think that the view of that case which we took in *Crane* v. *Omerod* was correct. All that the court decided was that where the procedure of section 156 had been followed, and the claimant, having given a notice of his claim pursuant to that section, afterwards failed to fulfil the conditions imposed by that section upon a claimant, it was not for him to say that the sale was wrongful, and that the purchaser did not acquire a good title to the goods sold. There is nothing in that decision which conflicts with the general principle that if a sheriff or a county court bailiff sells goods under an execution which are not in fact the goods of the execution debtor, and if the true owner has a right to take possession of these goods, the sheriff or bailiff is liable in an action in trover. For the reasons which I have given this appeal must be dismissed.

KENNEDY and RIDLEY, JJ., concurred.

Appeal dismissed.

Solicitors for appellant, *Todd, Dennis, & Lamb.*

Solicitors for respondents, *Syrett & Sons.*

[THE END.]

Weekly Reporter, Sept. 2, 1905.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1904, TO THE 12TH OF AUGUST, 1905.

VOL. LIII.

LONDON: 27, CHANCERY LANE, W.C.

1905.

A DIGEST

OF ALL THE

CASES DECIDED IN ENGLAND,

FROM

THE 24TH OF OCTOBER, 1904, TO THE 12TH OF AUGUST, 1905,

AS REPORTED IN

VOL. LIII. OF THE WEEKLY REPORTER, 1904-1905;

AND IN

CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; K.B.D., the King's Bench Division; BKCY., the King's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1905, *as well in this Volume* (53) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

ACCUMULATIONS:—

Infant—Maintenance—Contingent legacy—Legacy from parent to child—Contingent life interest—Right to surplus income and accumulations—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-sections* 1, 2, *and* 3.—A legacy given by a testator to his infant child, made contingent on the infant attaining twenty-one, bears interest for the maintenance of the infant, if, and for such period as, no maintenance is expressly provided. But all that the infant is entitled to have is maintenance, and he does not take any immediate vested interest in the income, so that should there be a surplus not required for maintenance, the surplus does not become the property of the child or pass to his personal representative if he dies a minor, but is regarded as an accretion to the *corpus* of the contingent legacy. Nor does the setting apart of a fund by the testator to answer the contingent legacy alter the character of the child's interest therein, but subject only to the right of maintenance thereout of the child, the income of the fund so set apart ought to be accumulated and added to *corpus.*

Consequently where a life interest in a legacy was given to a child, contingently on such child attaining twenty-one, the child was held entitled only to the income of the ultimate fund arising from the original fund and the surplus accumulated fund combined. By sub-section 2, of section 43, of the Conveyancing Act, 1881, the persons for whose benefit surplus income, after providing for maintenance is to be accumulated, are the persons who become entitled to the *corpus* of the fund set apart.

In re Scott, 50 W. R. 454, [1902] 1 Ch. 918, overruled.—BOWLBY, RE, BOWLBY *v.* BOWLBY, *C.A.*, 270; [1904] 2 Ch. 685; 73 L. J. Ch. 810; 91 L. T. 573.

ADULTERATION:—

1. *Article purchased for test purposes—Time for instituting prosecution — Information within time specified—Issue of summons after time—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-section* 1.—By section 19 (1) of the Sale of Food and Drugs Act, 1899, where any article of food or drug has been purchased for test purposes, a prosecution under the Act shall not be instituted after the expiration of twenty-eight days from the time of purchase.

Held, that the prosecution was "instituted" if the information was laid within twenty-eight days, and that a summons, though not issued until after that time had elapsed, was not too late.

Beardsley v. *Giddings*, [1904] 1 K. B. 847, considered. — BROOKS *v.* BRADSHAW, *K.B.D.*, 13; [1904] 2 K. B. 798; 73 L. J. K. B. 839; 91 L. T. 535.

2. *Institution of prosecution—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 54), *s.* 19 (1).—By section 19 (1) of the Food and Drugs Act, 1899, it is provided: "Where any article of food or drug has been purchased from any person for test purposes, any prosecution under the Sale of Food and Drugs Act in respect of the sale thereof shall not be instituted after the expiration of twenty-eight days from the time of the purchase."

Held, that the laying of the information was the institution of the prosecution, and not the service of the summons.—BEARDSLEY *v.* GIDDINGS, *K.B.D.*, 78; [1904] 1 K. B. 847; 73 L. J. K. B. 378; 90 L. T. 651.

3. *Margarine in tub in shop—Package—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *s.* 6.—A tub standing at the back of the counter from which margarine is scooped to be supplied to a customer is a "package" within section 6 of the Margarine Act, 1887, and must be marked in accordance with that section.—MCNAIR *v.* HORAN, *K.B.D.*; 91 L. T. 555.

4. *Milk—Analyst's certificate, sufficiency of—Sale of Food and Drugs Acts*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6; 1899 (62 & 63 *Vict. c.* 51), *s.* 4.—*Sale of Milk Regulations*, 1901, 1.—In a prosecution under the Sale of Food and Drugs Acts, 1875 and 1899, the certificate of the analyst is bad for want of sufficiency if it does not indicate the amount, nature, or character of the adulteration; and the fact that the Board of Agriculture, under powers given by the Act of 1899, has published regulations (Sale of Milk Regulations, 1901) prescribing the standard percentage of ingredients in no way removes the necessity to indicate these matters on the face of the certificate. For this purpose it is not sufficient to refer to the particular regulation fixing the standard.

Fortune v. *Hanson*, 44 W. R. 431, [1896] 1 Q. B. 202, extended.—BAYLEY *v.* COOKE, *K.B.D.*, 410; 92 L. T. 170.

5. *Milk—Deficiency in fat—Sold as from cow—Not tampered with or adulterated—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.—The appellant was charged under section 6 of the Sale of Food and Drugs Act, 1875, for selling milk not of the nature, substance, and quality demanded, as such milk contained only 2·81 per cent. of milk fat.

It was proved that there had been no adulteration of or abstraction from the milk, but that the deficiency of fat was due to the cows not having been milked for fourteen hours, and the fat becoming absorbed by the cows. The hours of milking adopted by the appellant were the hours usually adopted in the district.

The justices were of opinion that they were bound to convict by the decision in *Smithies* v. *Bridge*, 87 L. T. Rep. 167, [1902] 2 K. B. 13.

Held, that the justices ought to have considered whether the milk was of the nature, substance, and quality demanded; that, unless the quantity of milk fat which was absent was so large as to point to an abnormal state of things, there was no evidence upon which they could convict under the circumstances. — WOLFENDEN *v.* MCCULLOCH, *K.B.D.*, 92 L. T. 857.

6. *Milk—Demand for sample from churn—No demand for milk—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.—An inspector, having asked the respondent for a sample from certain milk churns, was supplied with such sample, but the inspector made no request in terms to be supplied with milk.

A sample having been given, it was found on analysis to be deficient in milk fat.

Held, that there was no sale to the prejudice of the purchaser within section 6 of the Sale of Food and Drugs Act, 1875.—SANDYS *v.* JACKSON, *K.B.D.*, 92 L. T. 646.

7. *Preserved peas—Sulphate of copper—Injurious to health—Certificate of analyst—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 3.—Under section 3 of the Sale of Food and Drugs Act, 1875, the article of food must be rendered injurious to health by being mixed with some ingredient. It is not sufficient that the ingredient with which the food is mixed is injurious to health.

The certificate of the analyst in the case of an alleged offence under this section is not insufficient if it complies with the form in the schedule to the Act of 1875, merely because it does not state that the ingredient so mixed "rendered the article injurious to health."—HULL *v.* HORSNELL, *K.B.D.*, 92 L. T. 81.

8. *Sample purchased for analysis—Purchase of four packets of an article—Contents of packets mixed together and then divided—Compliance with requirement of Act—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 14.—The appellant, an inspector under the Sale of Food and Drugs Acts, purchased four penny packets from the respondent, a grocer, labelled "Finest cream of tartar; 98 per cent. bi-carbonate of potassium. B.P. 18[illegible]." The packets, which were all similar in size, appearance, and label, were taken by the respondent from the same box. The appellant having emptied out the contents of the four packets and mixed them together, divided them into three parts, sealed them up, and sent one of the sealed packets to the county analyst, who certified that the sample contained lead. At the hearing of an information preferred by the appellant against the respondent, laid under section 14 of the Sale of Food and Drugs Act, 1875, the respondent raised the objection that the appellant had made four separate purchases, as each packet was an article, and that by mixing together the contents of the four packets and then dividing the substance so mixed into three parts the requirements of section 14 had not been complied with. The justices dismissed the information. The inspector appealed.

Held, allowing the appeal, that the objection taken by the respondent was not a good objection.

Mason v. *Cowdray*, 49 W. R. 28 [1900] 2 Q. B. 419, distinguished.—SMITH *v.* SAVAGE, *K.B.D.*, 477; [1905] 2 K. B. 88; 74 L. J. K. B. [illegible]; [illegible] L. T. 775.

9. *Warranty—Milk—Place of delivery—Milk in*

pered with in transit—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51). *s.* 20 (6).—The respondent, a farmer at S., entered into a contract to supply to a retail purveyor at A.-road Station, new milk with all its cream, with a written warranty to that effect. On arrival it was found that the milk had had abstracted 16 per centum of its fat, and upon the retailer being summoned under section 9 of the Sale of Food and Drugs Act, 1875, he showed that it was part of a consignment received at A.-road Station from the respondent with the warranty.

The respondent, having been summoned under section 20 (6) of the Sale of Food and Drugs Act, 1899, for having given a false warranty, while admitting the abstraction of fat between S. and A.-road Stations, proved to the magistrate's satisfaction that at and from the handing over of the milk to the railway company at S. to the delivery at A.-road he had reason to believe the statements in the warranty were true.

The magistrate thereupon dismissed the summons.

Held, that the magistrate was right.—OATLEY *v.* LEMON, *K.B.D.*; 92 L. T. 200.

APPEAL:—

1. *Action referred to master—Right of appeal from master—Ord.* 14, *r.* 7.—Where an order is made under ord. 14, r. 7, referring an action to a master for trial, an appeal lies from his decision to a Divisional Court.

Decision of the Divisional Court (*ante*, p. 47, [1904] 2 K. B 245) reversed.—FRASER *v.* FRASER, *C.A.*, 310; [1905] 1 K. B. 368; 74 L. J. K. B. 183; 92 L. T. 341.

2. *Practice—Appeal from chambers—"Practice and procedure"—Order to arbitrator to state case——Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 19—*Judicature Act,* 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.—Proceedings in an action were stayed under section 4 of the Arbitration Act, 1889, upon the ground that there was an agreement to refer the matter to arbitration, and the matter was accordingly referred. In the course of the reference questions of law arose, and one of the parties obtained an order under section 19 from the judge in chambers directing the arbitrator to state a case for the opinion of the court.

Held, that an appeal from the order directing the arbitrator to state a case did not lie direct to the Court of Appeal.—FRERE AND STAVELEY TAYLOR & Co., RE, *C.A.*, 242; [1905] 1 K. B. 366; 74 L. J. K. B. 208; 92 L. T. 194.

See also Australia, 1, 2; Interpleader, 1; Justices, 2; Ship, 1; Trustee, 4.

APPOINTMENT.—See Election, 1, 2; Lunacy, 3; Power, 1, 2; Trustee, 1.

APPORTIONMENT.—See Rent-charge, 1; Local Government, 11.

APPROPRIATION.—See Company, 10; Dentist, 1.

ARBITRATION:—

1. *Award bad in point of law—Marine insurance—Depreciation in value of goods covered by policy—Undertaking—Covering note—Usage.*—A contract of sale contains a term that A., the vendor, shall effect on account of L., the vendee, insurance for 5 per cent. over net invoice price. Subsequently to the sale A. receives an undertaking from his vendor to hold a policy of insurance for account of A. to the extent of the value of the goods sold to A.—viz., £1,280, which goods A. has by the old contract resold to L. at a depreciated price—viz., £1,107. L. having paid the contract price, A. hands over to him the shipping documents, including the said undertaking. A. alleges that the mercantile usage in such cases is not to hand over the undertaking but a covering note for the actual value of the goods insured, and that it was owing to a mistake of a clerk that it was not the course pursued in this case. The goods were destroyed by fire after the property in them had passed to L. The underwriter paid L. £1,280 in pursuance of the undertaking. A. claims the amount represented by the difference between £1,280 and £1,107, and goes to arbitration under a clause in the contract. The award delivered pursuant to these proceedings stated that under the contract A. was entitled to the sum in dispute.

Held, that inasmuch as it was not a term of the contract that A. should be entitled to the sum in dispute, the award was bad in point of law on its face, and therefore must be set aside; that A. having no legal title to recover anything from the underwriters by reason of the fact that he had lost all interest in the property insured, he could have no better title against L. unless under an express or implied stipulation to that effect.

Held, further, that even if there were a mercantile usage supporting A.'s contention, yet the umpire had not so found in his award.

Quære (Kennedy, J.), whether such a usage could be supported in a court of law.—LANDAUER *v.* ASSER, *K.B.D.*, 534; [1905] 2 K. B. 184; 74 L. J. K. B. 659.

2. *Reference to arbitration—Condition precedent to right to sue—Stay of proceedings—Railway Passengers Assurance Company's Act,* 1864 (27 & 28 *Vict. c. cxxv.*), *ss.* 3, 16, 33—*Railway Passengers Assurance (Consolidation) Act,* 1892 (55 *Vict. c. viii.*) *ss.* 3, 7—*Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—The Railway Passengers Assurance Company's Act, 1864, provided by sections 3 and 16 that any question or difference arising on any contract of insurance entered into by the company should, if either the company or the person claiming under the contract required it, be referred to arbitration as a condition precedent to the enforcing of any claim to which the question or difference related.

The Railway Passengers Assurance (Consolidation) Act, 1892, repealed the Act of 1864, but by section 7 it provides that, notwithstanding the repeal, all contracts entered into by the company and in force at the date of the repeal shall be valid and effectual to all intents as if the Act had not been passed.

After the passing of the Act of 1864, and before the passing of the Act of 1892, the company entered into a contract of insurance, one of the conditions of which was that any question as to the liability of the company to pay the sum assured by the policy should, if the company or the assured or his legal representatives required it, be referred to arbitration in the manner specified in the Company's Act of 1864.

In 1904 the legal representative of the assured claimed payment from the company of the sum assured. The company disputed their liability, and required the question to be referred to arbitration.

Upon an action being afterwards brought by the legal representative to recover the amount of the policy, the company applied at chambers for an order that all proceedings in the action should be stayed.

Held, that, upon the condition of the contract referring to the Act of 1864, the parties had agreed that the question of the liability of the company should, if either party required it, be referred to arbitration as a condition precedent to enforcing the claim by action, and that, under the circum-

stances, the company were entitled, under section 4 of the Arbitration Act, 1889, to an order staying all proceedings in the action.—HODSON *v.* RAILWAY PASSENGERS ASSURANCE CO., *C.A.*; [1904] 2 K. B. 833; 73 L. J. K. B. 1001; 91 L. T. 648.

See also Appeal, 2; Building Contract, 1.

ARCHITECT:

Employment—General retainer — Work completed and remuneration paid—Right of employer to have the plans and specifications.—An architect, who has under a general retainer prepared plans and specifications, is not entitled to keep the plans on being paid his agreed fee, which then become the property of the building owner.

Ebdy v. *McGowan*, 2 Hudson on Building Contracts, 7, followed and approved.—GIBBON *v.* PEASE, *C.A.*, 417; [1905] 1 K. B. 810; 74 L. J. K. B. 502; 92 L. T. 433.

ASSIGNMENT:

1. *Debt*—Chose in action—*Maintenance—Indirect motive on part of assignee—Trust in respect of moneys recovered—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—The plaintiff sued as the assignee of certain debts. Creditors of the defendant to whom respectively debts of various amounts were due from the defendant, amounting in the whole to £90 11s. 5d., assigned those debts by deed to the plaintiff absolutely, in consideration of a covenant by him to the effect that, in case he should be able to recover and realize the amount of the said debts, he would immediately thereupon pay over to them the said respective amounts, or so much thereof as he might be able to recover or realize after payment of all costs necessarily incurred by him. Notice in writing of the assignment had been given to the defendant. It appeared that the plaintiff was interested in, and a director of, a company, of which the defendant was a co-director, and that the plaintiff, being dissatisfied with the action of the defendant as a director of the company, had, acting under the advice of a solicitor, taken the assignment of the before-mentioned debts with the view of procuring an adjudication in bankruptcy against the defendant, and so getting him removed from the directorate of the company.

The Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ., the first-mentioned doubting) held, following the decision in *Comfort* v. *Betts*, [1891] 1 Q. B. 737, that the assignment of debts was valid. They therefore allowed the appeal. —FITZROY *v.* CAVE, *C.A.*; [1905] 2 K. B. 364.

ATTACHMENT:—

Practice—Disobedience of order—Personal service—Knowledge of order—Evasion of service.—On an application for a writ of attachment for disobedience of an order of the court, if it appears that the person against whom the attachment is sought knew of the existence of the order and evaded service of it, he cannot avail himself of the objection that personal service has not been affected upon him.—KISTLER *v.* TETTMAR, *C.A.*, 230; [1905] 1 K. B. 39; 74 L. J. K. B. 1; 92 L. T. 36.

AUCTIONEER:—

Public auction—Sale of chattel of value exceeding £10—No signed "note or memorandum" of contract —Action for refusal to deliver — Liability of auctioneer—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.—The defendant, who was an auctioneer, was instructed by the owner of a pony to put it up for sale at a public auction with a reserve price of £25. At the auction the defendant put the pony up for sale and disclosed the owner's name, but, forgetting his instructions as to the reserve price, orally announced that the pony would sold without reserve. The plaintiff bid fifteen guineas, and being the highest bidder the pony was knocked down to him. The defendant made no note or memorandum in writing of the sale in his book. Immediately after the sale the defendant discovered and informed the plaintiff that he had made a mistake in offering the pony for sale without reserve, and he thereupon put it up for sale again, when it was bought in for seventeen guineas. In an action brought by the plaintiff for the delivery up of the pony, or, alternatively, for damages for breach of warranty of authority by the defendant to sell it without reserve,

Held, (1) that the value of the pony being more than £10, the action failed by reason of the absence of a written memorandum or note of the sale in accordance with section 4 of the Sale of Goods Act, 1893; and (2) that there had been no breach of warranty of authority to sell the pony without reserve, as, the principal's name having been disclosed, there was a contract binding on the principal on which he could, but for the non-compliance with section 4, have been successfully sued by the plaintiff.

Warlow v. *Harrison*, 8 W. R. 95, 1 E. & E. 309, distinguished.—RAINBOW *v.* HOWKINS, *K.B.D.*, 46; [1904] 2 K. B. 322; 73 L. J. K. B. 641; 91 L. T. 149.

AUSTRALIA, LAW of:—

1. *Australian Commonwealth Act*, 1903, *s.* 39—*Act not retrospective—Right of appeal in suit pending when Act was passed.*—Although the right of appeal from the Supreme Court of Queensland to his Majesty in Council is taken away by the Australian Commonwealth Act, 1903, yet the Act is not retrospective, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards is not taken away. —COLONIAL SUGAR REFINING CO. *v.* IRVING, *P.C.*; [1905] A. C. 369; 92 L. T. 738.

2. *Practice—Special leave to appeal—Circumstances under which granted—Questions of fact.*—On a petition for special leave, by virtue of the Royal prerogative, to appeal from the High Court of Australia, or the Supreme Court of Canada, the Judicial Committee will apply their judicial discretion to the particular facts and circumstances of each case, and no absolute rule can be laid down as to the principles upon which such an appeal should be allowed.

A case may be of a substantial character, and may involve questions of great public interest, and raise an important question of law, yet if the judgment of the court below is plainly right, or at least not attended with any substantial doubt, their lordships will not advise his Majesty to grant leave to appeal. Therefore where the court below had, upon a careful review of the facts, set aside a power of attorney, on the ground that the plaintiff was not of unsound mind and capable of understanding what he was doing when he executed it, leave to appeal was refused, though the amount in dispute was very large.

City of Montreal v. *Ecclésiastiques de St. Sulpice*, 61 L. T. Rep. 653, 14 App. Cas. 660, followed.—DAILY TELEGRAPH CO. *v.* MCLAUGHLIN, *P.C.*; [1904] A. C. 776; 73 L. J. P. C. 95; 91 L. T. 233.

BAILMENT—

Contract to supply carriage and driver to commercial traveller—Duty of driver to safeguard goods in carriage—Larceny of driver—Loss of goods.—The defendant, who was a jobmaster, agreed to let to the plaintiff, who was a wholesale silversmith, a

commercial brougham, horse, and a coachman, for the use of the plaintiff's traveller when taking samples to customers. The defendant did not know the nature of the plaintiff's trade nor the character of the samples to be carried. While the brougham was being so used the traveller went to lunch, leaving the brougham with the samples in it in the charge of the coachman, when, with the connivance of the coachman, the samples were stolen. The coachman had always borne a good character. In an action to recover the value of the samples,

Held, that although the defendant had undertaken by his coachman to use due care in safeguarding the samples in the brougham during the temporary absence of the traveller, and though he would therefore have been liable for the negligent act of the servant within the scope of his employment, he was not liable for the felony of his servant acting outside the scope of his employment.

Abraham v. *Bullock*, 50 W. R. 626, 86 L. T. 796, considered.

Judgment of Walton, J. (52 W. R. 631). reversed.—CHESHIRE *v.* BAILEY, *C.A.*, 322; [1905] 1 Ch. 237; 74 L. J. Ch. 176; 92 L. T. 142.

BANKRUPTCY—

1. *Act of bankruptcy—Notice to Stock Exchange creditors to close account—Marriage settlement—Covenant to settle all after-acquired property except business assets—Fraud against creditors—Vagueness—Liability—Release by discharge in bankruptcy—Assignment of furniture—Bill of Sale Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 4—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 31, *and* 49—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 47 *and* 49—A statement by a debtor that he is unable to pay his debts in full is not an act of bankruptcy, unless it amounts to a statement that he intends to deal with his creditors as a body. Permission given by a debtor to each of his Stock Exchange creditors individually to close his account at once does not amount to such a statement.

Decision of Wright, J. (52 W. R. 302), reversed.

A covenant by a husband in a settlement, made in consideration of marriage, to settle all his after-acquired property except business assets is not fraudulent and void against creditors under 13 Eliz. c. 5, nor is it too vague and uncertain to be enforced. Such a covenant, for a breach of which specific performance would be an appropriate remedy, is not barred on the covenanter obtaining his discharge from bankruptcy.

An assignment of personal chattels in pursuance of such a covenant is a marriage settlement within the exception contained in section 4 of the Bills of Sale Act, 1878, and does not require registration as a bill of sale.—REIS, RE, CLOUGH, EX PARTE, *C.A.*, 122; [1904] 2 K. B. 769; 73 L. J. K. B. 929; 91 L. T. 592.

2. *Adjudication — Practice — Notice to debtor—Adjudication under Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 20, *sub-section* 1—*Bankruptcy Rules, rr.* 27, 28, 190-192*a*.—If a receiving order is made against a debtor, and the creditors pass a resolution that he be adjudged bankrupt, it is in the power of the court, under section 20, sub-section 1, of the Bankruptcy Act, 1883, on the application of the official receiver, to make such an adjudication, although no notice has been given to the debtor that such an application is intended to be made. But, as a general rule, it is more convenient that notice should be given.—PONSFORD, RE, PONSFORD, EX PARTE, *C.A.*, 120; [1904] 2 K. B. 704; 73 L. J. K. B. 913; 91 L. T. 82.

3. *Annulment of adjudication—Payment of debts in full—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 35.—Where a bankrupt has obtained from his creditors an absolute release of all his debts, the court may, in its discretion, order the annulment of his adjudication, upon the ground that all his debts are paid in full.

In re Burnett, Ex parte The Official Receiver, 42 W. R. 368, differed from.—KEET, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*, 416; 92 L. T. 540.

4. *Appeal—Dispensing with security—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 27 (1)—*Bankruptcy Rule* 131.—Where there is no respondent to an appeal, the court will dispense with the security required by rule 131.—GARRARD, RE, *Bkcy.*; 92 L. T. 779.

5. *Assignment for benefit of creditors—Effect of payment to trustee—Act of bankruptcy—Relation back—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 49—Payment with full knowledge to the trustee under a deed of assigment for the benefit of creditors is not a protected transaction, where within three months of the execution of the deed, a receiving order is made against the grantor.—DAVIS *v.* PETRIE, *K.B.D.*; [1905] 2 K. B. 528.

6. *Bill of sale—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.—Letters of lien on goods in the actual possession of third parties, given by merchants to bankers as security for loans come within the exceptions specified in section 4 of the Bills of Sale Act, 1878, and therefore do not require registration.—HAMILTON, YOUNG, & CO., RE, *Bkcy.*, 539; [1905] 2 K. B. 381; 74 L. J. K. B. 677; 92 L. T. 779.

7. *Bill of sale—Hire and purchase agreement—Colourable transaction—Inference of fact—Registration—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 8.—The appellant advanced £2,000 to a publican to enable him to complete the purchase of an hotel. It was arranged that the appellant should buy the furniture in the hotel from the vendor for £2,000, and should sell it to the publican under a hire-purchase agreement. This was carried out, the purchase was completed and the hotel carried on for some time. The publican became bankrupt, and his trustee claimed the furniture, which had already been seized by the appellant on default made in payment of one of the instalments under the hire-purchase agreement.

Held, that the £2,000 was a loan to the purchaser of the hotel, and that the hire-purchase agreement was a security for the loan, which was void for want of registration as a bill of sale.

Decision of the Court of Appeal (*Mellor's Trustee* v. *Maas & Co.*) affirmed.—MAAS *v.* PEPPER, *H.L.*, 513; [1905 A. C. 102; 74 L. J. K. B. 452; 92 L. T. 371.

8. *Debt due to a partnership—Partnership dissolved—Appointment of a receiver in partnership action — Assignment of judgment debt — Leave to receiver to issue execution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6.—Where a receiver has obtained an assignment of a judgment debt he is entitled to present a bankruptcy petition, as a creditor, against the debtor.

In re Sacker, 37 W. R. 204, 22 Q. B. D. 179, explained and distinguished.—MACOUN, RE, *C.A.*, 197; [1904] 2 K. B. 700; 73 L. J. K. B. 892; 91 L. T. 276.

9. *Goods obtained by bankrupt on credit without intention to pay for them—Contract induced by fraud—Right of creditor to take back goods—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44.—Where a

bankrupt has obtained goods on credit without any intention of paying for them the vendor is entitled to treat the contract of sale as having been induced by fraud, and to disaffirm the contract and take back his goods after notice of act of bankruptcy, provided that he disaffirms the contract within a reasonable time of his discovery of the fraud.—EASTGATE, RE, WARD, EX PARTE, *Bkcy.*, 432; [1905] 1 K. B. 465; 74 L. J. K. B. 324; 92 L. T. 207.

10. *Judgment Summons—Receiving order in lieu of committal order—Evidence of means—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5, *sub-section* 2—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-section* 5.—Upon the hearing of a judgment summons a judge has no power to make a receiving order in lieu of a committal order if there is no evidence before him that the debtor has means to pay the judgment debt.

Reg. v. *Judge of County Court of Sussex*, 59 L. T. 32, 36 W. R. Dig. 104 distinguished.—DEBTOR, A, RE BAKER (LIMITED), EX PARTE, *Bkcy.*, 29; [1905] 1 K. B. 374; 74 L. J. K. B. 362; 91 L. T. 321.

11. *Lessee—Disclaimer—Mortgage by sub-demise—Vesting order—Liabilities of mortgagee—Discretion of Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55 (1) (2) (6)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.—The intention of the Legislature in enabling the trustee of a bankrupt to disclaim onerous property is to interfere as little as possible with the rights and liabilities of third parties. In exercising the wide discretion given to it, in the case of a disclaimer of leasehold property, by section 13 of the Bankruptcy Act, 1890, the court should give effect as far as possible to this intention, and see that its discretion is so exercised that not only do the sub-lessees, or mortgagees by sub-demise, gain no advantage, but also that no injustice is thereby done to the landlords.—CARTER & ELLIS, RE, SAVILL, EX PARTE, *C.A.*, 433; [1905] 1 K. B. 735; 74 L. J. K. B. 442; 92 L. T. 523.

12. *Money paid to banker for remittance to a third person—Trust—Right to follow.*—The bankrupts were bankers carrying on business in London and India. Two sums of money were paid to them in London to be remitted through their Bombay branch to a third person about to proceed to India. Neither the person who paid the money nor the person to whom it was to be remitted were customers of the bankrupts. The receiving order was made before the arrival at Bombay of the person to whom the money was to be remitted.

Held, (1) that no trust was constituted, and that the person who paid the money had no right to be paid in full in priority to the other creditors. (2) That the ordinary relationship of debtor and creditor was established between the bankrupts and the person to whom the money was to have been remitted.—WATSON & CO., RE, LLOYD, EX PARTE, *Bkcy.*; 91 L. T. 665.

13. *Order and disposition—Reputed ownership—Goods in possession of bankrupt in his trade or business—Samples in show-cases—Consent of true owner—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-section* 2 (*iii.*).—In order that another person's goods may be taken under section 44, sub-section 2 (iii.), of the Bankruptcy Act, 1883, to pay a bankrupt's debts in consequence of the reputed ownership of the bankrupt, it is essential that the true owner of the goods should have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must arise.

The bankrupts carried on business as bankers and agents, and they sold goods on commission. In their office were show-cases, some of which contained plated goods which, at the suggestion of the bankrupts, had been sent by the appellants, who were wholesale silversmiths, as samples for exhibition, but their names were not on the cases. When customers of the bankrupts wished to have any goods so exhibited the bankrupts introduced them to the appellants, who supplied them from their warehouse; but in a few cases of urgency the bankrupts had sold some of the samples.

Held, that the goods were not in the order and disposition of the bankrupts.

Sharman v. *Mason*, [1899] 2 Q. B. 679, distinguished.

Decision of Wright, J., reversed.—WATSON & CO., RE, ATKIN, EX PARTE, *C.A.*; [1904] 2 K. B. 753; 73 L. J. K. B. 854; 91 L. T. 709.

14. *Petition—Act of bankruptcy—Deed of assignment—Conduct of petitioning creditor—Sufficient cause for refusal of receiving order—Bankruptcy Act*, 1883 (46 *and* 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.—Where a debtor had offered a composition to his creditors a creditor refused to assent to the deed of assignment, by means of which the composition was to be carried out, and threatened bankruptcy proceedings unless he were paid in full.

Held, that the creditor was not entitled to succeed upon the presentation of a bankruptcy petition, as his conduct constituted "sufficient cause" within section 7, sub-section 3, of the Bankruptcy Act, 1883, for refusing to make a receiving order.

In re Shaw, Ex parte Gill, 49 W. R. 264, followed.—A DEBTOR, RE, THE DEBTOR, EX PARTE, *Bkcy.*, 223; 91 L. T. 664.

15. *Petition—Secured creditor—Estimate of value of security—Proof in bankruptcy—Undervalue—Mistake—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6 (2), 7 (3).—If in a petition in bankruptcy, presented by a secured creditor, an estimate of the value of the security is given in accordance with sub-section 2 of section 6 of the Bankruptcy Act, 1883, the court will not inquire into the correctness of the estimate, provided that the estimate is genuine and not a mere sham. But the secured creditor cannot take any benefit from the administration in bankruptcy except on the basis of the estimate. Whether he may amend his estimate upon proof of mistake as to value, *quære*.

Ex parte Taylor, In re Lacey, 13 Q. B. D. 128, and *In re Vautin, Ex parte Saffery*, 48 W. R. 96, discussed.—BUTTON, RE VOSS, EX PARTE, *C.A.*, 437; [1905] 1 K. B. 602; 74 L. J. K. B. 403; 92 L. T. 250.

16. *Practice—Claim by bankrupt to inspect the record of minutes of committee of inspection—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 80—*Bankruptcy Rules*, 1886, *rr.* 12, 16, 285, 292.—Neither by the Bankruptcy Act nor the Bankruptcy Rules has a bankrupt the right to inspect the record book kept by his trustee under section 80 and rule 285; and therefore the court will not give leave for such inspection, nor take notice of the circumstances on which the application is based.

Decision of Bigham, J. (*ante*, p. 30, [1904] 2 K. B. 760), affirmed.—SOLOMONS, RE SOLOMONS, EX PARTE, *C.A.* 49; [1904] 2 K. B. 917; 73 L. J. K. B. 1,029; 91 L. T. 512.

17. *Proof—Guarantee of interest on debentures—Extinction of debt by operation of law—Continuing liability of guarantor.*—The bankrupt had guaranteed

the interest on a debenture in a limited company which was afterwards dissolved, the debt being thereby extinguished.

Held, on the bankruptcy of the guarantor, that the debenture-holder was entitled to prove as a creditor on the guarantee, as the debt had been discharged by operation of law and not by any act of the creditor.—FITZGEORGE, RE, ROBSON, EX PARTE, *Bkcy.* 384; [1905] 1 K. B. 462; 74 L. J. K. B. 322; 92 L. T. 206.

18. *Proof—Principal and surety—Guarantee of interest—Covenant to pay premiums on policy of insurance—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *Schedule II., r.* 12.—The debtor borrowed £500, and covenanted jointly and severally with a third party to pay interest upon the loan so long as any part of the principal sum should remain due, and also to keep up the premiums upon a policy assigned by him to the leader as security. Upon the bankruptcy of the debtor the lender put in a proof assessing the value of his security at £100, and proving for the balance of the principal sum advanced. The third party also claimed to prove on the estate by way of indemnity for his liability for interest and premiums to the lender.

Held, that the principal sum ceased to be due upon the bankruptcy of the borrower, and that the security having been valued must be deemed to have been realised, consequently the third party was under no liability to the lender, and his proof must be rejected.—MOSS, RE, HALLETT, EX PARTE, *Bkcy.*, 558; [1905] 2 K. B. 307; 74 L. J. K. B. 764; 92 L. T. 777.

19. *Proof—Secured creditor—Amendment of proof by re-valuation of security—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *Schedule II., rr.* 9-14.—A creditor may amend his proof by assessing his security at an increased value, even though the original under-valuation of his security caused the failure of a scheme to pay the unsecured creditors 7s. 6d. in the £.—FANSHAWE, RE, LE MARCHANT, EX PARTE, *Bkcy.*, 222; [1905] 1 K. B. 170; 74 L. J. K. B. 153; 92 L. T. 32.

20. *Scheme of arrangement—Consent of creditors—Reasonable security—Speculative scheme—Approval by court—Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 3 (9).—Though the court is reluctant to refuse to approve a scheme which has been passed unanimously by the creditors, it is always open to the court to consider whether the scheme is or is not for the benefit of the creditors, and if the scheme appear to be too speculative, the court may withhold its approval notwithstanding that the creditors are unanimous in support of the scheme. Where the court refuses to approve a scheme an immediate adjudication of bankruptcy against the debtor will only be made in very exceptional circumstances.—FLEW, RE, FLEW, EX PARTE, *C.A.*, 438; [1905] 1 K. B. 278; 74 L. J. K. B. 280; 92 L. T. 333.

BECHUANALAND, LAW of:—

Mining regulations — Certificate of registration Forfeiture of claim—Roman Dutch law.—The possession of a "certificate of registration" of a mining claim issued under the rules and regulations of a mining company is not equivalent to a lease of the ground under the Roman Dutch law; and, therefore, where the rules and regulations necessarily imply a liability to forfeiture of the claim for non-payment of rent, even though there is no express provision to that effect, such claim may be forfeited by summary process.

Judgment of the court below reversed.—TATI CONCESSIONS (LIMITED) *v.* HEPPLE, *P.C.*; [1905] A. C. 139; 92 L. T. 245.

BILL OF EXCHANGE:—

Cheque—Negotiable instrument—Fictitious or non-existing person—Belief or intention of drawer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7 (3).—A cheque payable to the order of the payee was signed by the drawer under the erroneous belief, induced by the fraud of his clerk, that the sum for which the cheque was drawn was owing by the drawer to the person named as payee. There was in fact such a person as the payee. The clerk having forged the payee's name on the back of the cheque, a third person (the defendant) took it in good faith for value, and cashed it.

Held, that as at the time when the cheque was drawn the drawer believed that the name of the payee was inserted as part of a real transaction, and not as a pretence, the payee was not a "fictitious person" within the meaning of the Bills of Exchange Act, 1882, s. 7 (3), and that, therefore, the cheque could not be treated as payable to bearer, and was not a negotiable instrument, and that the defendant must refund the money he had obtained by means of it.

Bank of England v. *Vagliano,* 39 W. R. 657, [1891] A. C. 107, distinguished. — VINDEN *v.* HUGHES, *K.B.D.*, 429; [1905] 1 K. B. 795; 74 L. J. K. B. 410.

See also Cheque, 1

BILL OF SALE:—

1. *Statutory form—Amount of interest and period when amount payable uncertain—Validity—Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 & 46 *Vict. c.* 43), *schedule.*—By a bill of sale, in consideration of £50 due and owing from the grantor to the grantee, the grantor assigned to the grantee certain chattels in the schedule "by way of security for the payment of the said sum of £50." The grantor further agreed that he would pay the grantee "the said principal sum with interest thereon after the rate of £5 per centum per annum by the following instalments—namely, £10 on the 25th of December, 1903, and the like sum of £10 on the 25th of March, the 24th of June, the 29th of September, and the 25th of December in each year succeeding, until the whole amount be duly paid."

Held, that the bill of sale was void, as not being in accordance with the statutory form in the Bills of Sale Act (1878) Amendment Act 1882.—ATTIA *v.* FINCH. *K.B.D.*; 91 L. T. 70.

2. *Verbal agreement for sale of goods—Valuation and inventory—Lease of chattels in schedule.*—I. being indebted to H., agreed to sell his "valuation" at the M. S. Hotel to him, T. to value for both.

T. then prepared and signed an inventory and valuation for £930 12s. 7d., which was stamped and dated the 9th of August, 1902.

Subsequently, on the 12th of September, 1902, H. granted I. a quarterly lease of the M. S. Hotel, and also let to him the fixtures and effects set out in the schedule, and at the end of the lease it was stated, "the whole of the valuation as per inventory is the property of J. R. Holmes & Sons, brewers, Bingley," and this was signed by I.

Held, that neither the document of the 9th of August nor the lease of the 12th of September constituted a bill of sale, as there was a good sale, which passed the property independently of the documents.—CLAPHAM *v.* IVES, *K.B.D.*; 91 L. T. 69.

See also Bankruptcy, 6, 7.

BREAD:—

Sale otherwise than by weight—Loaf weighed with others—Bread Act, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 4.—

A purchaser having asked for a loaf of bread was served with a loaf for which he paid 3d. It purported to be a 2lb. loaf, but on being weighed was ½oz. short of 2lb. The seller proved that all the loaves of bread were weighed three-quarters of an hour after they were baked, three loaves at a time, and that all the batches of three loaves weighed 6lb.

Held, that this was a sale otherwise than by weight within section 4 of the Bread Act, 1836. The weighing of the bread must be sufficient to ascertain the quantity or weight of bread in the particular loaf that is handed to the purchaser.—WELCH *v.* CUTLER, *K.B.D.*; 92 L. T. 239.

BUILDING CONTRACT:—

Construction—Architect's certificate—Arbitration clause—Conclusiveness of certificate—Action by building owner for damages.—By a building contract it was provided that a builder should carry out the work in accordance with the directions and to the satisfaction of the architect; that the architect during the progress of the work should have the power to order in writing the removal of any defective material and the re-execution of any defective work; and that any defects which should appear within twelve months after completion of the work, arising in the opinion of the architect from defective material or work, should be made good by the builder.

It was further provided that the builder should be entitled to payment from time to time upon the certificates of the architect; but that "no certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement."

The contract also provided that any dispute or difference between the building owner and the builder, arising during the progress of the work or afterwards, "as to the construction of the contract or as to any matter or thing arising thereunder, or as to the withholding by the architect of any certificate," should be referred to arbitration.

Held (reversing the judgment of Farwell, J.), in an action by the builder upon certificates of the architect, that the certificates were not conclusive so as to prevent the building owner from setting up a claim for damages in respect of defective work and material.—ROBIN *v.* GODDARD, *C.A.*; [1905] 1 K. B. 294; 74 L. J. K. B. 167; 92 L. T. 10.

BURIAL:—

Burial ground—Land set apart for, in breach of Order in Council—Disused burial ground—Power to build on—Metropolitan Open Spaces Act, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act,* 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act,* 1887 (50 & 51 *Vict. c.* 32), *s.* 4, *and Schedule.*—The prohibition imposed by section 3 of the Disused Burial Grounds Act, 1884, against the erection of buildings upon a disused burial ground, applies to any land which has been "set apart for the purposes of interment" within section 1 of the Metropolitan Open Spaces Act, 1881, even if it was so set apart in breach of an Order in Council prohibiting the opening of any new burial ground in the district, and consequently could never have been lawfully used for the purposes of interment.—BOSWORTH AND GRAVESEND CORPORATION, RE, *C.A.*; [1905] 2 K. B. 426.

BURIAL:—

No service rendered—Incumbent of parish—Right to fees.—A certain burial ground was divided into four plots A, B, C, and D. In 1879 a plan was submitted to the Secretary of State, who sanctioned the division into consecrated and unconsecrated ground, in accordance with the plan, which showed that plot A was to be the consecrated part. In 1882 the bishop consecrated both plots A and C.

Two persons were buried in plot C who were Nonconformists, and no sort of service was rendered by the incumbent of the parish of B. F. in respect of these burials.

Held, that the plaintiff, the incumbent, was not entitled to fees in respect of these burials.—WILLIAMS *v.* BRITON FERRY BURIAL BOARD, *K.B.D.*; 92 L. T. 696.

See also Charity, 6, 7.

CANADA, LAW of:—

1. *Assessment Act,* 1892 (55 *Vict. c.* 48)—*Liability for taxes—Covenant in lease—Interest on rent in arrear.*—The effect of the Canadian Assessment Act, 1892, is to impose a liability for taxes upon the lessees of a municipal corporation without any recourse to the corporation.

Held, therefore, that a covenant on the part of the lessee to pay taxes is a "usual covenant" in a lease granted by a municipal corporation.

In a case in which the lessee had been in possession for some time before the corporation could show a good title to grant a lease:

Held, that interest on rent in arrear was only payable from the date at which a good title was shown.

Judgment of the court below affirmed with a variation.—CANADIAN PACIFIC RAILWAY CO. *v.* TORONTO CORPORATION, *P.C.*; [1905] A. C. 32; 74 L. J. P. C. 15; 91 L. T. 703.

2. *Bye-law—Validity—Guarantee of debentures—Approval by ratepayers—Quebec Act* (60 *Vict. c.* 76, *s.* 7 (*c*).—A contract by which a corporation guarantees the debentures of a company is a contract involving financial obligations on the part of the corporation within section 7 (*c*) of the Quebec Water Company's Act, 1897; and a municipal by-law under which such contract was made requires the approval of a majority of the whole body of ratepayers when passed in order to be valid.

Judgment of the court below affirmed.—HANNA *v.* GRAND MÈRE CORPORATION, *P.C.*; [1904] A. C. 789; 73 L. J. P. C. 105; 91 L. T. 302.

3. *Canadian Act* 48 & 49 *Vict. c.* 50—*Transfer of lands from Dominion to province—Profits of lands—Period of enjoyment.*—The Canadian Act 48 & 49 Vict. c. 50, s. 1, which was re-enacted as section 4 of the Revised Statutes of Canada, c. 47, provides that certain Crown lands in the province of M. "shall be transferred to the province, and enure wholly to its benefit and uses."

Held, that the province was entitled to the profits of the lands transferred only from the date of the actual transfer, and not from the date of the statute.

Judgment of the court below affirmed.—ATTORNEY-GENERAL FOR MANITOBA *v.* ATTORNEY-GENERAL FOR CANADA, *P.C.*; [1904] A. C. 799; 73 L. J. P. C. 100; 91 L. T. 300.

4. *Dominion Act,* 1867—*Powers of Dominion Parliament and Provincial Legislature.*—A telephone company, incorporated by a Dominion statute, the scope of whose business is not confined within the limits of any one province of Canada, is under the exclusive legislative authority of the Parliament of Canada, under sections 91 and 92 of the Dominion Act, notwithstanding the fact that it has applied to a Provincial Legislature for authority to exercise its

powers by carrying on local business within the province, and has not in fact extended its business beyond the province.

Judgment of the court below affirmed.

Reg. v. *Mohr*, 7 Quebec L. Rep. 183, 2 Cartwright 257, disapproved.—TORONTO CORPORATION *v.* BELL TELEPHONE CO., *P.C.*; [1905] A. C. 52; 74 L. J. P. C. 22; 91 L. T. 700.

5. *Dominion Lands Act*, 1886—*Regulations of* 1889—*Reservation of mines and minerals.*—The enactments and regulations relating to Crown lands reserved for sale or homesteads have no application to lands granted by way of subsidies for public works.

Held, therefore (reversing the judgment of the court below), that patents issued for land to be granted to a railway company by way of bounty or subsidy, under a special Act and Order in Council which contained no reference to mines and minerals, were not subject to the Regulations of 1889 made under the Dominion Lands Act, 1886, and should be free from any reservation of mines or minerals, except gold and silver.—CALGARY AND EDMONTON RAILWAY CO. *v.* REX, *P.C.*; [1904] A. C. 765; 73 L. J. P. C. 110; 91 L. T. 301.

6. Habeas corpus—*Extradition offence—Jurisdiction of judge—Conspiracy—Larceny—Practice.*—Where a prisoner is brought before a competent tribunal, and charged with an offence within the meaning of an extradition treaty, and remanded in order that the prosecution may bring forward the evidence by which it is proposed to support the charge, a judge has no jurisdiction, under the Canadian law, to treat the remand warrant as a nullity, and adjudicate upon the case as though the whole evidence were before him.

Judgment of the Superior Court for Lower Canada reversed.

Where an indictment for conspiracy has been framed in which acts of larceny are charged as overt acts of the conspiracy, the prosecution are not estopped from treating them as distinct and independent acts of larceny.—UNITED STATES OF AMERICA *v.* GAYNOR, *P.C.*; [1905] A. C. 128; 74 L. J. P. C. 44; 92 L. T. 276.

7. *Ontario—Assessment Act* (*Revised Statutes of Ontario*, 1897, c. 224)—*Real estate—Electric cars—Liability to assessment—Court of Revision—Jurisdiction*—Res judicata.—Cars running upon a system of electric tramways are not liable to be taxed as "real estate" or as "fixtures" under the Assessment Act of Ontario.

Judgment of the court below reversed.

Bank of Montreal v. *Kirkpatrick*, 2 Ont. L. Rep. 113, disapproved.

The jurisdiction of the "Court of Revision" under the Assessment Act is confined to the question of the amount of the assessment, and does not extend to the question whether the property is by law assessable at all. Therefore where the assessment is *ab initio* a nullity they have no power to confirm it or give it validity.

Nickle v. *Douglas*, 37 U. C. Q. B. 51, approved.—TORONTO RAILWAY CO. *v.* TORONTO CORPORATION, *P.C.*; [1904] A. C. 809; 73 L. J. P. C. 120; 91 L. T. 541.

8. *Representation of provinces—Readjustment—Number of members in proportion to population—British North America Act*, 1867, *s.* 51.—The British North American Act, 1867 (30 & 31 Vict. c. 3), provides by section 51 that the number of members for a province may be readjusted in the manner provided by the Act, in the proportion which the population of the province bears to the aggregate population of Canada.

Held (affirming the judgment of the court below), that "Canada" in the section must be taken to mean the whole Dominion of Canada, and not only the four original provinces existing at the date of the passing of the Act; and that the section applied to the representatives of provinces subsequently incorporated; and that the representation of such provinces might be decreased on a first readjustment.—ATTORNEY-GENERAL FOR PRINCE EDWARD ISLAND *v.* ATTORNEY-GENERAL FOR CANADA, *P.C.*; [1905] A. C. 37; 74 L. J. P. C. 9; 91 L. T. 636.

CEYLON, LAW of:—

Charter of Justice of 1833—*Civil Procedure Code*, 1899, *s.* 547—*Administration—Small estate—Partition action—Ordinance No.* 12 *of* 1904.—By section 547 of the Ceylon Civil Procedure Code, 1889, no action is maintainable for the recovery of any property included in the estate of a deceased person where such estate exceeds in value 1,000 rupees unless grant of probate or letters of administration have first been issued to some person.

Held, that this applies to an action for partition, and that the action could not be maintained where no administration had been taken out.

Held further, that this was not affected by the provisions of Ordnance No. 12 of 1904.—PONNAMMA *v.* ARUMOGAM, *P.C.*; [1905] A. C. 383; 92 L. T. 740.

CHARGING ORDER:—

Judgment—Interest of judgment debtor in stock—Stock vested in trustees—Trustees to divide capital at end of six years—Power to change investment—Judgments Acts, 1838 (1 & 2 *Vict. c.* 110), *s.* 14; *and* 1840 (3 & 4 *Vict. c.* 82), *s.* 1.—A testatrix, who was domiciled in America, by her will, which extended only to her property in England, appointed two persons to be executors and trustees thereof, and directed them to collect all her estate in England, both capital and income, and to invest and re-invest the same as from time to time might be prudent, and to manage the whole fund, and to invest all interest or income accumulating after her death as well as the capital; and she directed them at the end of six years after her death to divide the accumulated interest and income among certain persons, and to divide the capital of her estate then in their custody and control into three equal parts, one of such parts to be paid to and to become the sole property of the defendant, with remainder in case of his death before the expiration of the six years. The testatrix died in August, 1903, and her will was duly proved. Her property in England was invested by the trustees of the will in the purchase of £4,442 Transvaal Government Guaranteed Stock, and this stock stood in the books of the Bank of England in their names. The plaintiff subsequently recovered judgment against the defendant for £216, and applied for an order under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1, charging the defendant's interest in the said stock with the payment of the amount of the judgment debt.

Held, that the will imposed no obligation on the trustees to sell the stock or to change the investment, and that the defendant had an interest in the stock which could be charged under the Acts.—BOLLAND *v.* YOUNG, *C.A.*, 67; [1904] 2 K. B. 824; 73 L. J. K. B. 1030; 91 L. T. 746.

CHARITY:—

1. *Advowson—Will—Trust to present fit and pious person.*—A charitable trust can be created of an advowson as of other civil property, but such a

charitable trust must be for the benefit of the public, or a class of the public, and cannot be implied from a direction to choose fit and proper persons, such being the duty imposed by law upon every owner of an advowson.

Decision of Buckley, J., 52 W. R. 106 [1904] 1 Ch. 41), affirmed.—CHURCH PATRONAGE TRUST, RE, LAWRIE *v.* ATTORNEY-GENERAL, *C.A.*, 85; [1904] 2 Ch. 643; 73 L. J. Ch. 712; 91 L. T. 705.

2. *Certificate of Charity Commissioners—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 62. —By a will lands were given and bequeathed to the six clerks or petty canons in Chester Cathedral. The dean and chapter were not directly interested in the lands settled by the will, but by an Act of Parliament and Order in Council they were required to provide that the stipends of the minor canons should not be less than £150 each.

Held, that such an interest was not sufficient to bring the case within the exception contained in the Charitable Trusts Act, 1853, s. 62. The exception of "any cathedral or collegiate church" cannot be interpreted so as to exclude from the operation of the Act every endowment in which any minister or officer of the cathedral is interested. The exception does not extend to an endowment over which the dean and chapter have not any control, and which does not form portion of their capitular estates, and is not held by them upon any trusts.

In re Meyrick's Charity, 3 W. R. 435, considered. —DOD'S CHARITY, RE, *Ch.D. Swinfen Eady, J.*, 314; [1905] 1 Ch. 442; 74 L. J. Ch. 260; 92 L. T. 260.

3. *Condition precedent—Remoteness—Perpetuity—Postponement of enjoyment—Reserve fund—Uncertain event—Validity of gift—Charity, Gift to—Will—Construction.*—A testator gave his residuary real and personal estate to a trustee upon trust thereout to form a "reserve fund" for the purposes thereinafter mentioned, and to pay the balance of the income of his said residuary estate, after payment of outgoings, to his niece during her life, and after her death to pay such income (after payment into the said reserve fund every quarter of a year of 10 per cent. of such income, and also certain outgoings) by equal monthly payments to three annuitants for their respective lives, who should be poor inhabitants of M. And the testator directed that "the said annuities shall not become payable until the said reserve fund shall amount to £400," and that the said reserve fund should be invested and only used in case of dire need, but be always kept up at £400; and that if, after the said annuities were payable, it should exceed £400, then the overplus might be used either to increase the amounts of the said three annuities or to create another annuity.

The testator's net residue consisted solely of real estate, and during the lifetime of the niece, the tenant for life, there was no income available for forming a reserve fund. On the death of the niece questions arose upon the construction of the will—(1) whether the charitable gifts of the annuities failed by reason of the direction that the annuities should not come into operation until after the reserve fund amounted to £400, which might be at a date beyond the limits of the rule against perpetuities; and (2) whether there had been an effectual devotion of the "reserve fund" to charitable purposes,

Held, by the Court of Appeal (reversing Buckley, J.), that, subject to the life estate, the residue had been effectually devoted to charity as from the testator's death, and that the direction to postpone the payment of the annuities until the reserve fund reached £400 was not a condition precedent to the charitable gift coming into effect, but was only a direction as to the particular application of the charitable fund and intended to secure the beneficial working of the charity, and that the case, therefore, fell within the second principle in *Chamberlayne* v. *Brocket*, (1872) L. R. 8 Ch. 206, 211; also that the reserve fund was equally devoted to a charitable purpose.—SWAIN, RE, MONCKTON *v.* HANDS, *C.A.*; [1905] 1 Ch. 669; 74 L. J. Ch. 354; 92 L. T. 715.

4. *Lands dedicated by deed—Question as to the person entitled—Summons by trustee—Charity Commissioners—Consent to application unnecessary—Construction—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.—Where there is a question as to lands whether they are held upon charitable trusts or not, the trustee may apply to the court to have the question determined without first obtaining the consent of the Charity Commissioners.—SHUM, RE, PRICHARD *v.* RICHARDSON, *Ch.D. Farwell, J.*; 91 L. T. 192.

5. *Land transfer—Charity lands—Scheme legally established—Royal Charter—Consent of Charity Commissioners—Entry on register with restriction—Form of entry—Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29; *Land Transfer Rules*, 1903, *rules* 29, 83.—"A scheme legally established" under section 29 of the Charitable Trusts Amendment Act, 1855, does not in the case of an existing charity include a Royal Charter containing provisions for the management of the charity. Therefore, under the Land Transfer Rules, 1903, the entry on the register of charity land belonging to a previously existing society, subsequently incorporated by Royal Charter, must be subject to a restriction stating that no disposition is to be registered without the consent of the Charity Commissioners or an order of the registrar.

Observations *In re Mason's Orphanage and London and North-Western Railway Co.*, 73 L. T. Rep. 465, [1896] 1 Ch. 54; on appeal, 74 L. T. Rep. 161, [1896] 1 Ch. 596, explained and the decision in that case applied. — ATTORNEY-GENERAL *v.* NATIONAL HOSPITAL FOR THE PARALYSED, *Ch.D. Kekewich, J.*; [1904] 2 Ch. 252; 73 L. J. Ch. 677; 91 L. T. 63

6. *Legacy—Repair of burial grounds—Restriction to members of a particular sect—Advancement of religion.*—A bequest for the purpose of keeping in order burial grounds which are restricted to the use of the Society of Friends is a gift for the advancement of religion, and, consequently, a valid charitable bequest. — MANSER, RE, ATTORNEY-GENERAL *v.* LUCAS, *Ch.D. Warrington, J.*, 261; [1905] 1 Ch. 68; 74 L. J. Ch. 95; 92 L. T. 79.

7. *Mortmain—Gift for maintenance of churchyard—Statute—Implied repeal—Gifts for Churches Act*, 1803 (43 *Geo.* 3, *c.* 108), *s.* 1—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *s.* 7. —The restriction contained in the Gifts for Churches Act, 1803, s. 1, is impliedly repealed by section 7 of the Mortmain and Charitable Uses Act, 1891.

Held, therefore, that a residuary gift by a testatrix of property exceeding £500 in value for the maintenance of a churchyard was a valid charitable gift. — DOUGLAS, RE. DOUGLAS *v.* SIMPSON, *Ch.D. Kekewich, J.*; [1905] 1 Ch. 279; 74 L. J. Ch. 196; 92 L. T. 78.

8. *Sale of chapel—Consent of Charity Commissioners*

—*Voluntary contributions—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 62.—The trustees of the Welsh Calvinistic Methodist Connexion sold a chapel which was conveyed to them by an indenture dated the 31st of October, 1879, to hold unto and to the use of themselves, their heirs and assigns, upon trust for the Connexion, and also upon trust to sell, exchange, mortgage, demise, or let the chapel; and it was declared that the trustees should hold the proceeds of sale upon trust for the Connexion.

The consideration money of the conveyance of the 31st of October, 1879, was paid by the vendors out of moneys which they had borrowed on promissory notes signed by some of them, the principal and interest of which was afterwards paid out of a fund formed by voluntary contributions subsequently made or collected by members of the congregation.

Held (it being admitted that the proceeds of sale were applicable as income), that the money raised for the purchase of the chapel was not a donation or bequest unto and in trust for the charity, but was raised by voluntary contributions, and as such came within the exceptions in section 62 of the Charitable Trusts Act, and the consent of the Charity Commissioners to a sale was unnecessary.

In re Clergy Orphan Corporation, [1894] 3 Ch. 145, considered.—HARDING AND WELSH CALVINISTIC METHODIST CONNEXION, RE, *Ch.D. Buckley, J.*; 92 L. T. 641.

9. *Will—"Charitable and benevolent"—Validity of gift—Construction.*—Where a testator by his will gave the residue of his real and personal estate to "charitable and benevolent" institutions,

Held, that there was no uncertainty, and that the gift took effect as a charitable bequest.

In re Sutton, Stone v. *Attorney-General*, 28 Ch. D. 464, followed.—BEST, RE, JARVIS *v.* BIRMINGHAM CORPORATION, *Ch.D. Farwell, J.*, 21; [1904] 2 Ch. 354; 73 L. J. Ch. 808.

10. *Will—Perpetuity—Gift to officer's mess for unkeep of library.*—Gift of residuary estate for unkeep of a mess library held to be a charitable gift within the Statute of Elizabeth (43 Eliz. c. 4). Gift of leasehold houses for old officers of a regiment at a small rent during their life held void for perpetuity.

Income Tax Commissioners v. *Pemsel*, [1891] A. C. 583, 39 W. R. Dig. 217, discussed and explained.

In re Stratheden, 42 W. R. 647, [1894] 3 Ch. 265, approved.—GOOD, RE, HARINGTON *v.* WATTS, *Ch.D. Farwell, J.*, 476; [1905] 2 Ch. 60; 74 L. J. Ch. 512; 92 L. T. 796.

See also Will, 4, 5, 29.

CHEQUE:—

Stolen cheque—Forged indorsement—Foreign law—Conflict of law—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss* 24, 72.—Where a foreign bank cashes a cheque, drawn in a foreign country on a bank in England, the indorsement of which cheque is forged, the foreign bank acquires a good title which is passed to an English bank obtaining payment of the cheque from the bank on which it is drawn, if the foreign law identifies, as proprietor of the cheque and entitled to the proceeds thereof, a holder who has bought it *bonâ fide* and without gross negligence, notwithstanding the cheque has been stolen and its indorsement forged. The general rule of international law which applies to moveables is applicable to negotiable instruments, and any question of title arising out of the transfer of the cheque must be determined by the foreign and not the English law.

Judgment of Walton, J. (*ante*, p. 92), affirmed.—EMBIRICOS *v.* ANGLO-AUSTRIAN BANK, *C.A.* 306; [1905] 1 K. B. 677; 74 L. J. K. B. 326; 92 L. T. 305.

See also Bill of Exchange, 1.

CLUB:—

Registered—Returns—Liability of retired secretary—Licensing Act, 1902 (2 *Ed.* 7, *c.* 28), *ss.* 25, 30.—The appellant was in 1903 the secretary of a registered club and no return was made during January, 1904. During January, 1904, the appellant resigned the secretaryship, and his successor was appointed. On the 1st of February the appellant called at the office of the clerk to the justices for the necessary forms, and a return was made by the appellant's successor on the 4th of February.

Held, that the appellant had committed no offence in not making the return in proper time, as at the end of January, 1904, he was not the secretary, nor was he performing secretarial duties on the 1st of February.—BOOTH *v.* WEIGHTMAN, *K.B.D.*; 91 L. T. 532.

See also Gaming, 1.

COMPANY:—

1. *Articles of association—Form of proxy—Validity.*—The articles of association of a limited company provided that "every instrument appointing a proxy may be in the following form, or as nearly therein as may be," and, further, "No person shall be appointed to act as a proxy who is not a shareholder in the company." Another article referred to "the person named in such instrument."

A shareholder executed a power of attorney to act generally for the shareholder in all matters connected with the company. The document appointed certain persons by name, and proceeded "in the absence from B. of all the said persons, then the persons or person for the time managing the said business jointly and each of them severally to be my attorneys or attorney."

The proxy was used at a meeting by the managing director for the time being, who was not one of the persons expressly named in the power of attorney, and was not a shareholder in the company at the time when it was executed, but was a shareholder at the time when he used the proxy.

Held (reversing the judgment of the court below), that the articles had been sufficiently complied with, and that the proxy was valid.—BOMBAY AND BURMAH TRADING CORPORATION *v.* SHROFF, *P.C.*; [1905] A. C. 213; 74 L. J. P. C. 41; 91 L. T. 812.

2. *Bonds—Interest payable out of net earnings as and when available—Proceeds of sale—Capital or income—Tenant for life and remaindermen.*—A settlement comprised bonds which carried cumulative interest at six per cent., payable "as and when earned out of any net earnings of any year remaining after interest on" certain bonds, which constituted a prior charge, "shall have been paid for such year, and if in any year the net earnings so remaining available shall not be sufficient to pay such interest in full there shall be paid any part thereof earned and available, and any deficiency shall not be waived but shall be paid . . . out of the net earnings of any subsequent year or years as and when there shall be any net earnings available for such purpose." Upon a sale of the bonds by the trustees,

Held, that the whole of the proceeds of sale of the bonds was capital money, and that the tenant for life under the settlement was not entitled to any part thereof as arrears of income.—TAYLOR, RE,

MATHESON *v.* TAYLOR, *Ch.D. Buckley, J.*, 441; [1905] 1 Ch. 734; 74 L. J. Ch. 419; 92 L. T. 558.

3. *Debenture—Borrowing powers*—Ultrà vires—*Funds used for unauthorized purposes—Duty of lender to inquire—Knowledge by director of lending company—Imputed notice.*—Where a company has a power to borrow money generally for the purposes of the company a lender is not bound to inquire as to the purpose to which the borrowing company is about to apply the money; and if the money is applied for unauthorized purposes the validity of the loan is not affected, in the absence of knowledge on the part of the lender, by the fact that it was intended that the money should be misapplied.

In re Durham County Permanent Investment and Building Society, Davis's case, L. R. 12 Eq. 516, overruled on this point.

A company lent another company a sum of money secured by a debenture of the borrowing company. The lending company was induced to lend the money by K., one of its directors, who was interested in the borrowing company and in his private capacity had acquired the knowledge that the directors of the borrowing company intended to use the money borrowed for purposes outside the purposes authorized by their memorandum and articles of association, which, however, gave the company a general power of borrowing for the purposes of its business. K. was the only director of the lending company who knew how the money was to be applied.

Held, that the knowledge of K. ought not to be imputed to the lending company, as there was no legal duty on the director to impart his knowledge, nor any duty on the lending company to have acquired the knowledge, and the debenture was a valid security.

Decision of Buckley, J., affirmed.—DAVID PAYNE & Co., RE, YOUNG *v.* DAVID PAYNE & Co., *C.A.*; [1904] 2 Ch. 608; 73 L. J. Ch. 849; 91 L. T. 777.

4. *Debentures—Claims upon registered holder—Transfer—Rights of transferee—Conditions of debenture—Right to be registered.*—A company issued debentures to B. under the misapprehension that B. had given value for them, which was not the case. The moneys secured were expressed to be payable to B. "or the registered holder thereof for the time being." One of the indorsed conditions was that the moneys secured would be paid "without regard to any equities between the company and the original holder," and that the receipt of the registered holder should be a good discharge to the company for the moneys payable. Another condition was that a transfer must be delivered with such evidence of title as the company might reasonably require. B. deposited these debentures with C. to secure moneys owing to C. by B. C. had no knowledge of the defectiveness of B.'s title. C. afterwards procured a transfer from B., but he did not get himself registered, or demand to be registered, as the holder of the debentures. The company having gone into liquidation, C demanded to be paid the sums secured by the debentures, without regard to the claims of the company upon B.

Held, that, under debentures drawn in that form, C. had no right to demand to be registered as holder, and that not being registered he was only entitled to the debentures subject to all equities existing between the company and B. with regard to them.

Held, also, that under the indorsed condition the company could refuse to register C., as not having shown a good title to the debentures.

In re Goy & Co. (Limited), 48 W. R. 425, [1900] 2 Ch. 149, explained and distinguished.—PALMER'S DECORATION AND FURNISHING Co., RE, *Ch.D. Buckley, J.*, 142; [1904] 2 Ch. 743; 73 L. J. Ch. 828; 91 L. T. 772.

5. *Debentures—Floating security—Appointment of receiver—Judgment creditor—No principal or interest in arrear—Jeopardy.* — The court will, at the instance of the holder of a debenture creating a floating charge upon the undertaking and property of a limited company, appoint a receiver of the property comprised in the debenture where the property is in danger of execution being levied upon it by a judgment creditor, notwithstanding that no principal moneys or interest are in arrear under the debenture, and that the judgment creditor appears and objects.—LONDON PRESSED HINGE Co., RE, *Ch.D. Buckley, J.*, 407; [1905] 1 Ch. 576; 74 L. J. Ch. 321; 92 L. T. 409.

6. *Debentures—Issue as security for loan—Debentures returned to company with blank transfer on repayment—Registered owner—Subsequent transfer to purchaser for value—Priorities.*—The company duly issued a series of debentures each of which was to rank *pari passu* with the others. Certain of these debentures were issued as security for loans, and on repayment were returned to the comprny with blank transfers, but they were not transferred to the company, nor was the company entered on the register as the owner of the debentures. Subsequently these debentures were transferred to other persons for value by completing the blank transfers.

Held, that the debentures so dealt with did not rank *pari passu* with the other debentures of the same series, and that the company acting as they did had made a new issue of debentures.—TASKER & SONS, RE, HOARE *v.* TASKER & SONS, *Ch.D. Kekewich, J.*, 247; [1905] 1 Ch. 283; 74 L. J. Ch. 141; 92 L. T. 17.

7. *Debentures issued jointly by three companies—Validity*—Ultrà vires—*Covenant to pay both joint and several—Companies' undertakings charged with such debentures—Application of proceeds—Construction of articles of association.*—Three companies by their memorandum and articles of association had power to borrow money on the security of debentures charged upon the property of the company. They subsequently, in order to raise money to meet certain liabilities, issued joint debentures, by which they jointly and severally agreed to pay to the holder for the time being the money so lent, together with interest on the same, and they thereby respectively charged with such payments their several undertakings, and all their present and future property and assets.

Held, that the debentures constituted a valid charge upon the assets of the company, so far as the money so advanced had come into the hands of each company, although it was an *ultrà vires* act for any company to charge its assets with money advanced to another company.

Held, also, that a clause in the articles of association of a company which empowered the directors to borrow any sum of money, not exceeding the amount of the preference share capital of the company, on the security of the property of the company by, *e.g.*, debentures, did not limit the amount which could be raised on the security of debentures, when no preference shares had been issued.

Decision of Byrne, J., on the first point reversed.—JOHNSTON FOREIGN PATENTS Co., RE, *C.A.*, 189; [1904] 2 Ch. 234; 73 L. J. Ch. 617; 91 L. T. 124.

8. *Debentures—Receiver—Assets charged by receiver—Receiver agent of debenture-holders—Personal*

liability of debenture-holders and receiver—Principal and agent.—Debenture-holders were given power to appoint a receiver to take possession of the assets, carry on the business, sell the property, make any arrangements he should think advisable in the interests of the debenture-holders, and apply moneys received to certain specified purposes. But the debentures did not provide that the receiver was to be the agent of the mortgagors. A receiver appointed under this power made an agreement with the plaintiffs whereby he assigned to them book debts of the company in consideration of their doing certain work for the company. Subsequently the debenture-holders appointed another receiver in the place of the first one. The new receiver repudiated the agreement, but offered by letter to pay the plaintiffs for certain work. The work was done but not paid for.

Held (following *In re Vimbos* (*Limited*), 48 W. R. 520, [1900] 1 Ch. 470), that the receiver was the agent of the debenture-holders; that he had authority to pledge the assets in priority to the debentures; that the agreement was a valid assignment of book debts paid to the receiver during his agency so far as was necessary to secure payment to the plaintiffs; that the plaintiffs were, therefore, entitled to have the money received in respect of these debts paid over to them; that the debenture-holders were themselves personally liable to pay the plaintiffs the amount due to them; and that the second receiver was, by the terms of his letter, personally liable to pay for the work thereby ordered. — ROBINSON PRINTING CO. *v.* CHIC (LIMITED), *Ch.D. Warrington, J.*, 681; [1905] 2 Ch. 123; 74 L. J. Ch. 399.

9. *Debentures—Series—Transfer of some debentures to company — Subsequent transfer by company — Validity.*—A limited company duly issued a series of debentures, each of which was to rank *pari passu* with the others. Certain of these debentures were, for value, transferred to the company itself, and afterwards re-transferred, likewise for value, by the company to other persons.

Held, that the debentures so dealt with did not rank *pari passu* with the other debentures of the same series.—ROUTLEDGE & SONS, RE, HUMMEL *v.* ROUTLEDGE & SONS, *Ch.D. Buckley, J.*, 44; [1904] 2 Ch. 474; 91 L. T. 288.

10. *Debenture trust deed—Deficient security—Payment of interest and principal—Default—Realization of securities—Appropriation by payees to principal and interest—Income tax.*—The trustees of a debenture trust deed were thereby directed, in case of default by the trust company which created it, to pay the principal moneys and interest for which the trust company should become liable under its debentures, to realize the securities, and apply the proceeds in the first place in or towards payment of all arrears of interest on the debentures, and, secondly, in or towards payment of principal.

The trust company having made default, a debenture-holders' action was brought, and an order was made in that action for the trusts of the debenture deed to be carried into execution. The securities were gradually realized.

Under numerous orders made in the action certain sums were paid to the debenture-holders on account both of interest, after deducting income tax, and of principal and interest generally. The realization having been practically completed, the trustees had in their hands a sum of money out of which it was proposed to pay a final dividend to the debenture-holders.

Held, that all payments hitherto made by the trustees on account generally might be attributed as payments on account of principal; and that no income tax would therefore be payable.

Order of Byrne, J., varied. — SMITH *v.* LAW GUARANTEE AND TRUST SOCIETY, *C.A.*; [1904] 2 Ch. 569; 73 L. J. Ch. 733; 91 L. T. 545.

11. *Directors—Remuneration—Travelling and hotel expenses—Attending board meetings—Resolutions of directors—Reimbursement* inter se—*Articles of association of company—Special circumstances.*—Directors of public companies who receive payment for attending to the business of the company are not entitled to be paid their travelling expenses to and from board meetings out of the company's assets in addition, unless there are special circumstances existing, or there is an authority in the instrument which regulates the company or the shareholders at a properly convened meeting to sanction it. Therefore a resolution of the directors, general in terms, purporting to give their travelling expenses to all the directors is clearly bad in the absence of such special circumstances or authority. — YOUNG *v.* NAVAL AND MILITARY SOCIETY OF SOUTH AFRICA, *K.B.D.*, 447; [1905] 1 K. B. 687; 74 L. J. K. B. 302; 92 L. T. 458.

12. *Floating charge—Assignment of present and future book debts—Registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.—A mortgage of the present and future book debts of a trading company which contemplates the carrying on of the business in the ordinary way, and leaving such debts for the time being under the control of the directors, is a floating charge within the meaning of section 14 of the Companies Act, 1900, and therefore void, if not registered, as against the creditors of the company.

Decision of the Court of Appeal (*sub. nom. Houldsworth* v. *Yorkshire Woolcombers Association*, [1903] 2 Ch. 284) affirmed. — ILLINGWORTH *v.* HOULDSWORTH, *H.L.*, 113; [1904] A. C. 355; 73 L. J. Ch. 739; 91 L. T. 602.

13. *Foreign laws — Limited liability — Company formed for purpose of trading in foreign country—Personal liability of shareholders under the foreign law—Conflict of laws.*—An English company incorporated under the Joint Stock Companies Acts as a limited company was, as the memorandum of association stated, formed for the purpose of acquiring and working mines in (amongst other countries) the United States of America, and by the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California, and for the purposes of those mines purchased from the plaintiffs, manufacturers in California, certain machinery. By the law of California every shareholder of a company, whether incorporated in California or elsewhere, trading within that State is personally liable for such proportion of the company's debts as the amount of his shares bears to the whole of the subscribed capital of the company. The company having become insolvent, the plaintiffs sued the defendant, a shareholder of the company, in this country for his proportion of the price of the machinery.

Held, that the defendant did not by becoming a member of the company upon the terms of the memorandum and articles of association authorize the directors to pledge his personal credit for the price of the goods supplied, and that the action could not be maintained.—RISDON IRON AND LOCO-

the contract does not apply, and the contract remains voidable without such time limit.

If a company states in its prospectus the number of shares as the minimum upon which it will proceed to allotment, that is a condition upon which an applicant takes his shares, and if that condition is not complied with the applicant is entitled under the general law to repudiate the contract. A company having fixed in its prospectus a minimum number of shares upon which it would proceed to allotment, inadvertently allotted shares before the minimum number had been applied for. The company was registered before 1900, but the allotment was after 1900, and was the first allotment to the public. Upon the mistake being discovered its directors proceeded to return the application moneys and cancel the allotment.

Held, that, although the limitation of the period during which an allotment is voidable, imposed by section 5 of the Companies Act, 1900, could not apply, yet the contract to take the shares was voidable, both as a breach of section 4 of the Act and also under the general law, as in breach of the conditions mentioned in the prospectus, and consequently a motion to restrain the company returning the allotment and cancelling the shares failed.—FINANCE AND ISSUE (LIMITED) *v.* CANADIAN PRODUCE CORPORATION, *Ch.D. Buckley, J.*, 170; [1905] 1 Ch. 37; 73 L. J. Ch. 751; 91 L. T. 685.

26. *Shares—Issue of shares at discount—Issue of debentures at discount—Option of debenture-holders to take fully-paid shares.*—A company proposed to issue debentures at a discount of 20 per cent. The debentures were to be payable on the 1st of November, 1909, and any debenture-holder was, up to the 1st of May, 1909, to have the option of exchanging his debenture for fully paid-up shares in the company at the rate of one £1 share for every £1 secured by the debenture. By the conditions of the debentures the debenture was to become immediately payable on the holder giving written notice to the company that he wished to exercise his option.

Held, that the scheme ought to be restrained by injunction, on the ground that it might be used as a means for issuing shares at a discount.—MOSELEY *v.* KOFFYFONTEIN MINES (LIMITED), *C.A.*, 140; [1904] 2 Ch. 108; 73 L. J. Ch. 569; 91 L. T. 266.

27. *Shares—Transfer of shares—Registering transfer without production of share certificate—Note on certificate—False declaration—Reasonable inquiry—Notice—Agency—Articles—Liability of company—Companies Act*, 1862 (25 & 25 *Vict. c.* 89), *ss.* 22, 30.—The articles of a limited company provided that the company should not be bound to regard or see to the execution of any trusts, whether express, implied or constructive, to which any share might be subject; and that before registration of any transfer of shares, the instrument of transfer should be left at the office of the company, together with any evidence the company might require to prove the title of the transferor. C. was the registered holder of shares in the company, and in May, 1903, he deposited the certificate of his shares, and an executed transfer of the shares with the date in blank, with R. as security for a loan. Upon the certificate was this note: "Without the production of this certificate no transfer of the shares mentioned therein can be registered." In June, 1903, C., unknown to R., sold the shares to Y., and lodged with the company for registration a transfer to Y. of the shares, without the certificate, but with a written declaration by C. stating that the certificate was in the possession of a friend, but not as security for a loan or other consideration. C. was a servant of the company, and the directors, acting in good faith, accepted his declaration as sufficient and registered the shares in Y.'s name, and issued to him a fresh certificate for the shares. In September, 1903, R. filled in the date of his transfer and lodged it with the company for registration, together with the original certificate; but the company declined to register his transfer because the shares had been already transferred to and registered in the name of Y. In an action by R. against the company for damages for having wrongfully registered the shares in Y.'s name,

Farwell, J., dismissed the action ([1905] 1 Ch. 296).

Held, upon the facts, that the company must be treated as having had, through three officers of theirs, notices of the plaintiff's charge at the time they registered the transfer; and accordingly the company were ordered to repay to the plaintiff the proceeds of the shares which had been paid by the purchaser to the company by the direction of the vendor in part payment of a loan made to him out of the company's funds, the loan transaction having been arranged by the three officers of the company, but without its having been formally brought before or considered by the board of directors. The appeal was therefore allowed.—RAINFORD *v.* JAMES KEITH & BLACKMAN CO., *C.A.*; [1905] 2 Ch. 147; 74 L. J. Ch. 531; 92 L. T. 786.

28. *Shares—Unpaid calls—Forfeiture—Payment by former holder—Liability of purchaser of forfeited shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38 (4), *Table A, art.* 22.—A company under their articles declared certain of their shares (which were 5s. shares, upon which 3s. 4d. had been paid up) to be forfeited for non-payment by A., their holder, of a further call of the remaining 1s. 8d., and the company then sold these shares to N., with a certificate following the words of article 22 of Table A. The company after the sale made a further call upon N. of 1s. 3d. per share, which was paid, leaving 5d. of the nominal amount unpaid. Subsequently the liquidator of the company, which had gone into liquidation, obtained from A., the former holder, a sum equal to nearly 5d. per share in respect of his liability after forfeiture under the articles of the company which were substantially the same for this purpose as those of Table A. The liquidator of the company also claimed to place N. upon the list of contributories for a sum equal to 5d. per share held by them, notwithstanding the payment made by A.

Held, that although A. was not a contributory yet his payment was made in respect of the unpaid nominal amount due upon the shares, and that to the extent of this payment nothing was due from N. upon the shares.—RANDT GOLD MINING CO., RE, *Ch.D. Buckley, J.*, 90; [1904] 2 Ch. 468; 73 L. J. Ch. 598; 91 L. T. 174.

29. *Special resolution—Confirmation—Notice of meetings—Contingent notice—Articles of association—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.—A provision in the articles of association of a company to the effect that whenever it is intended to pass a special resolution the two meetings may be convened by one notice, and that it shall be no objection that the notice convenes the second meeting contingently on the resolution being duly passed at the first meeting, is not *ultra vires* the company as being inconsistent with section 51 of the Companies Act, 1862, and a contingent notice given in conformance with such a provision is valid.

Alexander v. *Simpson*, 38 W. R. 161, 43 Ch. D. 139, distinguished.

Decision of Buckley, J. (*ante*, p. 442, [1905] 1 Ch. 609) reversed.—NORTH OF ENGLAND STEAMSHIP CO, RE, *C.A.*, 499; [1905] 2 Ch. 15; 74 L. J. Ch. 404.

30. *Winding-up—Appeal from registrar—Companies (Winding-up) Rules*, 1903, *r.* 7.—The Court of Appeal will not entertain an appeal direct from the registrar in chambers in the winding up of a company. Motion to discharge the order should be made before the judge.—PRETORIA-PIETERSBURG RAILWAY CO., RE, *C.A.*, 41; [1904] 2 Ch. 170; 73 L. J. Ch. 551; 91 L. T. 274.

31. *Winding up—Bankruptcy of contributory—Liability on shares—Proof in bankruptcy—Surplus assets—Right of participation.*—The holder of shares in a limited company which has gone into liquidation, upon which shares there is a liability for calls, cannot share in the distribution of the surplus assets of the company until he has paid all sums due to the company in respect of his liability on the shares, and this is so with regard to his trustee in bankruptcy where the shareholder has become bankrupt, even when the company have proved against his estate for the amount of the liability, and have received a dividend thereon before they went into liquidation.

The principle of *In re Overend, Gurney, & Co., Ex parte Grissell*, 14 W. R. 1015, L. R. 1 Ch. 528, applied.—WEST COAST GOLD FIELDS (LIMITED), RE, *Ch.D. Buckley, J.*, 455; [1905] 1 Ch. 597; 74 L. J. Ch. 347.

32. *Winding up—Claim for debt—Creditor resident abroad—Security for costs—Companies (Winding-up) Rules*, 1903, *r.* 201.—A person resident abroad claiming by summons as creditor in the voluntary winding up of a company must give security for costs, the ordinary practice of the High Court, and not that of bankruptcy, being applicable under rule 201 of the Companies (Winding-up) Rules, 1903.—PRETORIA-PIETERSBURG RAILWAY CO. (NO. 2), RE, *Ch.D. Buckley, J.*, 74; [1904] 2 Ch. 359; 73 L. J. Ch. 704; 91 L. T. 285.

33. *Winding up—Contributory—Discharge of contributory on composition—Reduction of discharge on ground of concealment—Lapse of time*—The House reversed with costs the decisions of the majority of the Second Division, given with the assistance of the judges of the First Division of the Court of Session, and restored the Lord Ordinary's interlocutor (1904, 6 F. 754, 692).—WATTS *v.* ASSETS CO., BAIN *v.* ASSETS CO., *H.L.*; [1905] A. C. 317.

34. *Winding up — Debentures — Receiver and manager—No surplus assets—Petition to wind up—Just and equitable—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* 5—*Companies (Winding-up) Rules*, 1903, *r.* 186.—Since the Companies (Winding-up) Rules, 1903 (containing rule 186), were made, it is no longer a rule of practice that a petition to wind up a limited company must in all cases contain an allegation of available assets from which the petitioner has a reasonable probability of obtaining something in the event of winding up. If it is desirable that a company should be wound up, an order may be made, although the petitioner can derive no advantage from the assets.

The business of a company was being carried on by a receiver and manager appointed by its debenture-holders. All the assets were charged by the debentures, and were insufficient to pay what was due upon the debentures. A judgment creditor presented a petition to have the company wound up by the court compulsorily.

Held, that the company was a mere *nominis umbra*, and that it was desirable that it should be wound up, and the order was made under section 79, sub-section 5, of the Companies Act, 1903. — CHIC (LIMITED), RE, *Ch.D. Warrington, J.*, 659.

35. *Winding up — Examination of directors — Allegations of misfeasance—Representation by solicitors and counsel—Jurisdiction as to costs of examination—Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.—The examination of officers of a company in liquidation under section 115 of the Companies Act, 1862, is "a proceeding in the Supreme Court" within section 5 of the Judicature Act, 1890; and therefore the costs of the attendance of the witnesses, and of their being represented by solicitors and counsel, are within the discretion of the court, and may, if the court thinks fit, be ordered to be paid by the parties at whose instance the examination is heard.—APPLETON, FRENCH, & SCRAFTON (LIMITED), RE, *Ch.D. Warrington, J.*, 601; [1905] 1 Ch. 749; 74 L. J. Ch. 471.

36. *Winding up — Life assurance — Scheme for reduction of contracts — Other business—Separate accounts—Mixed payments—Pension tea—Inequality of reduction—Life Assurance Companies Act*, 1870 (34 & 35 *Vict. c.* 61), *ss.* 4 *and* 22.—A company sold tea to women at a price above the market price upon the terms that it would grant to various classes of customers in certain events weekly sums as pensions for life so long as the customers bought the tea of the company and remained widows. The company became insolvent, and a petition was presented to have it wound up. The company proposed to continue business, and put forward a scheme for reduction of their contracts to pay the pensions, by which a new company was to be formed, which would sell the tea and pay 75 per cent. of the extra price to the old company, which should insure the payment of the pensions. The reduction proposed was unequal as between the various classes of customers.

Held, that such a scheme of reduction would not be approved, because (1) it involved the pensioners making new contracts with a new company, and therefore was not within section 22 of the Life Assurance Companies Act, 1870; (2) the business of life insurance could not be carried out in compliance with section 4 of the same Act, as the premiums to be taken could not be dealt with as separate sums and be carried to a separate account; and (3) the proposed reduction being unequal as between the various classes of pensioners was not authorized by section 22 of the Act.—NELSON & CO. (LIMITED), RE, *Ch.D. Buckley, J.*, 361; [1905] 1 Ch. 551; 74 L J. Ch. 290; 92 L. T. 404.

37. *Winding up—Liquidator—Invalid appointment—Claim for remuneration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 67.—A limited company resolved on a voluntary winding up and appointed the appellant liquidator. This resolution was subsequently set aside as invalid by an order of the court. On a compulsory winding up of the company the appellant claimed to prove as a creditor for work done by him while purporting to act as liquidator prior to the order of the court.

Held, that section 67 of the Companies Act, 1862, could not be used to justify the appellant's claim against the company for services as liquidator, as he had never had valid authority from the company to act as liquidator, nor was the appellant entitled at common law to be paid on a *quantum meruit* for such services; but that the appellant was entitled to claim reasonable remuneration for such work as

he had done for the company for business purposes unconnected with the voluntary winding up, or which had been used by the official receiver and liquidator in the compulsory winding up with full knowledge of the facts.—ALLISON, JOHNSON, & FOSTER, RE, *K.B.D.*, 285; [1904] 2 K. B. 327; 73 L. J. K. B. 763; 91 L. T. 66.

38. *Winding up—Liquidator—Security for costs—Practice—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—According to the practice of the court the liquidator of a company is not bound to give security for costs in respect of a misfeasance summons taken out by him.—STRAND WOOD CO., RE, *C.A.*, 69; [1904] 2 Ch. 1; 73 L. J. Ch. 550; 90 L. T. 800.

39. *Winding up—Power to borrow—Irredeemable debenture stock—Floating security—Perpetual annuity—Explanation of memorandum by articles.*—A railway company incorporated under the Companies Acts, 1862 to 1880, one of whose objects, as stated in the memorandum of association, is to borrow money by the issue of debenture stock, cannot in consequence grant perpetual annuities by the issue of such stock. The granting of such annuities is not borrowing, nor is it a purpose subsidiary to the objects of a commercial company, and therefore contemporaneous articles of association of such a company cannot be looked at for the purpose of construing the above-mentioned object to mean the raising of money by the granting of perpetual annuities. And when such a company is wound up the debenture stockholders are entitled to nothing more than the payment of the amount secured by the stock with interest.—SOUTHERN BRAZILIAN RIO GRANDE DO SUL RAILWAY CO., RE, *Ch.D. Buckley, J.*, 489; [1905] 2 Ch. 78; 74 L. J. Ch. 392; 92 L. T. 598.

40. *Winding up — Voluntary liquidation — Approaching dissolution—Stay of proceedings—Postponement of dissolution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 89, 143.—The voluntary winding up of a company continues after the meeting has been called and the return made to the registrar under sections 142 and 143 of the Companies Act, 1862, and during the three months appointed by the latter section, at the expiration of which the dissolution of the company takes place; and the court has during those three months, under sections 89 and 138, jurisdiction to stay the proceedings in the winding up for the purpose of keeping the company on foot and preventing the operation of section 143, and will in a proper case make such an order.

Semble, such an order as above-mentioned will prevent the dissolution of the company at the expiration of the three months.—EASTERN INVESTMENT CO., RE, *Ch.D. Warrington, J.*, 186; [1905] 1 Ch. 352; 74 L. J. Ch. 281; 92 L. T. 359.

41. *Winding up—Voluntary winding up—Pending action against company—Adoption of defence by liquidator—Plaintiff's costs of action—Costs out of assets of company.*—If the liquidator of a company in liquidation, whether voluntary or compulsory, elects either to prosecute or defend proceedings in a pending action to which the company is a party on behalf of the estate, the company must be treated as an ordinary litigant, and if costs are given against it the liquidator must pay those costs in full to the plaintiff out of the assets of the company.

The liquidator of a company in voluntary liquidation, which was defendant in an action pending at the date of liquidation, upon the demand of the plaintiff as to his intentions, adopted the defence, and refused to admit the plaintiff's claim. The company had judgment given against it with costs.

Held, that the plaintiff was entitled to have these costs paid out of the assets of the company, and was not obliged to add them to his claim for proof in the winding up.—WENBORN & SONS, RE, *Ch.D. Buckley, J.*, 332; [1905] 1 Ch. 413; 74 L. J. Ch. 283; 92 L. T. 228.

See also Criminal Law, 7; Inland Revenue, 16, 20, 30; Insurance, 2; Libel, 1.

COMPROMISE:—

Legal rights—Agreement—Family solicitor common agent — Mistake — Setting aside. — A compromise between members of a family, made after consultation with the family solicitor, is in general binding, even though it may not be quite in accordance with their exact legal rights, provided the solicitor has fully explained to the parties what those rights are. But if any one of the parties has entered into the compromise in consequence of what afterwards proves to have been an erroneous view taken by the solicitor of the facts or of the law, or merely because the solicitor may have considered a compromise would be for the advantage of all parties irrespective of their legal rights, that party may have the compromise set aside.—ROBERTS, RE, ROBERTS *v.* ROBERTS, *C.A.*; [1905] 1 Ch. 704; 74 L. J. Ch. 483.

CONFLICT OF LAWS:—

Assignment abroad of reversionary interest—Personal estate in England—Notice—Priority.—In June, 1891, A. H. S., being then domiciled in the State of New York, assigned to his wife by deed his reversionary interest under his late father's will absolutely. The estate was invested in English trust securities. Notice to the trustees of the will was not necessary to complete an assignment of a chose *in action* or reversionary interest in personalty according to the law in the State of New York, and notice of this assignment was not sent to the English trustees. In August, 1894, A. H. S., being then in England, assigned by deed his reversionary interest in his father's estate to the plaintiff to secure £400 by way of mortgage. The plaintiff forthwith gave notice of this assignment to the trustees of the will. In September, 1903, the wife gave notice to the trustees of the assignment made to her. In an action to settle the priorities of these two assignments,

Held, that, as the court was administering an English trust fund settled by the will of an English testator, the rights of the claimants to that fund must be regulated by English law, and, accordingly, that the plaintiff was entitled to priority by virtue of the notice he had given to the trustees.—KELLY *v.* SELWYN, *Ch.D. Warrington, J.*, 619; [1905] 2 Ch. 117; 74 L. J. Ch. 567.

See also Company, 13.

CONTRACT—

1. *Breach — Penalty or liquidated damages — Waiver.*—The appellants, a firm of shipbuilders, contracted to build four ships of war for a foreign Government, at an agreed price payable in instalments, to be delivered at fixed times. The contracts provided that "the penalty for late delivery shall be at the rate of £500 a week for each vessel." The vessels were not delivered till long after the agreed dates of delivery, and the purchasers brought an action claiming £500 a week for each vessel.

Held, that these sums were to be regarded as liquidated damages, and that the plaintiffs were entitled to recover the full amount, irrespective of such damage as they could prove that they had sustained by the delay in delivery.

Held, further, that acceptance after the date fixed for delivery and payment in full of the last instalment of the agreed price did not operate as a waiver of the penalty clauses in the contracts.

Judgment of the court below affirmed.—CLYDEBANK ENGINEERING CO. *v.* CASTANEDA, *H.L.*; [1905] A. C. 6; 74 L. J. P. C. 1; 91 L. T. 666.

2. *Construction—Agreement to participate in profits of business for a specific period—Sale within that time—Implied stipulation.*—The appellants, who were wholesale tobacconists, agreed with the respondent in consideration of his undertaking to become a customer and not to sign any agreement with any company or firm which would prevent him from buying or selling the appellants' goods, and to continue to buy and sell such goods, that the respondent should for four years share in a distribution by the appellants of an annual bonus among such of their customers as should purchase direct from them, the distribution to be made according to the purchases for the year. Before the expiration of the four years the appellants sold their business and went into liquidation. The respondent had fulfilled his part of the undertaking.

Held, that there was an implied undertaking on the part of the appellants that they would continue to carry on their business, and would not do any voluntary act which would make it impossible to distribute the sums which they had undertaken to distribute, and therefore that by parting with their business there was a breach of contract, which entitled the respondent to damages.

Decision of the Court of Appeal (*ante*, p. 71, [1904] 2 K. B. 410) affirmed.—OGDENS *v.* NELSON, *H.L.* 497; [1905] A. C. 109; 74 L. J. K. B. 433; 92 L. T. 478.

3. *Construction — Supervening impossibility — Failure of crop.*—The defendants, who were market gardeners, entered into a contract to supply the plaintiffs with a quantity of gherkins. In reply to the plaintiffs the defendants wrote: "We could offer you in green probably about fifty hogsheads, and say 150 hogsheads large at the same price as last year." The defendants subsequently wrote: "We accept your offer . . . for fifty hogsheads crooked green at 30s. per hogshead; 150 hogsheads large green at 21s. per hogshead; 150 to 200 hogsheads second flower at 27s. as required; terms as usual." Owing to the weather, and through no fault or negligence of the defendants, the crop of gherkins was a failure.

An action having been brought for damages for breach of contract,

Held, that the contract was for a specific quantity of a particular kind of goods, and did not refer to gherkins only grown on the defendants' land, and that the defendants were liable for the failure to deliver.—HAYWARD *v.* DANIEL, *K.B.D.*; 91 L. T. 319.

4. *Costs—Agreement to pay costs out of estate—Refusal of judge to sanction—Infant beneficiary—Liability upon agreement—Contract tending to affect administration of justice.*—During the course of proceedings in the Probate Division to establish the validity of one or other of two wills, an agreement was made between the plaintiff, who claimed under the later will as residuary legatee, and the defendant, who claimed under the earlier will as executor and trustee for an infant beneficiary whose guardian was a party to the agreement, providing that whichever will was upheld the costs, as between solicitor and client, of the plaintiff and the defendant and the infant should be paid out of the estate of the deceased, whether the court so ordered or not. The court pronounced in favour of the earlier will, but on behalf of the infant beneficiary refused to sanction the agreement to pay costs out of the estate.

In an action by the plaintiff upon the agreement to recover his costs incurred in the proceedings,

Held, that the agreement was not void as tending to affect the administration of justice; that if the parties had been *sui juris* they could have entered into such an agreement, which would have been valid, and that the fact that the defendant could not perform his contract to pay the plaintiff's costs out of the estate owing to the beneficiary thereto being an infant, and therefore not bound by the contract, did not absolve the defendant from his obligation under the agreement, and that the defendant was therefore liable for the plaintiff's costs.—PRINCE *v.* HAWORTH, *K.B.D.*; 92 L. T. 773.

5. *Hire-purchase—Agreement by hirer to keep in repair—Lien—Authority of hirer to give lien to repairer.*—By a hire-purchase agreement the plaintiff let a dog-cart; one of the terms of the agreement being that the hirer should keep and preserve the said dog-cart from injury, damage by fire included. During the currency of the agreement the dog-cart was sent by the hirer to the defendant for repair. The defendant claimed a lien on the dog-cart for the cost of the repairs. In an action by the plaintiff to recover the dog-cart or its value,

Held, that the terms of the agreement gave authority to the hirer to create a lien as against the plaintiff in favour of the defendant for the amount of his charges.—KEENE *v.* THOMAS, *K.B.D.*, 336; [1905] 1 K. B. 136; 74 L. J. K. B. 21; 92 L. T. 19.

6. *Rescission — Misrepresentation — Purchase of shares—Contract completed.*—Rescission will not, in the absence of fraud, be decreed of a contract for the purchase of shares in a company after the contract has been completely carried out by transfer and registration. The rule being the same in the case of *choses in action* in this respect as in the case of a conveyance of land. Repudiation of a purchase of shares in a company on the ground of misrepresentation must be made at the earliest possible moment. Mere silence will not amount to misrepresentation.—SEDDON *v.* NORTH-EASTERN SALT CO., *Ch.D. Joyce, J.*, 232; [1905] 1 Ch. 326; 74 L. J. Ch. 199; 91 L. T. 793.

7. *Seizure of works and re-entry—Right to determine contract*—Quantum meruit—*Default or delay caused by parties suing.*—A party to a contract for the execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress, when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself or his agent. A contractor in such circumstances may treat the contract as at an end, and may sue for work and labour done, instead of suing for damages for breach of the contract.—LODDER *v.* SLOWEY, *P.C.*, 131; [1904] A. C. 442; 73 L. J. P. C. 82; 91 L. T. 211.

8. *Wilful misconduct — Negligence — Knowledge—Burden of proof.*—Wilful misconduct means misconduct to which the will is party as distinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who either acts with reckless ignorance or knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do, as the case may be, a particular thing, and yet intentionally does or fails or omits to do it, or persists in the

act, failure, or omission regardless of consequences. [Definition of Johnson, J., in *Graham* v. *Belfast and Northern Counties Railway Co.*, [1901] 2 I. R. 13, adopted.]

Notice to a company that an act will cause damage is not sufficient to constitute wilful misconduct, unless it can be proved, the burden being upon the party alleging, that notice came to the knowledge of the person actually doing the act complained of. Hence, notice, *e.g.*, to the manager of the goods depot of a railway company, that a particular method of loading is objectionable, is not sufficient. It must be proved that the foreman in charge of the loading had notice.—FORDER *v.* GREAT WESTERN RAILWAY CO., *K.B.D.*, 574; [1905] 2 K. B. 532.

9. *Wrongful repudiation—Subsequent discovery of proper ground for repudiation—Right to reject—Waiver of conditions by buyer.*—The defendants bought of the plaintiff about one hundred tons of Honduras rosewood for shipment in the course of 1903 at £6 10s. per ton weight delivered, cash against bill of lading, less 2½ per cent. discount, c.i.f. L., H., or L. at plaintiff's option.

The deliveries of the wood were to be by instalments, and the wood was shipped by two ships. While the first ship, which contained about sixty-three tons, was on the voyage, the defendants heard that the plaintiff had shipped rosewood to another buyer, and on the 5th of October, 1903, they wrote to the plaintiff's agent in H. stating that, in consequence of this alleged breach of an alleged collateral oral stipulation not to supply any other person in the trade, they would not accept any of the wood under the contract. Upon the 30th of October the bill of lading for the wood arrived in England, and was tendered by the plaintiff's agent to the defendants and was refused. The ship arrived on the 9th of November. The second ship arrived in January, 1904, and the bill of lading for that shipment was tendered by the plaintiff's agent to the defendants on the 18th of January and was refused. Seventeen tons of the wood by the first ship was not according to the contract. The plaintiff sold the wood and claimed as damages the difference between the contract price and the price realized.

Held (dismissing the appeal), that the defendants by repudiating the contract waived the conditions precedent to be performed by the plaintiff, and that they were liable to pay damages in respect of the non-acceptance of the first consignment, as they could not say the plaintiff was not ready to perform his part of the contract because a considerable portion of the wood was not according to the contract in quality.—BRAITHWAITE *v.* FOREIGN HARDWOOD CO., *C.A.*; 92 L. T. 637.

See also Restraint of Trade, 1, 2; Sale of Goods, 1-5; Trade Union, 2; Valuer, 1.

CONVEYANCING ACT.—See Accumulations, 1; Distress, 2; Power, 1; Principal and Agent, 6; Vendor and Purchaser, 2.

COPYHOLDS:—

1.—*Fines and fees—Appointment of new trustees—Admission of heir-at-law of last surviving trustee—Admission of new trustees—Tenant for life and remainderman—Apportionment.*—The fines and fees payable in respect of the admission of new trustees to copyhold estates devised to trustees in trust for a tenant for life, with remainders over to other persons, must be borne by the tenant for life and remaindermen in proportion to the value of their respective interests.

Carter v. *Sebright*, 26 Beav. 374, followed.—BULLOCK'S SETTLED ESTATES, RE, *Ch.D. Swinfen Eady, J.*; 91 L. T. 651.

2. *Repairs—Custom—Duty of copyholder to repair—Implied contract—Action for damages—Forfeiture.*—The lord of a manor cannot bring an action against a copyhold tenant for breach of an implied contract to repair, unless there is a custom binding the tenants to repair. Where no such custom is proved, there is no implied contract, and no right to damages, and the lord is confined to his remedy by forfeiture for non-repair.—GALBRAITH *v.* POYNTON, *K.B.D.*; [1905] 2 K. B. 258; 74 L. J. K. B. 649.

See also Manor, 1, 2.

COPYRIGHT:—

Pictures — Infringement—"Copy"—Reproduction of substantial part—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 11.—The plaintiff was the owner of the copyrights in several works of art, including an oil painting of which the principal feature was the winged figure of Psyche, and his business consisted of reproducing these copyright works in various forms and sizes by means of photographic processes and selling the reproductions. The plaintiff complained that a very rough photographic illustration which appeared in the advertisement portion of a well-known magazine was an infringement of his copyright in this picture. The illustration, which was diminutive and was devoid of artistic merit, contained a rude reproduction of the female figure, but omitted a portion of the background of the picture. The defendants, who were vendors of the magazine, on becoming aware of the alleged infringement, took steps to have the illustration torn out before selling any further copies,

Held, that the illustration was an infringement of the plaintiff's copyright, inasmuch as it tended to prevent the sale of the plaintiff's goods by familiarizing the public with a base form of reproduction; and judgment was given for the plaintiff for a farthing damages and costs.—HANFSTAENGL *v.* W. H. SMITH & SONS, *Kekewich, J.*; [1905] 1 Ch. 519; 74 L. J. Ch. 304; 92 L. T. 351.

COSTS.—See Practice, 2-6; Solicitor, 1-6.

COUNTY COURT:—

1. *Detinue—Judgment for return of chattel—Warrant of delivery—Jurisdiction to commit—Assessment of value of chattel—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 89—*Rules of Supreme Court*, 1883, *ord.* 42, *rr.* 6, 7; *ord.* 48, *r.* 1—*County Court Rules*, 1903, *ord.* 25, *r.* 57.—In an action of detinue in a county court the plaintiff recovered judgment for the return of the chattel, and in default that a warrant of delivery should issue. The defendant did not return the chattel and a warrant of delivery in the usual form was issued. The defendant, nevertheless, did not deliver up the chattel, but the bailiff did not distrain his land and goods under the warrant. The plaintiff thereupon applied for an order of committal, and the county court judge, being satisfied that the defendant had wilfully disobeyed the order of the court, made an order of committal.

Held, that, as the High Court had, under ord. 42, rr. 6, 7, power to enforce a judgment for the recovery of a chattel by a writ of attachment or committal, the county court had, under section 89 of the Judicature Act, 1873, and ord. 25, r. 57, of the County Court Rules, 1903, jurisdiction to enforce the judgment by committal; that the plaintiff was not precluded, by having obtained the warrant of delivery or by not having distrained thereunder, from applying for an order of com-

mittal; and that it was not a condition precedent to the making of an order for delivery up of a chattel that the value of the chattel should have been assessed.—HYMAS *v.* OGDEN, *C.A.*, 209; [1905] 1 K. B. 246; 74 L. J. K. B. 101; 91 L. T. 832.

2. *Execution—Hire-purchase agreement—Wrongful sale by high bailiff of goods taken in execution.*—A hire-purchase agreement contained a clause whereby the owners had the right, without previous notice, to determine the hiring and retake possession of the furniture if it should at any time be seized in execution. It was seized in execution by the high bailiff of a county court, and, no claim having been made, it was sold, delivered to the purchaser, and the proceeds paid into court. Interpleader proceedings were taken by the owners, who only heard of the seizure after the sale was complete, and the execution creditor during those proceedings admitted the title of the claimants, who gave a notice claiming damages against the high bailiff for alleged conversion of the furniture by selling it.

Held, that the claimants, inasmuch as they were entitled to possession of the furniture from the time of its being taken in execution, could recover damages from the high bailiff by reason of his act of conversion in selling.—JELKS *v.* HAYWARD, *K.B.D.*, 686; [1905] 2 K. B. 460; 74 L. J. K. B. 717; 92 L. T. 692.

3. *Factory—Covenant to pay outgoings—Expenses of alterations to provide escape from fire—Right of action in High Court—Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 7 (2).—Where a tenant has covenanted to pay all outgoings, and his landlord, on the requisition of the local authority, has been required to make certain alterations under the Factory and Workshop Act, 1891, so as to provide means of escape from fire, the landlord cannot sue his tenant in the High Court on his covenant, but must apply in the county court under section 7 (2) of the statute.—HORNER *v.* FRANKLIN, *K.B.D.*; [1904] 2 K. B. 877; 73 L. J. K. B. 1019; 91 L. T. 564.

4. *Jurisdiction — Infringement of trade-mark — Franchise—Injunction—County Courts Acts*, 1865 (28 & 29 *Vict. c.* 99), *s.* 1; *and* 1888 (51 & 52 *Vict. c.* 43), *s.* 56—*Patents, Designs, and Trade-Marks Acts*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 62, 69 (4), 71, 72, 75, 76, 77, 81 (5) (12), 90 (1) (2) (3), 92; *and* 1888 (51 & 52 *Vict. c.* 50), *s.* 18.—The county court has no jurisdiction under section 56 of the County Courts Act, 1888, to try an action to restrain infringement of a trade-mark, such an action not being a personal action within the meaning of that section or of section 58 of the repealed County Courts Act, 1846. Nor is such an action included in the equitable jurisdiction conferred by the County Courts (Equitable Jurisdiction) Act, 1865.

The right obtained by registration of a trade-mark is not a franchise; though it is incorrect to say that a franchise cannot be created by Act of Parliament.

Decision of the Divisional Court (*ante*, p. 218, [1904] 2 K. B. 693) reversed.—BOW *v.* HART, *C.A.*, 372; [1905] 1 K. B. 592; 74 L. J. K. B. 341; 92 L. T. 181.

5. *Remitted action—Amendment—Claim for unliquidated damages—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 87.—An action, commenced in the High Court by a writ specially indorsed with a claim for £33 12s. for demurrage at a specified rate in respect of the detention of the plaintiffs' wagons, was remitted to the county court under section 65 of the County Courts Act, 1888. At the trial the plaintiffs failed to prove an agreement to pay demurrage.

Held, that the county court judge had power to amend the particulars of claim by substituting a claim for unliquidated damages.—SPENCER, WHATLEY, & UNDERHILL *v.* FORSTER & CO., *K.B.D.*; [1905] 1 K. B. 434; 74 L. J. K. B. 288; 92 L. T. 163.

6. *Remitted action—Costs—Discretionary power of of county court judge to deprive successful party of costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 55, 113.—In an action remitted to the county court under section 65 of the County Courts Act, 1888, which provides that in the case of remitted actions "the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts," the county court judge has the same discretion under section 112 over the costs in the county court as if the action had been commenced in that court.—EVERALL *v.* BROWN, *K.B.D.*, 664; [1905] 2 K. B. 196; 74 L. J. K. B. 708.

COVENANT:—

1. *Covenant running with land — Option of purchasing fee simple—Executory interest—Rule against perpetuities.*—Lands were demised to W. for ninety-nine years at a yearly rent, with an option in favour of W., his heirs or assigns, of purchasing the fee simple thereof at any time during the term. Other lands were similarly demised to W., with a similiar option in favour of W., his executors, administrators, and assigns.

Held, that whether the options were or were not covenants running with the land, they created an interest in land, which interest did not at the time of its creation necessarily vest within the limits allowed by the rule against perpetuities, and consequently were void.

The *dicta* in *Muller* v. *Trafford*, 49 W. R. 132, [1901] 1 Ch. 54, relating to covenants for perpetual renewal, distinguished.——WOODALL *v.* CLIFTON, *Ch.D. Warrington, J.*, 203; 74 L. J. Ch. 555; 92 L. T. 292.

2. *Vendor and purchaser—Specific performance—Title—Possessory title—Restrictive covenant—Notice—Purchaser for value—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34.—Freehold land held by virtue of a statutory title based on adverse possession for twelve years is not thereby freed from restrictive negative covenants. Such covenants are analogous to an equitable charge, and the land can only be freed from them (1) by showing abandonment, or (2) by the plea of purchaser of the legal estate for value without notice, the person advancing such plea being bound to show that he accepted nothing less than a full title of forty years, and that this title did not disclose the restrictions in question.—NESBITT AND POTTS, RE, *Ch.D. Farwell, J.*, 297; [1905] 1 Ch. 391; 74 L. J. Ch. 310; 92 L. T. 448.

See also Landlord and Tenant, 1, 2; Settlement, 1, 3, 6, 7; Vendor and Purchaser, 1, 2.

CRIMINAL LAW:—

1. *Cruelty to children—Necessity of attendance of child—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict. c.* 41), *s.* 16—*Prevention of Cruelty to Children Act*, 1904 (4 *Ed.* 7, *c.* 15), *s.* 16.—By section 16 of the Prevention of Cruelty to Children Act, 1894, which was repealed and in part re-enacted by section 16 of the Prevention of Cruelty to Children Act, 1904, the attendance of

the child at the trial is held not to be essential in certain cases.

Held, that it was not an essential condition to the proper hearing of the cause that in all other cases, except those mentioned in the section, the child in respect of whom the offence is alleged to have been committed should be present at the trial. —REX *v.* HALE, *C.C.R.* 400; [1905] 1 K. B. 126; 74 L. J. K. B. 65; 91 L. T. 839.

2. *Evidence—Cross-examination of prisoner—Questions as to previous convictions—Criminal Law Evidence Amendment Act*, 1898 (61 & 62 *Vict.* c. 36), *s.* 1 (*f*).—A prisoner was tried on the charge of stealing copper. His defence was that he was acting under the direction of the police, and his counsel asked a detective, who was one of the witnesses for the prosecution, whether he had not, in other cases, employed the prisoner as a police spy. The prisoner was called as a witness, and was asked as to whether he had been previously convicted. He answered in the affirmative, but a further question as to what the conviction was for was not pressed. The prisoner was found guilty.

Held, that the conviction was bad, as the nature and conduct of the defence was not such as to involve imputations on the character of the witnesses for the prosecution, and therefore, as provided by section 1 (*f*) of the Criminal Evidence Act, 1898, no questions could be put to the prisoner tending to show that he had been convicted of a previous offence.—REX *v.* BRIDGWATER, *C.C.R.*, 415; [1905] 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T. 838.

3. *Evidence—False pretences—Course of conduct—Evidence of subsequent transaction—When admissible.* —The test to be applied in considering whether, on the trial of an indictment charging obtaining money, goods, or credit by false pretences, evidence of acts of the defendant subsequent to those which are the subject of the indictment is admissible, is whether the evidence is relevant. A connection must be shown to exist between the acts which are the subject of the indictment and the acts sought to be proved. The fact that the subsequent act shows that the defendant has committed an offence distinct from that which is charged in the indictment, is not sufficient to make evidence of the subsequent acts inadmissible if a connection is shown to exist between the transactions.

Reg. v. *Holt*, 8 Cox C. C. 411, considered and explained.—REX *v.* SMITH, *C.C.R.*; 92 L. T. 208.

4. *Falsification of accounts—Omitting or concurring in omitting—Jurisdiction—Falsification of Accounts Act*, 1875 (38 & 39 *Vict.* c. 24), *s.* 1.—It was the duty of A., the servant or clerk in Paris of B. & Co., of London, to pay any moneys received by him into a bank, and on the same day to transmit slips, supplied to him, to his employers in London by post. He knew that entries were made from these slips into a book called the Paris Cash Account Book kept in London. A. fraudulently misappropriated two sums of money received by him in Paris, and did not forward slips for these sums, in consequence of which no entries were made in the London book. On an indictment under section 1 of the Falsification of Accounts Acts, 1875,

Held, there was jurisdiction to try the offence in in England, because an essential part of it was completed in London.

Held, by Lord Alverstone, L.C.J., and Lawrance, and Ridley, JJ., that the omission to send the slips with the intent to defraud, knowing that thereby there would be an omission from the London book, was omitting or concurring in omitting material particulars from that book within the meaning of the statute.

Held, by Channell, J., *semble*, also by Kennedy, J., that the mere omission to send the slips with the intent to defraud, knowing thereby that there would be omission from a book, not the book of, nor kept by, the sender, would not amount to an offence under the section; but on the finding of the jury that A. intended the London book to be falsified, that the conviction should be upheld.—REX *v.* OLIPHANT, *C.C.R.*, 556; [1905] 2 K. B. 67; 74 L. J. K. B. 591.

5. *Indecent assault—Evidence—Complaint by prosecutrix—Admissibility.*—Upon the trial of a prisoner on a charge of indecent assault upon a girl under the age of thirteen, her consent therefore being not material to the charge, a complaint made to a third party in the absence of the prisoner is admissible in evidence, not as part of the *res gestæ* or as evidence of the truth of the things alleged, but as confirming the testimony of the prosecutrix.

Reg. v. *Lillyman*, 44 W. R. 654, [1896] 2 Q. B. 167, considered.—REX *v.* OSBORNE, *C.C.R.*, 494; [1905] 1 K. B. 551; 74 L. J. K. B. 311; 92 L. T. 393.

6. *Larceny—Sale of goods—Fraudulent delivery by seller's servant to purchaser—Receipt given for less quantity than actually delivered—No identification of specific goods stolen.*—A servant of the seller, in collusion with the prisoner, who was in the habit of buying from the seller, sold and delivered to the prisoner 32 tons, 13 cwt. of goods, but only entered against him in the seller's books 31 tons, 3 cwt., and charged him with the smaller amount only.

Held, that as there was no contract between the seller or his agent and the prisoner by which the property in the goods passed to the prisoner he was properly convicted of larceny, although it was not possible to say which 1 ton, 10 cwt. out of the 32 tons, 13 cwt. had been stolen.—REX *v.* TIDESWELL, *C.C.R.*; [1905] 2 K. B. 273; 74 L. J. K. B. 725.

7. *Manager of company—Publication of false statements—Larceny Act*, 1861 (24 & 25 *Vict.* c. 96), *s.* 84.—A person who in fact acts as a manager of a public company, though he has never been appointed to that position, is a "manager" within the meaning of section 84 of the Larceny Act, 1861, and is therefore liable to be convicted for having published false statements with intent to deceive or defraud.—REX *v.* LAWSON, *C.C.R.*, 459; [1905] 1 K. B. 541; 74 L. J. K. B. 296; 92 L. T. 301.

8. *Previous conviction—Arraignment—Error—Larceny Act*, 1861 (24 & 25 *Vict.* c. 96), *s.* 116.—The prisoner was indicted at quarter sessions for attempting to commit a larceny; and a subsequent count in the indictment charged a previous conviction. The prisoner was arraigned upon and pleaded to both counts. Objection was taken on his behalf that the arraignment contravened section 116 of the Larceny Act, 1861, which provides that on an indictment for an offence after a previous conviction the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and that until he be found guilty of that offence he shall not be called on to plead to the charge of the previous conviction. The recorder adjourned the trial to the next sessions. At that sessions there was no fresh arraignment, but the former pleas of the prisoner were treated as standing. He was, however, given in charge of the jury on the first count only, and was found guilty and sentenced upon that count.

Held, that, although the arraignment did not take place at the sessions at which the prisoner was tried, and although the fact of the previous conviction was not disclosed to the jury by whom he was convicted, yet the fact that the arraignment did not comply with the provisions of section 116, was such a substantial defect as could not be cured by verdict; and accordingly that the conviction should be quashed.—FAULKNER *v.* REX, *K.B.D.*, 665; [1905] 2 K. B. 76; 74 L. J. K. B. 562; 92 L. T. 769.

9. *Procedure — Penal statute, construction of — Retrospective and prospective operation—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 5, *sub-section* 1—*Prevention of Cruelty to Children Act*, 1904 (4 *Ed.* 7, *c.* 15), *s.* 27.—The extension by a subsequent statute of the limit of time within which the prosecution of a statutory offence must be commenced, being a matter of procedure only, has a retrospective operation.—REX *v.* CHANDRA DHARMA, *C.C.R.*, 431; [1905] 2 K. B. 335; 74 L. J. K. B. 450; 92 L. T. 700.

CUSTOM:—

Validity—Legal origin—Presumptions—Right of drying nets on seashore—Character of accreted land.—A custom affecting land is not bad for uncertainty because it is not invariable in every part, nor because the limits of the land affected by the custom are not defined more clearly than the limits of land comprised in a grant. So a custom is not unreasonable because it is prejudicial to the interests of a private individual if it is for the benefit of the commonwealth, for such benefit renders its lawful commencement reasonably probable; again, where the existence of a right for a long period has been proved, everything that is reasonably possible to be presumed in favour of that right should be presumed; and the party, seeking to defeat the right by reason of its inception within legal memory, has the onus of proving that it could not possibly have existed from time immemorial and have continued without interruption. Land accreted takes the character of the land to which it is added, and is subject to the same customs as affect such land: Thus, persons entitled by custom to dry nets on a piece of land adjoining the sea are, where gradual accretion has taken place, entitled to exercise that right on the land gained by accretion.—MERCER *v.* DENNE, *Ch.D. Farwell, J.*, 55; [1904] 2 Ch. 534; 74 L. J. Ch. 71; 91 L. T. 513.

See also Arbitration, 1; Sale of Goods, 4.

CY-PRÈS:—

Will—Perpetuity—Life estates to unborn persons.—A testator devised freeholds to F. G. for life, then to the issue of F. G. upon various limitations which were void for remoteness, and finally to F. G. in fee. F. G. died a bachelor. The limitations to the issue of F. G. left out his sons' sons' daughters.

Held, that the doctrine of *cy-près* does not apply when simple estates tail cannot be framed to exclude and include the classes of persons designated by the testator for exclusion and inclusion. To attain this result contingent limitations are not to be introduced in the course of the estates tail. *Dictum*, that the doctrine of *cy-près* may be invoked on behalf of an ultimate remainder.

Doctrine of *cy-près* discussed.

Monypenny v. *Dering*, 2 De G. M. & G. 145, approved.

Martelli v. *Holloway*, 5 H. L. 532, explained.—MORTIMER, RE, GRAY *v.* GRAY, *Ch.D. Farwell, J.*, 394; 92 L. T. 452.

DEFENCE ACTS:—

Compulsory taking of land—Land acquired by Crown for defence of realm — Compensation for injurious affection of adjoining lands of owner—Defence Act, 1842 (5 & 6 *Vict. c.* 94), *ss.* 16, 19—*Land Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 63.—Where part of the lands of a subject are compulsorily taken by the Crown under and for the purposes of the Defence Acts, the compensation to be paid the owner is not necessarily limited to a fair sum for the land actually purchased. Therefore if the owner can show loss from severance and injurious affection caused to his adjoining land not purchased by the Crown, he is entitled to compensation also on that footing.—BLUNDELL *v.* REX, *K.B.D.*, 412; [1905] 1 K. B. 516; 74 L. J. K. B. 91; 92 L. T. 53.

DENTIST:—

Debtor and creditor—Appropriation of payments—Unregistered dentist—Payment by two cheques—Right to appropriate unpaid cheque to work not within Dentists Act, 1878—*Appropriation in witness-box at trial—Cheque for fees within Act—Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *s.* 5.—The plaintiff, an unregistered dentist, agreed to do certain work to the defendant's teeth for a fee of £45. On completion of the work the defendant gave the plaintiff a cheque for £20, and another, post dated, for £25. The cheque for £20 was duly paid, but the defendant stopped payment of that for £25, and the plaintiff commenced an action to recover the amount. The defendant set up section 5 of the Dentists Act, 1878, as a defence, which provides that no person shall be entitled to recover any fee for the performance of any dental operation or for any dental advice unless he is registered under the Act.

During a second trial of the action the plaintiff in the witness-box, in answer to a question put by his counsel, appropriated the amount due to him for materials and work outside the Act to the £25 cheque, and the judge found that he was entitled to £21 in respect of those items, and had duly appropriated the £25 cheque towards the payment of them.

Held, that the consideration for the contract was not illegal, as section 5 of the Act merely prevented the recovery by an action of the fees and charges; that the plaintiff having a right of appropriation up to the very last moment, had a right even in the witness-box to appropriate the £25 cheque to the amount due to him for work outside the Act, as he had done nothing previously which amounted to an appropriation; and was entitled to judgment for £21.

Decision of Divisional Court reversed.

Whether an unregistered dentist is entitled to sue on a cheque given for fees and charges within section 5 of the Act, *quære.*—SEYMOUR *v.* PICKETT, *C.A.*; [1905] 1 K. B. 715; 74 L. J. K. B. 413; 92 L. T. 519.

DESIGN:—

Registration—Patent for same article—Application for patent before registration of design—Patents, &c., Act (46 & 47 *Vict. c.* 57), *ss.* 13, 47.—The grant of a patent and the statutory right of the proprietor of a design are different in their legal nature and effect, and though in most cases it is difficult for the two rights to co-exist, yet if the circumstances allow they may co-exist, the second right in point of time being subject to the other. And if this be so, the fact that they are both vested in the same person will not prevent his enforcing either right.

Decision of Byrne, J., affirmed.—WERNER MOTORS

v. GAMAGE, *C.A.*, 167; [1904] 2 Ch. 580; 73 L. J. Ch. 770; 91 L. T. 588.

DISTRESS:—

1. *Distress for sum not exceeding £20—Alleged overcharge—Right to sue in county court—Distress (Costs) Acts,* 1817 *and* 1827—*Distress for Rates Act,* 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.—The plaintiff, a passive resister, sought to recover 12s. 6d. in the county court, the amount which he alleged he had been overcharged in connection with a distress not exceeding £20 levied on his goods. The county court judge considered, following *Hill* v. *Pannifer,* 52 W. R. 588, [1904] 1 K. B. 811, that he had no jurisdiction to go into the reasonableness of the charges, and that the plaintiff's course was to apply to the justices, who were the proper tribunal to deal with the case.

Held, following *Headland* v. *Coster & Lamb,* 49 SOLICITORS' JOURNAL 133, [1905] 1 K. B. 219, in which *Hill* v. *Pannifer* was discussed and overruled, that the action would lie, and that the learned judge had jurisdiction to entertain it.—REX *v.* PHILBRICK, *K.B.D.*, 527; [1905] 2 K. B. 108; 74 L. J. K. B. 464; 92 L. T. 571.

2. *Lessee and underlessee—Original lease—Reversionary lease*—Interesse termini—*Underlease exceeding original term—Lessee's right to distrain—Landlord and Tenant Act,* 1730 (4 *Geo.* 2, *c.* 28). *s.* 5—*Conveyancing and Law of Property Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 44.—As a reversionary lease merely creates an *interesse termini* until entry thereunder, it does not enlarge the term of the original lease.

Smith v. *Day,* (1837) 2 M. & W. 684, 46 R. R. 747; *Doe* v. *Walker,* (1826) 5 B. & C. 111, 29 R. R. 184; *Hyde* v. *Warden,* (1877) 3 Ex. D. 72, and *Joyner* v. *Weeks,* (1891) 2 Q. B. 31, followed.

If a lessee with an original lease and a reversionary lease or an agreement therefor underlets the premises for a term exceeding the original lease, he cannot distrain for rent during the original lease either at common law for want of a reversion, or under the Landlord and Tenant Act, 1730, s. 5, or the Conveyancing Act, 1881, s. 44.

Parmenter v. *Webber,* (1818) 8 Taunt. 593, 20 R. R. 575; *Preece* v. *Corrie,* (1828) 5 Bing. 24, 30 R. R. 536; and *Beardman* v. *Wilson,* (1868) L. R. 4 C. P. 57, followed and applied.—LEWIS *v.* BAKER, *Swinfen Eady, J.*; [1905] 1 Ch. 46; 74 L. J. Ch. 39; 91 L. T. 744.

3. *Lodger's goods—Declaration by lodger—Inventory of goods—"Subscribing" the inventory—Landlord and tenant—Distress for rent—Lodgers' Goods Protection Act,* 1871 (34 *&* 35 *Vict. c.* 79), *s.* 1.—The superior landlord of a house having levied a distress upon the goods of a lodger for rent due from the immediate tenant, the lodger served the superior landlord with a correct declaration under the Lodgers' Goods Protection Act, 1871. The declaration stated that the goods, "a list of which is hereunto annexed," were the property of the lodger, and also that "the list of articles hereto annexed is a correct inventory" of the goods referred to in the declaration; and upon a subsequent part of the same piece of paper there was an inventory. The declaration was signed by the lodger at the foot thereof, but the inventory was not otherwise signed by him.

Held, that the inventory was "subscribed" by the lodger within the meaning of section 1 of the Lodgers' Goods Protection Act, 1871, which provides that "to such declaration shall be annexed a correct inventory, subscribed by the lodger."—GODLONTON *v.* FULHAM AND HAMPSTEAD PROPERTY Co., *K.B.D.*; [1905] 1 K. B. 431; 74 L. J. K. B. 242; 92 L. T. 362.

4. *Lodger's goods—Illegal distress—Liability of bailiff—Lodgers' Goods Protection Act,* 1871 (34 *&* 35 *Vict. c.* 79), *s.* 2.—An action will lie against a bailiff for an illegal distress under section 2 of the Lodgers' Goods Protection Act, 1871.

Page v. *Vallis,* 19 T. L. R. 393, overruled.—LOWE *v.* DORLING & SON, *K.B.D.*; [1905] 2 K. B. 501.

5. *Poor rate—Costs and charges of distress—Distress for sum not exceeding £20—Limitation of amount of costs and charges—Distress (Costs) Act,* 1817 (57 *Geo.* 3, *c.* 93). *s.* 1, *Schedule—Distress (Costs) Act.* 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Acts,* 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.—The provisions of the Distress (Costs) Act, 1817, as extended to a distress for poor rates for an amount not exceeding £20 by the Distress (Costs) Act, 1827, are still in force; and no costs or charges in respect of such a distress can be taken in excess of the amounts provided by those statutes.

Hill v. *Pannifer,* [1904] 1 K. B. 811, overruled.—HEADLAND *v.* COSTER, *C.A.*; [1905] 1 K. B. 219; 74 L. J. K. B. 210; 92 L. T. 98.

DIVORCE:—

1. *Adultery—Condonation—Desertion — Revival of adultery.*—Where a wife commits adultery and is afterwards forgiven and taken back by her husband, but subsequently to the condonation she deserts him, such desertion revives the condoned adultery, and entitles the husband to petition for a dissolution of his marriage.

Houghton v. *Houghton,* [1903] P. 150, considered and made applicable to the case of a husband as well as that of a wife. — COPSEY *v.* COPSEY, *P.D. & Ad.D.*; 91 L. T. 363.

2. *Costs, wife's—Summary Jurisdiction (Married Women) Act,* 1895—*Matrimonial Causes Act,* 1857, *s.* 26—*Practice.*—The court held that the decision in *In re Wingfield & Blew,* [1904] 2 Ch. 665, did not affect the question of providing a wife with adequate means for fighting a case in the Divorce Court in accordance with its usual practice.—SHEPPARD *v.* SHEPPARD, *P.D. & Ad.D.*, 608; [1905] P. 185; 74 L. J. P. 102.

3. *Decree* nisi—*Condonation after decree—Damages—Decree rescinded—Costs—Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 33, 51.—A husband petitioned for a divorce on the ground of his wife's adultery with the co-respondent, and made a claim for damages. At the hearing of the suit a decree *nisi* was pronounced, and the jury awarded £75 damages. After the decree *nisi* was pronounced, but before it was made absolute, the husband and wife resumed cohabitation.

The King's Proctor intervened, and the decree *nisi* was rescinded.

Held, the husband was not entitled to the damages which had been awarded.—HYMAN *v.* HYMAN, *P.D. & Ad.D.*; [1904] P. 403; 73 L. J. P. 106; 91 L. T. 361.

4. *Desertion by petitioner—Conduct conducing to adultery—Practice of Ecclesiastical Courts—Judicial separation refused.*—The court declined to grant a petitioner a decree of judicial separation on the ground of adultery on the ground that he himself had been found guilty of desertion.—HODGSON *v.* HODGSON, *P.D. & Ad.D.*, 623.

5. *Discretional bar—Adultery of the wife—Cruelty of the husband—Matrimonial Clauses Act,* 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Allowance to be secured to*

guilty wife—Restrictive conditions—Dum casta et sola et vixerit.—The court, in exercising its discretion in favour of and granting a divorce to a husband who had previously been judicially separated on the ground of his cruelty, ordered that the decree dissolving the marriage should not be made absolute unless and until the husband should secure an allowance of £52 a year, payable weekly, to the divorced wife.

The principles which guide the court in ordering an allowance in such cases, and the rules which lead the court to determine on the insertion of a *dum sola et dum casta* clause, considered and discussed. — SQUIRE *v.* SQUIRE AND O'CALLAGHAN, *P.D. & Ad.D.*; [1905] P. 4; 92 L. T. 472.

6. *Garnishee order—Orders for wife's support and costs—Attachment of debts*—Choses in action—*Debts owing or accruing—Fees of public officer—Assignment to defeat individual creditor*—13 *Eliz c.* 5—*Validity of assignment executed by assignor alone—Subsequent execution by assignee—Payment after notice of garnishee order* nisi—*Payment by cheque—Obligation to stop payment.*—The fees due to a public official due to him for work done under a special contract, but not payable until certain ministerial acts have been performed, are debts accruing to such official, and are attachable as soon as the work has been performed, irrespective of the time of payment.

An assignment of such debts by a judgment debtor is perfectly valid against the claims of a judgment creditor if made before the date of the garnishee order, even though the assignment is executed by the judgment debtor alone, and afterwards assented to and executed by the assignee, the validity of the assignment dating back to the date of its execution by the assignor. But such an assignment may be void under the statute of Elizabeth (13 Eliz. c. 5) if the assignment tends to defeat, hinder, or delay creditors. And it makes no difference if one creditor alone is defeated, hindered, or delayed. *Choses in action* are covered by the statute of Elizabeth since the passing of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

There is no legal obligation on the garnishee to stop the payment of any cheque which he has given to the judgment debtor prior to the service upon him of a garnishee order *nisi.*—EDMUNDS *v.* EDMUNDS, *P.D. & Ad.D.*; [1904] P. 362; 73 L. J. P. 97; 91 L. T. 568.

7. *Intervention—King's Proctor—Suppression of facts—Matrimonial Causes Act,* 1857, *s.* 31—*Discretion of court.*—The court held that the mere non-disclosure by a petitioner before a decree *nisi* of material facts within the meaning of section 31 of the Matrimonial Causes Act, 1857, is not sufficient to disentitle such petitioner to the discretion of the court in making absolute the decree *nisi.* It observed that the facts suppressed must be of such a nature as would have made the court act differently than it did at the trial.

Alexandre v. *Alexandre,* 2 P. & D. 164, followed. —HUNTER *v.* HUNTER, *P.D. & Ad.D.*, 666.

8. *Petition and supplemental petition—Desertion—Two years not elapsed at date of petition—Power of husband to return—Judicial separation—Charges unreasonably made—Costs.*—A wife presented a petition for divorce against her husband, the charges being cruelty and adultery. No charge of desertion was made as the parties had not lived apart for two years at the date of the filing of the petition. Subsequently, a supplemental petition was filed in which desertion was charged. The charges of cruelty and adultery failed.

Held, that the wife could not obtain a decree of judicial separation on the supplemental petition as she had, by her original petition, put it out of the power of her husband to return to her.—KAY *v.* KAY, *P.D. & Ad.D.*; [1904] P. 382; 73 L. J. P. 108; 91 L. T. 360.

9. *Variation of settlements—Adultery of husband—Discretion of court as to granting divorce—Report of registrar—Principles which ought to guide registrar.*—A husband petitioned for a divorce from his wife on the ground of her adultery with the co-respondent. At the hearing of the suit it was found that the husband had also been guilty of adultery. In the exercise of his discretion under section 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the President granted the petitioner a decree *nisi,* which decree was subsequently made absolute, holding that all the circumstances of each case ought to be considered, and that the discretion given by the Act might be extended as occasion arose.

On a petition for the variation of settlements, the registrar reported in favour of the extinction of the wife's interest in all funds brought into settlement by the husband, but submitted that, since the husband had been found guilty of adultery, no order should be made giving him any interest in the funds brought into settlement by the wife, the income from which was payable to her under the terms of the settlement.

Held, that the court was guided by the same reasoning in respect of the variation of settlements as in granting a decree of divorce, and that, since the husband had not been barred from obtaining a divorce, he ought not to be deprived of the results thereof.

The report of the registrar was varied accordingly, and a certain allowance granted to the petitioner out of his wife's income during their joint lives, the sum to be subsequently increased on the death of the mother of the respondent.—CONSTANTINIDI *v.* CONSTANTINIDI, *P.D. & Ad.D.*; 92 L. T. 473.

10. *Variation of settlements—No issue of marriage—Matrimonial Causes Act,* 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Interests of unborn persons—Consent of all living persons interested—Reconveyance of trust property to innocent settlor.*—Where the only living persons who could be interested under the terms of a marriage settlement consented, the court, upon the petition of the innocent settlor, whose marriage had been dissolved, and notwithstanding that the interests of unborn persons might be adversely affected, ordered the trustees to reconvey to the petitioner the whole of the settled property.—MORRISSEY *v.* MORRISSEY, *P.D. & Ad.D.*; [1905] P. 90; 74 L. J. P. 11; 92 L. T. 476.

11. *Variation of settlement—Service—Respondent an uncertificated bankrupt—One of the trustees also an uncertificated bankrupt and his address unknown—Notice to official receiver in bankruptcy—Service dispensed with.*—The court dispensed with service of a petition to vary a settlement, made on a marriage now dissolved, in a case where the respondent and one of the trustees were uncertificated bankrupts and the address of the said trustee was not known and where notice of the motion to dispense with service had been given to the chief official receiver in bankruptcy.

Snelling v. *Snelling,* 63 L. T. 263, followed.—GORDON *v.* GORDON, *P.D. & Ad.D.*; [1905] P. 96; 74 L. J. P. 39; 92 L. T. 476.

12. *Wife's petition—Adultery of petitioner brought about under duress and by coercion of the husband—Material fact—Suppression—Refusal of decree.*—If a petitioner withholds from the court, on the hearing of a petition for dissolution of marriage, the fact that she has committed adultery, such withholding of a fact is of itself a ground for refusing to make the degree absolute, even though the adultery is found, on a full investigation of all the facts of the case, to be such as would warrant the court in granting the petitioner relief, and though, had the facts been fully disclosed to the court in the first instance, it would, in the exercise of its discretion, have granted relief.—ROCHE *v.* ROCHE, *P.D. & Ad.D.*; [1905] P. 142; 74 L. J. P. 50; 92 L. T. 668.

See also Ireland, Law of, 1.

DONATIO MORTIS CAUSA:—

Will—Construction—Appointment of executors—Direction for sale and division of household property, including leasehold house—Residuary personal estate—Handing over of box containing share certificates and personal ornaments—Retention of key.—A testatrix by her will appointed executors and trustees, and, after giving certain specific legacies, continued: "With the exception of the above legacies, I direct that the remainder of my household property, including household property in M., should be sold, and, after paying funeral, testamentary expenses, and debts, be equally divided "as therein mentioned. The testatrix's personal estate comprised two leasehold houses, shares, money on deposit at the bank, and household furniture.

Held, that under the above bequest the entire residue of the testatrix's personal estate passed.

The same testatrix shortly prior to her decease had intrusted a parcel containing a box to the care of a friend, and had requested this friend to carry out her instructions. At a subsequent interview the testatrix drew the friend's attention to a small key with a label attached thereto, saying, "If I die, that will be sent to you." On the day of the testatrix's death the key with the label was received by the friend, and the box was found to contain share certificates and valuables, with a paper giving directions as to the persons to whom the testatrix desired the contents of the box to be given.

Held, that, inasmuch as the testatrix had retained the key, she had not parted with her dominion over the property contained in the box, and consequently that the handing over of the box did not constitute a valid *donatio mortis causâ.*—JOHNSON, RE, SANDY *v.* REILLY, *Ch.D. Farwell, J.*; 92 L. T. 357.

EASEMENT:—

1. *Light—Ancient lights—Prescription—Ordinary and extraordinary user—Nuisance—Damage—Construction.*—To constitute an actionable obstruction of ancient lights there must be a substantial interference with the ordinary user of light, and if in respect of business premises, then with the ordinary user required for an ordinary business. In these expressions the word "ordinary" is used solely with reference to light, and an ordinary user or an ordinary business means a user or business which in fact requires only an ordinary amount of light. This is a question, not of law, but of fact.

There can be no prescription of an extraordinary user of light by user for twenty years, either with or without notice of the owner of the servient tenement.

Colls v. *Home and Colonial Stores (Limited), ante,* p. 30, [1904] A. C. 179, considered.—AMBLER *v.* GORDON, *K.B.D.*, 300; [1905] 1 K. B. 417; 74 L. J. K. B. 185; 92 L. T. 96.

2. *Light—Dwelling-house—Prescription—Actionable nuisance—Mandatory injunction—Damages.*—The result of the decision in *Colls* v. *Home and Colonial Stores, ante,* p. 30, is that the right to light gained by prescription is a negative easement, and is properly enforced by an action of nuisance. To give rise to such an action the interference with the access of light through the ancient windows must be of such a character as sensibly to interfere with the comfort and convenience or usefulness of the building according to the ordinary notions of mankind.

In the case of a dwelling-house in which such obstruction to light had been caused as to make one room less convenient and less comfortable, so as to materially diminish the letting value of the house, though the room was still well lighted and there was sufficient light to enable it to be used for the purposes for which it was designed.

Held (by Vaughan Williams and Cozens-Hardy, L.JJ., Romer, L.J., *dissentiente*), that an actionable nuisance had been committed. If there is no case of sharp practice or unfair conduct on the part of the defendant, and the case is not one in which damages cannot be regarded as reasonable and adequate compensation, the relief to be given should be by granting damages and not by mandatory injunction.—KINE *v.* JOLLY, *C.A.*, 462; [1905] 1 Ch. 480; 74 L. J. Ch. 174; 92 L. T. 209.

3. *Light—Prescription—Extent of right—Right for ordinary purposes.*—The owner or occupier of a dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and in these cases the question to be considered is whether the obstruction complained of amounts to an actionable nuisance. The actual user will neither increase or diminish the right.

Decision of the Court of Appeal (50 W. R. 227, [1902] 1 Ch. 302) reversed.

Warren v. *Brown,* 50 W. R. 97, [1902] 1 K. B. 15, overruled.—COLLS *v.* HOME AND COLONIAL STORES, *H.L.*, 30; [1904] A. C. 179; 73 L. J. Ch. 434; 90 L. T. 687.

4. *Light—Prescription—Substantial nuisance—Mandatory injunction—Damages.*—The defendant sought to replace his old building by one which was found as a fact to seriously interfere with the light of the plaintiffs' premises, making them less suitable for business and occupation. A mandatory injunction was granted.

The judgment of the House of Lords in *Colls* v. *Home and Colonial Stores,* 53 W. R. 30, [1904] A. C. 179, explained.

Deprivation of light is on a par with other cases of nuisance, and an injunction will be granted if a substantial nuisance is caused thereby. The court must look at the amount of light left to a plaintiff and not at the amount taken away from his easement by the defendant's operations.

Shelfer v. *City of London Electric Lighting Co.,* 43 W. R. 238, [1895] 1 Ch. 287, upheld.

Proper terms of injunction as in *Yates* v. *Jack,* 14 W. R. 618, 1 Ch. 295, with the words "so as to be a nuisance" added.—HIGGINS *v.* BETTS, *Ch.D. Farwell, J.*, 549; [1905] 2 Ch. 210; 92 L. T. 850.

5. *Right of way—Abandonment—Non-user—Excessive user.*—In 1891 certain premises (coloured pink on the plan on the deed) were conveyed to M. together with a right of way over land coloured yellow on the plan on the deed. The land coloured yellow was subsequently conveyed to J., who

covenanted to permit the use of the right of way. M. owned adjoining land (coloured blue on the plan), which abutted on a public highway, and on which was a public-house, and erected assembly rooms partly on the land to which there was a right of way and partly on the adjoining land. The licensing magistrates objected to a gateway opening on the right of way, but in 1892 a wall was built with an opening for a gateway 6ft. 9in. wide, this opening being temporarily closed with sliding scaffold boards.

In 1894 the hereditaments formerly belonging to M. were sold to F., together with the right of way, and in December of that year the scaffold boards were removed to enable building material to be taken along the right of way.

In 1896 a further application to the magistrates to allow gates to be placed at the gateway was refused, and the magistrates insisted on the gateway being bricked up.

In 1898 the premises, together with the right of way, were conveyed to G. In 1903 an opening was made in the wall and a gate 4ft. 4in. wide placed there, and materials for altering the premises were conveyed along the right of way.

It was now proposed to sever the assembly rooms from the public-house, and to use them for a factory, the only access to which was over the right of way.

The present owners of the land coloured yellow contend that the right of way had been abandoned; or, if not, if it was used to buildings not wholly erected on the dominant tenement, that the proposed user was excessive.

Held (affirming the decision of Swinfen Eady, J.), that there had been no abandonment of the right of way; but (reversing the decision of Swinfen Eady, J.) that the intended use would be an excessive user of the right of way.

Finch v. *Great Western Railway Co.*, 5 Ex. Div. 254, distinguished by Romer, L.J.—HARRIS *v.* FLOWER, *C.A.*; 91 L. T. 816.

See also Lands Clauses Act, 3; Settled Land, 5.

ECCLESIASTICAL LAW:—

Brawling—Ordination of priest—Notable crime or impediment—Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 *Vict. c.* 29).—An allegation that a candidate for ordination as priest has assisted in church services where ritualistic practices are carried on does not constitute a "notable crime" or impediment within the meaning of the ordinal in the Book of Common Prayer.—KENSIT *v.* ST. PAUL'S DEAN AND CHAPTER, *K.B.D.*, 622; [1905] 2 K. B. 249; 74 L. J. K. B. 454; 92 L. T. 601.

EDUCATION.—See Local Government, 7; School, 1; Will, 4.

ELECTION:—

1. *Will — Appointment — Power — Perpetuity.* — Where the limitations in a will are illegal and void for perpetuity they cannot be used to raise a case of election. The fact that the limitations also exceed the limits of the power is immaterial. The court is bound on finding illegality to refuse to assist in carrying it out.

In re Bradshaw, [1902] 1 Ch. 436. 50 W. R. Dig. 138, not followed.—OLIVER, RE, EVERED *v.* LEIGH, *Ch.D. Farwell, J.*, 215; [1905] 1 Ch. 191; 74 L. J. Ch. 62.

2. *Will—Appointment under power—Perpetuity.*—The doctrine of election, that a person cannot take property against an instrument and at the same time claim other property under the instrument, does not apply to a case where the claimant takes property in default of an appointment in consequence of the appointment actually made being void for transgressing the rule against perpetuities; and in such a case the claimant can take not only that property but also other property given to him by the instrument purporting to make the appointment, without making compensation.

In re Oliver's Settlement, ante, p. 215, followed.

In re Bradshaw, [1902] 1 Ch. 436, 50 W. R. Dig. 138, not followed.—BEALE'S SETTLEMENT, RE, *Ch.D. Warrington, J.*, 216; [1905] 1 Ch. 256; 74 L. J. Ch. 67; 92 L. T. 268.

3. *Will—Compensation—Time to ascertain compensation—Testator's death—Date of election.*—The time to ascertain the amount due as compensation in consequence of election against a will is the date of the testator's death, not the time of election.—HANCOCK, RE. HANCOCK *v.* PAWSON, *Ch.D. Kekewich, J.*, 89; [1905] 1 Ch. 16; 74 L. J. Ch. 69; 91 L. T. 737.

ELECTION LAW:—

1. *Municipal corporation—Election of disqualified candidate—Notice of disqualification—Right of unsuccessful candidate to take the seat—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *Schedule III., Part II., r.* 16.—Although the Municipal Corporations Act, 1882, has declared the nomination of a person for the office of municipal councillor who at the time of the nomination is out of the United Kingdom to be void unless certain notice be given, nevertheless if he be elected by a majority of votes and no previous notice of the disqualification be given, the unsuccessful candidate is not entitled to take the seat vacated by the void election.

Hobbs v. *Morey*, 52 W. R. 348, [1904] 1 K. B. 74, followed.—BOYCE *v.* WHITE, *K.B.D.*, 430; 92 L. T. 240.

2. *Registration—County vote—Ownership qualification—Freehold estate of vicar in parish church building and its site—Pew rents—Occupation—Representation of the People Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 24.—Section 24 of the Reform Act, 1832, enacts that no person shall be entitled to a parliamentary county vote in respect of his estate as a freeholder in any land or building "occupied by himself," if such land or building so occupied is of such value (now £10 per annum) as would confer on him the right of voting for a borough, whether he shall or shall not have actually acquired the right to the borough vote in respect of such building or land (*i.e.*, by being registered).

A vicar was the owner, in his capacity of vicar, of a freehold estate in merely the parish church building and the land on which it stood and the graveyard adjoining; he also received as vicar for his own use the "pew rents"—*i.e.*, moneys paid by persons for the use of sittings in the pews of the church during divine service—to the amount of £40 a year. The said church building and land were situate within a parliamentary borough.

Held, that the vicar did not in these circumstances "himself occupy" the said church building and land within the meaning of section 24 of the above Act, and consequently was not by virtue of that section, prevented from having the parliamentary county vote as owner of a freehold estate in the said church building and land.

Semble, the fact that, in the case of a new parish church erected under the Church Buildings Acts, neither the Order in Council creating the new parish nor the deed of consecration of the church, contains the special provisions relating to pew rents embodied in the Church Building Acts, does not render the collection and receipt of pew rents by,

or on behalf of, the vicar, illegal.—WOLFE *v.* CLERK OF SURREY COUNTY COUNCIL; REEVE *v.* SAME, *K.B.D.*, 264; [1905] 1 K. B. 439; 74 L. J. K. B. 161; 92 L. T. 114.

3. *Registration — Parliamentary and municipal franchises—Disqualifications—Non-payment of poor rates—Meaning of expression "poor rate" for registration purposes—Sums chargeable on, or payable out of, the poor rate—Representation of the People Act,* 1867 (30 & 31 *Vict. c.* 102), *s.* 3 (4)—*Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *subsection* 2 (d) (e)—*Poor Rate Assessment Act,* 1869 (32 & 33 *Vict. c.* 41), *s.* 20—*Education Act,* 1902 (2 *Ed.* 7, *c.* 42), *s.* 18.—Non-payment in full, on or before the 20th of July in the qualifying year, of all poor rates that have become payable, in respect of the qualifying premises, up to the preceding 5th of January, disqualifies the occupier from being entitled to be registered either as a Parliamentary or as a local government elector.

The expression "poor rate," so far as registration is concerned, is not limited to the assessment for the relief of the poor, but includes assessments for other purposes chargeable thereon according to law —*e g.*, the education rate and the burial rate.—ASH *v.* NICHOLL, *K.B.D.*, 173; [1905] 1 K. B. 139; 74 L. J. K. B. 74; 91 L. T. 803.

See also Local Government, 2.

ELECTRIC LIGHT:—

1. *Company—Supply of electric current or electrical energy outside statutory area—Statute—Contravening statutory prohibition—Interpretation—Metropolitan Electric Lighting Act,* 1889 (52 & 53 *Vict. c. cxcvi.*), *ss.* 3, 5—*Metropolitan Electric Supply Act,* 1898 (61 & 62 *Vict. c. ccxxxv.*) *ss.* 2, 16.—A limited liability company authorized by statute to supply electrical energy within certain areas, and also authorized by statute to set up a station for generating electric current and electrical energy at a place outside their areas of supply, and from that generating station to supply those areas with electric current and electrical energy, is not authorized under the statutory powers aforesaid to supply electric current or electrical energy to customers outside their statutory areas of supply.—ATTORNEY-GENERAL *v.* METROPOLITAN ELECTRIC SUPPLY CO., *C.A.*, 418; [1905] 1 Ch. 757; 74 L. J. Ch. 384; 92 L. T. 544.

2. *Electric Lighting Act,* 1882 (45 & 46 *Vict. c.* 56), *s.* 11—*Contract by undertakers—Local authority named as undertakers—Provisional order—Transfer of powers—Consent of Board of Trade—Local government.*—A corporation obtained a provisional order for the supply of electrical energy within their district. They entered into an agreement with the defendant company which provided that the company should construct all necessary works for the manufacture, supply, and distribution of electricity within the area of supply, and should manufacture, distribute, and supply electricity therein. Nothing in the agreement was to be deemed to transfer to the company any powers which the corporation were by the order or by the Electric Lighting Acts, 1882 and 1888, prohibited from transferring. No application was made to the Board of Trade to sanction this agreement. The company did not construct the works, and the corporation brought an action against them for damages for breach of contract.

Held, that the first part of section 11 of the Electric Lighting Act, 1882, only authorized a corporation which had obtained a provisional order for the supply of electricity to enter into contracts for the construction of works and for the supply to itself of electricity. That the second part of the section prohibited corporations and others who had obtained orders from transferring them or divesting themselves of any legal powers given to them, or any legal liabilities imposed on them by the Act, or the orders, without the consent of the Board of Trade. That the agreement was on its true construction a transfer of the duties and liabilities of the plaintiff corporation to the defendant company, and that it was therefore prohibited by the section and could not be enforced.—SUDBURY CORPORATION *v.* EMPIRE ELECTRIC LIGHT AND POWER CO., *Ch.D. Warrington, J.*, 684; [1905] 2 Ch. 104; 74 L. J. Ch. 442.

3. *Protection of gas company's mains—Non-compliance by electric company with requirements of gas company—Daily penalties—Time for laying complaint —Summary Jurisdiction Act,* 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Electric Lighting (Clauses) Act,* 1899 (62 & 63 *Vict. c.* 19), *Schedule* 18, 76.—In October, 1903, an electric company were laying electric mains near the pipes of a gas company. On the 2nd of October, 1903, the gas company wrote to the electric company complaining that the electric mains were being laid in a manner injurious to the gas pipes, and making certain requirements pursuant to section 18 of the schedule to the Electric Lighting (Clauses) Act, 1899. The correspondence between the companies continued until November, 1903, the work of laying the electric mains being completed on the 31st of October, 1903.

The electric company having disputed the reasonableness of the requirements, the matter was referred to arbitration, and by the arbitrator's award, dated the 12th of October, 1904, it was found that the electric company had not conformed with the requirements of the gas company, and the latter was awarded a sum as full compensation for the loss and injury they had sustained. On the 29th of April, 1904, the gas company's solicitors called upon the electric light company to comply with the gas company's requirements.

On the 31st of May, 1904, the gas company made a complaint alleging that the electric company "on and since the 2nd of October, 1903," had made default in complying with certain requirements under section 18 in that they did not conform and had not conformed with the requirements made by the gas company for protecting from injury their pipes and securing access thereto.

The justices convicted the electric company and inflicted a penalty of £1, and a further sum of £1 for every day during default.

Held, that the complaint was not out of time for not having been commenced within six months of the matter of complaint by virtue of section 11 of the Summary Jurisdiction Act, 1848; that the gas company were not barred from proceeding for penalties by the arbitration and subsequent award; and that, although the part of the conviction that inflicted the daily penalty was bad, that did not invalidate the conviction, and that the other part of the conviction was good.—CHEPSTOW ELECTRIC LIGHT CO. *v.* CHEPSTOW GAS CO., *K.B.D.*; [1905] 1 K. B. 198; 74 L. J. K. B. 28; 92 L. T. 27.

ESTATE DUTY.—See Inland Revenue, 1-6; Will, 3, 12, 22.

ESTOPPEL:—

Disposition by testatrix under incapacity—Entry of tenant for life under will and acquisition by him of possessory title—Rights of remaindermen.—Where a married woman, married before 1883, disposed of freehold property, over which she had a power of appointment, in favour of her husband for life, and

by a codicil purported to devise certain other of her freehold property (over which she had no power of appointment) to her husband for life with remainders over, and the husband entered and held both properties for twenty-one years.

Held, that the husband was not estopped from denying the validity of the disposition by the codicil of the property therein comprised, and that the rights of the remaindermen were barred.—ANDERSON, RE, PEGLER *v.* GILLATT, *Ch.D. Buckley, J.*, 510; [1905] 2 Ch. 70; 74 L. J. Ch. 433; 92 L. T. 725.

See also Company, 23; Executor, 1; Sale of Goods, 5.

EVIDENCE:—

1. *Mortgage—Presumption of death—Solicitor's books.*—The court will presume the death of a person after seven years, although there be strong evidence to show that the person has reason to keep his identity concealed.

A deceased solicitor's books are evidence if he charges himself therein with receipts on his client's behalf, as being entries against his interests, whether or not the entries were made in the ordinary course of his business as a solicitor.

A third mortgagee in an action to enforce his charge, having obtained judgment, an inquiry was directed to ascertain the date when the first mortgagee entered into possession. The first mortgagee admitted that he had been in possession since 1892. The third mortgagee claimed that the first mortgagee must account as from the year 1881, when the transferor of the first mortgage to the present first mortgagee became entitled. There was evidence to show that the transferor, who herself took a transfer of the mortgage, went into possession in 1881, and the only evidence to rebut it was contained in the books of an absconding solicitor, who had not been heard of since 1896. The books were in the possession of the official receiver, the said solicitor being a bankrupt.

Held, that the books were admissible evidence, inasmuch as the entries, which it was sought to give in evidence, were against the interest of the solicitor, whose death must be presumed.—WILLS *v.* PALMER, *Ch.D. Kekewich, J.*, 169.

2. *Presumption of death—Person not heard of for seven years*—Onus probandi—*No presumption of continuance of life.*—There is no presumption at law in favour of existence of life, and when a person has not been heard of for seven years, the burden of proving that he was alive at a particular date after that at which he was last heard of rests upon those who claim through him.—ALDERSEY, RE, GIBSON *v.* HALL, *Ch.D. Kekewich, J.*; [1905] 2 Ch. 181; 74 L. J. Ch. 548; 92 L. T. 826.

See also Criminal Law, 3; Local Government, 3

EXECUTOR:—

1. *Legatee—Conditional gift—Beneficial interest of executor on breach of condition—Estoppel—Duty of executor to give notice of legacy.*—Where a legacy is given upon a condition, an executor who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy.

Dictum of Lord Hardwicke in *Chauncy* v. *Graydon*, (1743) 2 Atk. 616, 619, discussed.

A testatrix appointed as executor her son A., and bequeathed a leasehold house to her son B., who was then abroad, and directed that if he did not return and claim it it should go to A. Subsequently to the death of the testatrix, A. wrote to B.: "A house has been left you, and according to the will it is to be in my hands until you claim it." But A. did not inform B. of the gift over, and B. died abroad without having claimed the house.

Held (affirming Joyce, J.), that A. was not estopped by the letter from claiming under the gift over, because (1) there was no sufficiently precise representation that B. was absolutely entitled; (2) it was proved that B.'s non-return was the consequence of the representation.—LEWIS, RE, LEWIS *v.* LEWIS, *C.A.*, 393; [1904] 2 Ch. 656; 73 L. J. Ch. 748; 91 L. T. 242.

2. *Retainer—Administrator—Insolvent estate—Right of retainer—Exercise for benefit of trust estate.*—The administratrix of a sole trustee who died insolvent appointed new trustees of the trust estate without, however, vesting the trust property in them.

Held, that the right to sue for the trust property was a *chose in action* retained by her, and that in virtue of such right and as legal personal representative of the trustee she was bound, if called upon to do so by the beneficiaries under the trust, to exercise her right of retainer in respect of any debt due from the trustee's estate to the trust estate.

In re Ridley, [1904] 2 Ch. 775, considered.—BENETT, RE, WARD *v.* BENETT, *Ch.D. Buckley, J.*; 92 L. T. 593.

3. *Retainer—Executor of trustee—Insolvent estate—Right of beneficiaries to require retainer—Right of executor to disclaim trusts.*—A testator bequeathed £3,000 to R. on trust that he, his executors, administrators, or assigns, should invest it and hold the investments on trusts for the benefit of certain persons.

R. invested the money, but afterwards sold the investments and misappropriated the proceeds. He died insolvent in March, 1903, having appointed an executor of his will, who took out probate.

R.'s estate was being partially administered by the court.

The beneficiaries entitled to the £3,000 took out a summons asking that the executor might be directed to retain the £3,000 and interest out of the estate.

The executor, in an affidavit, submitted to any order that the court might make, but at the hearing of the summons he by his counsel disclaimed the trusts of the £3,000. It did not appear that he had acted in them.

Held, on the authority of *Legg* v. *Mackrell*, 2 De G. F. & J. 551, that he was entitled to disclaim the trusts; and that the court could not therefore order him to exercise the right of retainer.—RIDLEY, RE, RIDLEY *v.* RIDLEY, *Ch.D. Joyce, J.*; [1904] 2 Ch. 774; 73 L. J. Ch. 696; 91 L. T. 189.

4. *Retainer—Married woman—Loan by wife to husband—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.—The conjoint operation of section 10 of the Judicature Act, 1875, and section 3 of the Married Women's Property Act, 1882, does not operate to alter the right of retainer by an executrix. An executrix therefore is entitled in the course of administration of the insolvent estate of her husband to retain out of assets in her hands the amount of a debt due to her in respect of moneys lent out of her separate estate for the purposes of his business.—AMBLER, RE, WOODHEAD *v.* AMBLER, *C.A.*, 584; [1905] 1 Ch. 697; 74 L. J. Ch. 367; 92 L. T. 716.

See also *Donatio Mortis Causâ*, 1; Inland Revenue, 27; Practice, 6; Probate, 3, 6.

FACTORY :—

1. *Machinery—Fencing of—Machinery on site not part of factory, but within curtilage—Liability to fence—"Place situate within curtilage" of factory, but "solely used for some purpose other than the manufacturing process carried on in factory"—Factory and Workshop Act,* 1901 (1 *Ed.* 7, *c.* 22), *ss.* 10, 149, *sub-section* 4.—The respondents were occupiers of a factory for the manufacture of iron and tin plates, and by the side of their factory and within the curtilage thereof, upon a site which had been cleared for the purpose of creating a new mill thereon, there was a crushing machine driven by a steam engine and used solely for crushing stone and making mortar and cement for the new works intended to be erected on that site. Both the steam engine and crushing machine were upon that site.

Upon an information under the Factory and Workshop Act, 1901, for not securely fencing the dangerous parts of this machinery, the justices were of opinion that the machinery was not securely fenced, but they decided that the place on which the engine and crusher stood, though within the close, curtilage, and precincts forming the factory, was a place solely used for a purpose other than the manufacturing process carried on in the factory, within the meaning of sub-section 4 of section 149 of the Act, and therefore could not be deemed to be a part of the factory, and was not a separate factory in itself, and they dismissed the information upon that ground.

Held, that the justices having found that the site on which the machinery was was not a part of the area of the existing factory, but was a place or area separate and apart from the factory, they were right in law in holding that the case came within the exemption of sub-section 4 of section 149, as the machinery in this separate area was being solely used for a purpose other than the manufacturing process carried on in the factory.—LEWIS *v.* GILBERTSON, *K.B.D.*; 91 L. T. 377.

2. *Means of escape from fire—Tenement factory—Factory and Workshop Act,* 1901 (1 *Ed.* 7, *c.* 22), *ss.* 14, 149.—By section 149 of the Factory and Workshop Act, 1901, a tenement factory is defined as a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process.

Held, that the word "supplied" in the section meant supplied from the same source, and that factories within the same building that generated their own mechanical power were not tenement factories within the meaning of the Act.—BRASS *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 27; [1904] 2 K. B. 336; 73 L. J. K. B. 841; 91 L. T. 344.

3. *Underground bakehouse—Expenses of alteration to get district council's consent—Covenant by lessee to pay "impositions and outgoings."*—The lessee of an underground bakehouse covenanted to pay "all existing and future taxes, rates, duties, assessments, impositions, and outgoings, of every description for the time being payable either by the landlord or tenant in respect of the said premises." The district council having refused to grant their certificate under section 101 of the Factory and Workshop Act, 1901, unless certain alterations were carried out,

Held, that the expenses of these alterations were "impositions" or "outgoings," and that they must be borne by the lessee.—GOLDSTEIN *v.* HOLLINGSWORTH, *K.B.D.*; [1904] 2 K. B. 578; 73 L. J. K. B. 826; 91 L. T. 85.

4. *Underground bakehouse—Structural alterations—Expenses of alterations necessary to secure certificate—Covenant by lessee to pay all "outgoings"—Liability of lessee under covenant to bear expenses of alterations—Jurisdiction of magistrate to apportion expenses as between owner and occupier—Factory and Workshop Act,* 1901 (1 *Ed.* 7, *c.* 22), *s.* 101, *sub-section* 8.—The lease of premises used as an underground bakehouse contained a covenant by the lessee that he would during the term pay "all existing and future rates, assessments, and outgoings of every description, whether parliamentary, parochial, or otherwise." The district council having refused to grant the certificate required under section 101 of the Factory and Workshop Act, 1901, that the bakehouse was suitable for the purpose, unless certain structural alterations were made in the premises, and the lessee having made these structural alterations,

Held, that the expenses of these structural alterations were "outgoings" within the meaning of the lessee's covenant, and that the lessee was bound to bear the same, and that therefore a court of summary jurisdiction had no jurisdiction, under sub-section 8 of section 101 of the Act, to apportion the expenses between the owner and the occupier.—MORRIS *v.* BEAL, *K.B.D.*; [1904] 2 K. B. 585; 73 L. J. K. B. 830; 91 L. T. 486.

See also County Court, 3.

FERRY :—

Demise by Crown of ancient ferry rights across a river from vill to vill—Extent of such rights—Disturbance—Rapid development of neighbourhood—Rival service of steamboats—New traffic—Cowes Ferry Act, 1901 (1 *Ed.* 7, *c. lxxxviii.*).—The plaintiffs claimed an injunction and damages in respect of an alleged wrongful interference with their right of ancient ferry and passage across the river separating East and West Cowes, which, in 1901, the Crown demised to them. The defendants denied the plaintiff's exclusive right of ferry or that they had interfered with it, and alleged that they carried a kind of traffic different to that carried or intended to be carried by the plaintiffs' ferry.

Held, that as the traffic carried by the defendants might on the evidence fairly be treated as new traffic which had recently sprung up owing to the rapid development of the neighbourhood and other causes, and as the traffic of the ancient ferry was not a diminishing but an increasing and progressive traffic, the plaintiffs were not entitled to an injunction.

Held, further, that on the construction of the lease the right of ferry demised was only a right of ferry from one terminus to another, and was not therefore an exclusive right of ferry from vill to vill.

Quære, whether East and West Cowes did not comprise too great an area to consitute "vills" between which the Crown could grant an exclusive right of ferry.—COWES URBAN COUNCIL *v.* SOUTHAMPTON, &c., STEAM PACKET CO., *K.B.D.*, 602; [1905] 2 K. B. 287; 74 L. J. K. B. 665; 93 L. T. 658.

FIXTURES :—

1. *Landlord and tenant—Tenant for life and remainderman — Right of removal — Intention to improve inheritance.*—A tenant for life of settled estates granted a lease for twenty-one years of a steam-mill and machinery. The lessee covenanted that he would at the end of the tenancy sell to the lessor all machinery then on the premises other than the demised machinery; and the lessor covenanted that he would pay for it. The tenant brought additional machinery into and affixed it to the mill

On the expiration of the tenancy the tenant for life bought this machinery under the provisions of the lease. He died, and his executrix claimed the machinery thus bought.

Held, that, as between tenant for life and remainderman, chattels affixed to the soil by the tenant for life for purposes of trade did not become part of the freehold, and might be removed by him. The question must be determined by the intention of the person by whom the chattels were attached; and that, in the absence of evidence to show that the tenant for life intended to make a present to the remainderman, his executrix was entitled to the machinery. — SIR EDWARD HULSE, BART., RE, BEATTIE *v.* HULSE, *Ch.D. Buckley, J.*; [1905] 1 Ch. 406; 74 L. J. Ch. 246; 92 L. T. 232.

2. *Machinery affixed by bolts and screws—Hire-purchase agreement—Rights of mortgagee in possession.*—The lessee of a factory mortgaged it, together with the fixtures, machinery, and fittings erected thereon. Shortly afterwards, under a hire-purchase agreement entered into by the mortgagor, certain machines were fastened by the mortgagor in the factory on concrete beds by means of upright bolts and screws, but so that they could be removed without injury to the freehold. The premises were taken possession of by the mortgagee, and the vendor of the machines claimed them under the terms of the hire-purchase agreement.

Held, that the machines were fixtures, and therefore the mortgagee was entitled to retain them.

Decision of the Court of Appeal (51 W. R. 405, [1903] 1 K. B. 87) affirmed.

Hobson v. *Gorringe*, 45 W. R. 356, [1897] 1 Ch. 182, approved.—REYNOLDS *v.* ASHBY, *H.L.*, 129; [1904] A. C. 466; 73 L. J. K. B. 946; 91 L. T. 607.

FORESHORE:—

1. *Land by the sea—Accretion—Seashore—Description of parcels—"Situate on seashore"—"Bounded on seashore"—Dimensions an essential part of description—Evidence—Level book founded on surveys made by deceased surveyor admissible.*—A conveyance of land described as "situate on the seashore" and "bounded on the west by the seashore" does not, where the plans contained in the conveyance show a strip of land between a boundary satisfying the dimensions given in the parcels and the seashore, pass such strip. In such case there is an implied covenant by the grantor not to use the strip for any purpose that would prevent the grantee from having as free and effectual access to the sea over the strip as if it were actually seashore vested in the Crown.

A level book founded on surveys made by a deceased surveyor under contract with a local board is receivable in evidence as a declaration made in discharge of professional duty.

Decision of Swinfen Eady, J. (52 W. R. 665), in substance, affirmed.—MELLOR *v.* WALMESLEY, *C.A.*, 581; [1905] 2 Ch. 164; 74 L. J. Ch. 475.

2. *Right of access—Limits of public user—Bathing in the sea from foreshore owned by private persons.*—Where the foreshore lying between high-water mark and low-water mark of ordinary tides is owned by private persons, there is no common law right to go there for the purposes of bathing in the sea therefrom.

Blundell v. *Catterell*, 5 B. & Ald. 268, considered and followed.

Decision of Buckley, J. (90 L. T. Rep. 199), affirmed.—BRINCKMAN *v.* MATLEY, *C.A.*; [1904] 2 Ch. 313; 73 L. J. Ch. 642; 91 L. T. 429.

FRAUD:—

Interest given in court of law or equity—Ordinance of the 10th of November, 1881, of Sierra Leone—Crown abandoning charges of fraud—Costs where Crown is a litigant.—Money obtained by fraud and retained by fraud can be recovered with interest, whether proceedings be taken in a court of equity or in a court of common law, but where the Crown in a civil action intentionally and deliberately put aside all charges of fraud no interest was allowed.

In dealing with costs in cases between the Crown and a subject the rule of the Judicial Committee of the Privy Council will be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.—JOHNSON *v.* REX, *P.C.*, 207; [1904] A. C. 817; 73 L. J. P. C. 113; 91 L. T. 234.

See also Bankruptcy, 9; Company, 16, 18; Contract, 6; Indemnity, 1; Jointure, 1; Principal and Agent, 4; Weights and Measures, 3-5.

FRIENDLY SOCIETY:—

Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *s.* 68—*Decision of arbitration committee—Power of court to review.*—The Friendly Societies Act, 1896, does not give to the domestic tribunals of the societies absolute power to pronounce decisions which shall be exempt from examinations in courts of law. To be protected from review, a decision must be given in accordance with the rules of the society.

Therefore where the arbitration committee of a friendly society proceeded to expel a member summarily without first making a charge against him in the manner provided by the rules:

Held, that he could bring an action for damages for wrongful expulsion.

Judgment of the court below affirmed. — ANDREW *v.* MITCHELL, *H.L.*; 91 L. T. 537.

GAMING:—

1. *Banker at pharaoh—Purchase of bank—Assisting in management of gaming-house.*—A person who, having bought the bank at a game of pharaoh (an unlawful game within section 2 of the Gaming Act, 1738, 12 Geo. 2, c. 28), acts as banker at a club where the game is played, is "assisting in conducting the business" of a gaming-house within section 4 of the Gaming Houses Act, 1854.—DERBY *v.* BLOOMFIELD, *K.B.D.*; 91 L. T. 99.

2. *Wagering Contract—Money deposited as security—Stockbroking transactions—Interest upon deposits—Company in liquidation—Surplus assets—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.—A claim to the return of moneys deposited as security for the observance of a contract void under the Gaming Act, 1845, is a claim under contract, and therefore, if there is a contract express or implied between the parties that interest shall be paid upon this money, such interest is recoverable by the depositor.

A company carried on stock and share transactions which were illegal as wagering transactions, for customers who deposited money as "cover" for these transactions. The company was wound up, but proved solvent, its creditors being paid 20s. in the £ upon their admitted proofs, and there were surplus assets. The course of dealing between the parties was for the company to pay interest to the customer upon the amount of "cover" in the company's hands.

Held, that the customers were entitled to interest as from the date of the winding up, in addition to the sums proved for.

Dictum of Rigby, L.J., in *Strachan* v. *Universal Stock Exchange Co.* (*Limited*), 43 W. R. 611, [1895] 2 Q. B., at p. 335, followed.—DUNCAN & CO., RE, *Ch.D. Buckley, J.*, 299; [1905] 1 Ch. 307; 74 L. J. Ch. 188; 92 L. T. 108.

GARNISHEE ORDER:—

Setting aside—Judgment creditor—Garnishee order absolute—Money paid under it—Order obtained on erroneous allegation of material facts.—A garnishee order obtained upon an allegation of material facts, which turns out to be erroneous, can be set aside, notwithstanding it has been made absolute.

Moore v. *Peachey*, 66 L. T. 198, followed.—MARSHALL *v.* JAMES, *Ch.D. Joyce, J.*, 363; [1905] 1 Ch. 432; 74 L. J. Ch. 279; 92 L. T. 681.

See also Divorce, 6.

HIGHWAY.

1. *Bridges—Liability to repair—Statute—Construction—Statute of Bridges.*—A statutory obligation to maintain a bridge which is part of a highway, imposed by a statute subsequent to the Statute of Bridges (22 Hen. 8, c. 5), it is not necessarily a liability to repair the highway to the extent of three hundred feet from each end of the bridge, notwithstanding that the inhabitants of a county must repair to that extent where they are liable to repair at all, and notwithstanding that persons liable to repair by prescription or *ratione tenuræ* are bound to repair to a similar extent.—HERTFORDSHIRE COUNTY COUNCIL *v.* NEW RIVER CO., *Ch.D. Swinfen Eady, J.*, 60; [1904] 2 Ch. 513; 74 L. J. Ch. 49; 91 L. T. 796.

2. *Diversion—Notices on highway—Time for affixing—Resolution of district council—Refusal of two justices to certify—Jurisdiction to apply to two other justices—Certificate—Consent of landowner—Highway Act*, 1835 (5 & 6 *Will.* 4, c. 50), *ss.* 84, 85.—Where a highway is proposed to be diverted, the notice required by section 85 of the Highway Act, 1835, to be affixed at end of the highway need not be affixed at such a date as to leave a period of four weeks before the issue by the justices of their certificate.

Where, pursuant to a resolution of a district council, the surveyor has applied to two justices to view a highway which is proposed to be diverted, and the justices refuse to certify, the surveyor may, without a fresh resolution of the district council, apply to two other justices to view, who, if they approve of the proposed diversion, may certify. The consent of the owner of the land through which the proposed new highway lies need not appear upon the face of the certificate.

Judgment of the Divisional Court ([1904] 2 K. B. 349, 52 W. R. Dig. 63) reversed.—REX. *v.* KENT JUSTICES, *C.A.*, 183; [1905] 1 K. B. 378; 74 L. J. K B. 50; 92 L. T. 132.

3. *Extraordinary traffic—Traction engine—Injury to road—Nuisance—Default of local authority in maintenance of road.*—In an action to restrain the defendant from using a traction engine upon a road in such a way as to cause a public nuisance, it was at the trial found as a fact that the condition of the road was caused primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic.

Held, that the plaintiffs were not entitled to an injunction to restrain the defendant from bringing his traction traffic upon the road.—ATTORNEY-GENERAL *v.* SCOTT, *C.A.*; [1905] 2 K. B. 160.

4. *Footway under inclosure award—Subsequent user for wheeled traffic—Nuisance—Dedication—Action for trespass—Non-joinder of Attorney-General.*—A lane in the seaside town of S., which ran from the High-street to the top of the cliff, and varied from 6ft. to 4ft. 4in. in width, had in 1811 been set out under an award by the Inclosure Commissioners under the S. Inclosure Act, 1809, as a public footpath.

In 1903 the S. Urban District Council erected in the centre of the footpath an iron post to prevent the lane being used for wheeled vehicles. The defendant having overthrown the post, the district council brought an action against him in respect of the alleged trespass, claiming damages and an injunction; and claiming further a declaration that the lane was a public footpath vested in the council and under the council's control, and that it was not a carriage-way.

The defendant contended that the lane was a public highway for all persons to go and return on foot, and with all manner of beasts and vehicles, and alleged that since the award of the commissioners there had been a dedication of the way as a cart road. Alternatively, he contended that before or since the award there had been a private right for the class consisting of the owners and occupiers of S. to use the way for carts.

The evidence showed, on the one hand, that when carts were driven through the lane the foot passengers were obstructed, and had to wait until the carts had completed their passage, and, on the other hand, that for more than forty years past barrow carts (sometimes drawn by donkeys or ponies) had been continuously used in the lane.

Held, first, that the action, being in substance one for damages for interference with the plaintiffs' property, could be maintained without the Attorney-General being made a party; and, secondly, that the user for wheeled traffic was in its inception and all along a public nuisance, and no length of time could legalize it, and that, as regards dedication, no one had the power to dedicate even with the consent of the local authority. Damages and an injunction accordingly.—SHERINGHAM URBAN COUNCIL *v.* HOLSEY, *Ch.D. Joyce, J.*; 91 L. T. 225.

5. *Local authority—Statutory duty to repair—Neglect to repair—Liability—Indictment—Damages—Liverpool Improvement Act*, 1846 (9 & 10 *Vict. c. cxxvii.*), *ss.* 36, 37, 38, 58.—Where by statute a liability to repair highways, which by common law would be thrown upon the inhabitants at large, is transferred to a new corporation or body created for the purpose of taking over the liability, it is not to be inferred that a new liability is created unless distinct intention on the part of the Legislature can be found in the terms of the Act. *Prima facie*, therefore, such new corporation or body is not liable to be sued by an individual for damages resulting from nonfeasance any more than the inhabitants of the parish would have been. And an intention on the part of the Legislature to impose the larger liability will not be inferred from a provision that the new corporation or body is to be liable to be indicted at common law for the want of the sufficient repair of any public highway in the same manner as any person or persons liable to the repair of highways was or were before the passing of the Act in question. If and so far as the case of *Hartnell* v. *Ryde Commissioners*, 11 W. R. 963, lays down any general proposition of law with regard to the liability in respect of the repair of highways, it must be taken to be overruled by the decision in *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 41 W. R. Dig. 85.—MAGUIRE *v.* LIVERPOOL CORPORATION, *C.A.*, 449; [1905] 1 K B. 767; 74 L. J. K. B. 369; 92 L. T. 374.

6. *Repairs—Extraordinary traffic—Damages—Limitation of time for action—Statutes—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.—An action against a public authority to recover damages for an

injury to a highway must be brought within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months after the ceasing thereof, by virtue of the Public Authorities Protection Act, 1896, s. 1. This statute is not expressly or impliedly repealed by section 12, sub-section 1 (*b*), of the Locomotives Act, 1898, which provides a limitation of twelve months when an action is brought by a highway authority to recover extraordinary expenses incurred by it in repairing a highway by reason of extraordinary traffic thereon.—KENT COUNTY COUNCIL *v.* FOLKESTONE CORPORATION, *C.A.*, 371; [1905] 1 K. B. 620; 74 L. J. K. B. 352; 91 L. T. 563.

7. *Repairs—Mandatory injunction—Retaining and supporting walls—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.—Where certain walls adjoining a highway, which was vested in a county council as the highway authority for purposes of maintenance and repairs, were allowed to become out of repair,

Held, that the court would not interfere with the discretion of the highway authority by making a declaration that such authority was liable to repair the walls on the ground that their becoming dilapitated might cause an obstruction in the highway.

Sandgate Urban District Council v. *Kent County Council*, 79 L. T. 425, 47 W. R. Dig. 106, followed. —ATTORNEY-GENERAL *v.* STAFFORDSHIRE COUNTY COUNCIL, *Ch.D. Joyce, J.*, 312; [1905] 1 Ch. 336; 74 L. J. Ch. 153; 92 L. T. 288.

8. *Obstruction—Tramway reconstruction—Maintenance of tramcar traffic—Public authority—Statutory powers—Implied powers—Contractors—Action six months after damage—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 25—*London County Tramways (Electrical Power) Act*, 1900 (63 & 64 *Vict. c. ccxxxviii.*). *s.* 6—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61).—The London County Council owned and worked certain tramways. They had power by a special Act to reconstruct the tramways for their electrification, but had no express statutory power to provide for the maintenance of the tramcar traffic meanwhile, or to put any rails in the streets raised above the surface. The defendants contracted with the council to carry out the reconstruction, and to provide during the work for the continuance of the tramcar traffic. For that purpose they placed a line of rails in the streets raised above the street level which, unless authorized by statute, was a nuisance. The omnibuses of the plaintiff company sustained damage in passing over these raised rails.

Held, that the raised rails were not necessary for the reconstruction, and were not therefore authorized by the special Act, but were a nuisance, and that the damage caused was actionable.

Held, also, that as the defendants were independent contractors, they were not protected by the Public Authorities Protection Act, 1893, although the acts complained of were done more than six months before the issue of the writ.—TILLING *v.* DICK, KERR, & CO., *Ch.D. Warrington, J.*, 380; [1905] 1 K. B. 562; 74 L. J. K B. 359.

HUSBAND AND WIFE:—

1. *Action by wife against husband—Detention of goods—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 17.—An action will lie at the suit of a married woman against her husband for the return of her personal property detained by him.—LARNER *v.* LARNER, *K.B.D.*; [1905] 2 K. B. 539.

2. *Deed of separation—Covenant to pay annuity—So long as she shall continue to live separate and apart—Death of husband.*—A husband covenanted in a deed of separation to pay his wife an annuity of £150 per annum during her life if she should so long continue to live separate and apart.

Held, that the annuity ceased to be payable on the death of the husband, as she could not be held to live separate and apart after her husband's death.—GILLING, RE, PROCTOR *v.* WATKINS, *Ch.D. Kekewich, J.*, 427; 74 L. J. Ch. 335; 92 L. T. 533.

See also Married Woman, 1-3; Poor Law, 8; Separation Deed, 1.

INDEMNITY:—

Forged transfer of stock—Innocent presentment of, for registration—Implied contract to indemnify.—T. and H. were the holders of certain stock of the plaintiff corporation. T. instructed a firm of stock-brokers to sell the stock, which they did. Before any transfer had been executed the purchasers pledged the stock with the defendants as security for an advance. A transfer purporting to be executed by both T. and H. in favour of the defendants was then handed to the defendants, who sent it to the plaintiffs for registration, and procured themselves to be registered as the holders. The defendants subsequently at the request of the pledgors transferred the stock to third parties, who in their turn were duly registered. Some time afterwards it was discovered that the signature of H. to the first-named transfer was a forgery, and upon an action being brought by him against the plaintiff corporation the latter were compelled to purchase stock to replace that which he had lost. The corporation then sued the defendants for an indemnity.

Held, that the defendants in sending in the transfer to the plaintiffs for registration impliedly undertook to indemnify them against the consequences of registering it, and that, there being no negligence on either side, the loss must fall upon the defendants.

Judgment of Lindley, J., in *Simm* v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188, dissented from. — SHEFFIELD CORPORATION *v.* BARCLAY, *H.L.*; 74 L. J. K. B. 747.

INDUSTRIAL SOCIETY:—

Special remedy for debts due from members—Past members—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 23.—Under section 23 of the Industrial and Provident Societies Act, 1893, a society can sue in the county court a past member for a debt contracted while he was a member, and consequently it is immaterial that the amount sued for is in excess of the ordinary jurisdiction of the county court. — GWENDOLEN LAND SOCIETY *v.* WICKS. *K.B.D.*, 219; [1904] 2 K. B. 622; 73 L. J. K. B. 815; 91 L. T. 440.

INFANT. — See Accumulations, 1; Limitations, Statute of, 2; Poor Law, 4.

INJUNCTION:—

1. *Equitable execution—Receiver*—Ex parte *injunction—R. S. C., ord.* 50, *r.* 15*a*, *App. K, Form No.* 61 (*a*).—Plaintiffs had obtained judgment against the defendants in an action for a sum of £2,585 13s. 7d. The judgment remaining unsatisfied, the plaintiffs obtained against the defendants a summons for the appointment of a receiver of the defendants' tolls and other property by way of equitable execution, together with an order for an *ex parte* injunction restraining the defendants from dealing with the property until the hearing of the application for a receiver, in the form App. K, No. 61 (*a*). The affidavit filed by the plaintiffs on obtaining the

summons and order for an injunction did not contain any evidence of any danger that the defendants would make away with the property before the hearing of the application for a receiver. On application by the defendants to Jelf, J., to dissolve the injunction, he refused to do so.

The Court of Appeal was of opinion that the *ex parte* injunction ought not to be a matter of course in all such cases, and that, in the absence of any evidence of any danger that the defendants would make away with the property in order to defeat the application for a receiver, the injunction ought to be dissolved. Appeal allowed.—LLOYD'S BANK (LIMITED) *v.* MEDWAY UPPER NAVIGATION CO., *C.A.*; [1905] 2 K. B. 359.

2. *Undertaking in lieu of injunction—Cross-undertaking by plaintiff as to damages.*—Where, before the opening of a motion for an *interim* injunction, the defendant offers out of court an undertaking which is embodied in the order in lieu of an injunction, there is no practice under which a cross-undertaking in damages by the plaintiff is to be implied. Such an implication may arise where the defendant's undertaking is given under pressure from the court. —HOWARD *v.* PRESS PRINTERS (LIMITED), *C.A.*, 98; 74 L. J. Ch. 100; 91 L. T. 718.

See also Easement, 2, 4; Highway, 7; Trade Union, 1, 3.

INLAND REVENUE:—

1. *Estate duty—Colonial bond to bearer containing charge on property in colony—Bond situate in England.* —A colonial bond to bearer, even though containing a charge on property in such colony, if negotiable by the law of such colony, is also negotiable in the country where such bond is physically situated. Therefore, as the bailee of such bond must get a good discharge before he can deliver it up, where such bonds are actually in England at the death of the deceased, estate duty is payable in respect of such bonds.—ATTORNEY-GENERAL *v.* GLENDINING, *K.B.D.*; 92 L. T. 87.

2. *Estate duty—Exemption—Personal property settled by will of person dying before the Finance Act —Subsequent conversion of personal property into real estate—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-section* 1.—A testator who died before the Finance Act, 1894, bequeathed the residue of his personal estate to trustees upon trust to convert it into money and to invest the money in real estate to the use of a tenant for life with remainder to the use of the eldest son of the tenant for life in tail male. Probate duty was duly paid on the personal estate, and the residue was invested in the purchase of real estate, which was conveyed to the uses of the testator's will.

Held, by the Court of Appeal, reversing the judgment of Channell, J., that on the true construction of section 21, sub-section 1, of the Finance Act, 1894, estate duty was not payable on the death of the tenant for life in respect of such real estate. —ATTORNEY-GENERAL *v.* LORD LONDESBOROUGH, *C.A.*, 147; [1905] 1 K. B. 98; 74 L. J. K. B. 81; 91 L. T. 52.

3. *Estate duty—Property deemed to pass on death—Interest provided by deceased by arrangement with other person—Policy of life insurance—Family arrangement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (d).—The tenant for life of certain estates, who had raised a sum of money on the security of his life estate and of fifteen policies of insurance on his life, entered into an arrangement with his son, the tenant in tail, in accordance with which the entail was barred, a sum of money was raised on a mortgage of the fee simple, out of which the charges on the father's life estate and on the policies were paid off, and the policies were assigned to the son. By a deed of settlement the income of the estates was to be applied, first, in paying the interest on the mortgage debt; next, in paying the premiums on the policies or substituted policies, and, if any policies should be surrendered, the amount of the premiums on such policies were to be paid to the son; and next, in paying £1,000 a year to the son. The son mortgaged the policies, assigning to the mortgagees the benefit of the provisions in the settlement for keeping up the policies, but without any covenant by himself to keep up the policies. The father having surrendered his life interest in the estates to the son, subject to the trusts for keeping up the policies, the son paid off the mortgage on the policies and then remortgaged them, covenanting in the new mortgage to pay the premiums. Shortly after the new mortgage the father died, and all the policy moneys were duly paid to the son. No premium in respect of five of the policies fell due or was paid after the date of the new mortgage. In respect of each of the remaining ten policies the defendant himself paid one premium under his covenant. The Crown claimed estate duty on the death of the father in respect of the policy moneys.

Held, that the estate duty claimed was payable, as the policies were an interest provided by the deceased by arrangement with his son within the meaning of section 2, sub-section 1 (*d*), of the Finance Act, 1894.—ATTORNEY-GENERAL *v.* LETHBRIDGE *C.A.*, 645; [1905] 2 K. B. 323; 74 L. J. K. B. 710.

4. *Estate duty—Settled property—Mortgage by tenant for life and remainderman—Indemnity to life tenant—Deduction of mortgage debt in estimating value —Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-section* 1 (b); *and s.* 7, *sub-section* 7 (b).—The tenant for life and remaindermen of a settled estate mortgaged the estate in fee as security for an advance to the remaindermen, who alone covenanted with the mortgagee to repay the advance and interest thereon. By an indenture of even date the remaindermen covenanted to indemnify the tenant for life against any liability or loss in respect of the mortgage debt, and out of another estate belonging to them created a rent-charge in favour of the tenant for life for the performance of their covenant. The tenant for life was in fact kept indemnified.

Held, that the whole property, without deduction of the mortgage debt, was liable to estate duty under the Finance Act, 1894, upon the death of the tenant for life.

Decision of the Court of Appeal (51 W. R. 326, [1903] 1 K. B. 483) reversed, and that of Phillimore, J. (50 W. R. 270, [1902] 1 K. B. 429), restored.—ATTORNEY-GENERAL *v.* LORD MONTAGU, *H.L.*, 115; [1904] A. C. 316; 73 L. J. K. B. 707; 90 L. T. 726.

5. *Estate duty—Settlement estate duty—Incidence of duties and of arrears of interest—General residue insufficient—Annuities—Liability of annuitants to contribute—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-section* 1; *s.* 6, *sub-section* 2; *s.* 9, *sub-section* 1; *s.* 14, *sub-section* 1—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-section* 1.—A testator who died in the year 1895, by a bequest held to be specific, bequeathed "all my moneys invested in and upon any stocks or funds, whether in or out of the United Kingdom, and all my railway stocks, shares, debentures, and bonds, and generally all and every my securities for money" to trustees upon trust during the life of his sister to

pay three sums of £1,000, £500, and £500 annually respectively, and the residue and the remainder thereof to his brother W. during his life.

After the death of his sister the trustees were to hold the trust fund, as to two sums of £21,000 and £18,000, upon certain trusts in favour of two of the testator's brothers respectively and their issue, and were to stand possessed of the residue of the trust fund, including the £18,000, in the event of his brother's death without issue upon trust for W. for life, with remainders over.

The testator bequeathed all the residue of his personal estate of whatever kind to W., subject to the payment of his funeral and testamentary expenses and debts and certain annuities.

The residuary personalty being insufficient to pay the testator's debts and the estate duty and settlement estate duty upon his estate,

Held, that both as to estate duty and settlement estate duty the loss occasioned by the insufficiency of the general residuary estate must fall on W. as residuary legatee of the trust fund specifically bequeathed.—DE QUETTEVILLE *v.* DE QUETTEVILLE, *Ch.D. Kekewich, J.*; 92 L. T. 758.

6. *Estates settled by Act of Parliament—Estate duty—Power of "alienation"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-section* 5—*Succession duty—Jointure of widow—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 4.—By a private Act of 1535 (27 Hen. 8, c. xvi.) real estates were limited to two persons, A. M. and E. P., respectively in tail, with cross-remainders between them in tail, with a proviso that no tenant in tail should alien any of the settled estates nor any other thing do to the hurt or disinheritance of his heirs or the remainders, "but only for the joynter of wyfe or wyves for terme of lyfe or lyves of any husband that hath or shall marry any of them or any of the heires that shall be inheritable to any of the same landes and tenementes, or for terme of lyfe of any other person or for yeres or at wyll after custome of the manour, yeldyng the true and auncyent rent of the same landes or tenementes so to him letten as is aforesaid."

By reason of the failure of the heirs of the body of A. M. the entirety of the said estates became vested in the heirs of the body of E. P.

By a private Act of 1863 (26 & 27 Vict. c. vi.) power was given for the Court of Chancery to direct a partition of the estates, which were then vested in H. C. and J. W. S. As the result of partitions in 1869 and 1877, a moiety of the estates was allotted to the successors in title of H. C. in severalty.

H. G. V. C., who subsequently succeeded to this moiety of the estates, limited such moiety in favour of his widow C. L. W. C. by way of jointure.

On the death of C. L. W. C. in May, 1901, such moiety passed to various persons as coparceners in tail, among whom was A. W. H. M.

A. W. H. M. died in March, 1902, after having appointed a life interest by way of jointure in favour of his widow E. M. in the share of the moiety to which he had become entitled.

On questions arising as to the estate duty and succession duty payable on the deaths of C. L. W. C. and A. W. H. M. respectively,

Held, that, in spite of the power of sale conferred on the successive tenants in tail by section 58 of the Settled Land Act, 1882, "no one of the persons successively in possession thereof was capable of alienating" the estates in question, and that accordingly section 5, sub-section 5, of the Finance Act, 1894, applied for the purposes of determining the estate duty payable on the death of C. L. W. C.; and that such duty was payable, not out of the corpus or capital value of the estates, but out of the interest of the successor therein; and

Held, that succession duty was not payable by E. M. in respect of the jointure that had been appointed to her by her husband A. W. H. M.—BOLTON'S SETTLED ESTATES, RE. *Ch.D. Joyce, J.*; [1904] 2 Ch. 289; 73 L. J. Ch. 688; 91 L. T. 259.

7. *Excise licence—Sale of spirits in bond—"Dealer in spirits"—Excise Licences Act*, 1825 (6 *Geo.* 4, *c.* 81), *s.* 2.—The appellant, a ships' store merchant, was the renter of a Customs bond, and in this bond he kept, amongst other dutiable articles, a quantity of spirits. The captain of a foreign vessel in the port ordered stores for his vessel from the appellant, and amongst these goods was an order for twelve reputed quart bottles of spirits. These were taken from the appellant's bonded warehouse in the ordinary course, and were conveyed to the ship and were there sealed up by a Customs official. The seal was not broken until the vessel was at sea outside territorial waters.

Held, that the appellant was a "dealer in spirits" within the meaning of section 2 of the Excise Licences Act, 1825, and required an excise licence. — TINWELL *v.* MAYHOOK, *K.B.D.*, 14; [1904] 2 K. B. 790; 73 L. J. K. B. 699; 91 L. T. 145.

8. *Income tax—Annual payment—Purchase of property—Lump sum.* — The plaintiff, who was owner of a term of years which was let for the whole term less twenty-one days at a rental of £1,925, assigned to the defendants, who were his sub-lessees, his reversion in the property in consideration of £1,000 and of a deed of covenant by which the defendants covenanted to pay the plaintiff the annual sum of £1,625, which was the net rent the plaintiff had previously received from the property.

Held, that the defendants were right in deducting income tax from the annual payments as falling within section 40 of the Income Tax Act, 1853.—CHADWICK *v.* PEARL LIFE ASSURANCE CO., *K.B.D.*; [1905] 2 K. B. 507; 74 L. J. K. B. 671.

9. *Income tax—"Annual payment payable out of such profits or gains"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *case* 1, *r.* 4, *Schedule D, and s.* 102—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24 (3).—By an agreement between the plaintiffs and the defendants the defendants had the exclusive right of selling and manufacturing articles by a secret process, and the defendants were to pay to the plaintiffs for forty years £8 per cent. on the gross receipts of such sale.

The plaintiffs resided abroad and were foreigners, and, before paying the amount payable to them under the agreement, the defendants deducted income tax payable in respect of the amount due under the agreement.

Held, that the income tax was rightly deducted.—DELAGE *v.* NUGGET POLISH CO., *K.B.D.*; 92 L. T. 682.

10. *Income tax—"Annuity"—Purchase of property—Purchase-money payable by annuity consisting partly of interest and partly of sinking fund—Exemption from income tax of part of annuity consisting of capital—Basis of calculation—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102, *Schedule D; and* 1853 (16 & 17 *Vict. c.* 34), *Schedule C.*—By agreements made between the East India Company and the East Indian Railway Co. for the construction of certain railways on lands leased to the railway company for ninety-nine years by the East

India Company, the East India Company were empowered to purchase the railways at any time after the first twenty-five years either for a gross sum or, at their option, by payment of an annuity for the residue of the term; but as the period of the twenty-five years was about to expire the parties entered into a new agreement by which the purchase of the railways was to be made by means of an annuity terminable at the end of seventy-three years and payable half-yearly by the Secretary of State for India to the company, and calculated at a specified rate of interest on a commuted price of £125 per £100 of capital stock, which gave, including a sum for redempton of capital, a certain annuity for each £100 stock so commuted, and this annuity was made up, as to part thereof, of interest on the capital stock so commuted, and as to another part thereof, of the sum for the redemption of capital, being the amount required to be set aside and invested half-yearly in every year at a like rate of interest "in order to produce by means of a sinking fund the capital sum of £125" at the end of the seventy-three years. This arrangement was sanctioned by an Act of Parliament and was acted upon, and under it the Secretary of State deducted and claimed to deduct income tax from the whole "annuity."

Held, upon the authority of *Secretary of State in Council of India* v. *Scoble*, [1903] A. C. 299, that the deduction should only have been of income tax in respect of so much of the payment as represented interest on unpaid capital.—EAST INDIAN RAILWAY CO. *v.* SECRETARY OF STATE FOR INDIA, *C.A.*; [1905] 2 K. B. 413.

11. *Income tax—Assistant master at schools—Liability to income tax on increase of salary—Scheme for provident fund—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Schedule E.*—Under a provident fund scheme for the year 1900 at Dulwich College it was provided that with respect to assistant masters that the following increase of salaries should be granted from the date on which the scheme came into operation, subject to certain conditions: "(*a*) Assistant masters having not less than five years' but less than fifteen years' service an increase of 5 per cent.; (*b*) assistant masters having not less than fifteen years' service and over an increase of 7½ per cent.; (*c*) a further addition, equal in amount to the above sums, to be granted from the same date to the assistant masters alluded to in (*a*) and (*b*) subject to certain conditions." All assistant masters were required to become members of the fund at the expiration of five years from their respective appointments. The whole of the above increases of salary were not to be paid to the masters, but to be retained by the governors and accumulated at compound interest for the purpose of forming the said provident fund.

Among the conditions to which the above increases of salary were subject were that assistant masters having less than ten years' service who might resign their appointments, or from any other cause than ill-health cease to belong to the college, should be entitled to receive the total increase sanctioned by (*a*) and the accumulations thereof, but should not receive the additional increase sanctioned by (*c*) or the accumulations thereof. In the event of any such assistant master retiring from ill-health the governors, in addition to the increase sanctioned by (*a*), might grant him the further 5 per cent. sanctioned by (*c*) and the accumulations thereof. Masters of over ten years' service were to receive on retirement before the age of sixty the total sum due under (*a*) or (*b*) and (*c*) with accumulations. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to receive the increase sanctioned by (*c*) or accumulations thereof. Any additional increase under (*c*) remaining unissued was to be credited to the fund for exceptional cases.

Held, that the true effect of the scheme was to add the sums specified in both (*a*) and (*c*) to the salary of assistant master; and that the respondent, an assistant master, was liable under section 146, Schedule E, of the Income Tax Act, 1842, to pay income tax on that addition to his salary.—SMYTH *v.* STRETTON, *K.B.D.*, 288; 90 L. T. 756.

12. *Income tax—Collections in church—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Schedule E.*—Portions of collections made in a church were paid to the incumbent. They were paid to him by reason of his being incumbent, but they would not have been paid to him if he had not been poor.

Held, that he was not assessable to income tax in respect of the amount so received.—TURTON *v.* COOPER, *K.B.D.*; 92 L. T. 863.

13. *Income tax—Company resident in the United Kingdom—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—A company was registered in G. West in Cape Colony as a limited company, and as an incorporated company, but was never registered in the United Kingdom.

By the articles of association it was provided that the head office should be in K. in Cape Colony, or in such other place or country as the directors should think fit. The company had offices both at K. and L.; but the head office was in K., and all meetings of shareholders were held at K.

The company owned or was interested in extensive diamond mines and mining and other property in S. A. The profits of the company were chiefly made by the raising and sale of diamonds to a syndicate, with whom the company had a series of contracts. These contracts were negotiated and executed in L., and the above firms were all described as of L.

The management of the business and the control of the company were vested in three life governors or permanent directors and sixteen ordinary directors, and the articles of association provided that four at least of the directors should reside in England. Weekly meetings of directors were held at the L. offices and also at the K. offices, proceedings being regulated by bye-laws which had been drawn up in L.

The average attendance in L. was largely in excess of the average attendance in K. There was no instance of the vote of the K. directors turning a minority in L. into a majority or negativing the decision of the L. board. The directors in L. appointed four committees—viz., the finance, the diamond, the machinery, and the dynamite—to act in L. Various matters of considerable magnitude were arranged and carried out by the L. directors and the committees. The general accounts of the company were kept at K., and the balance-sheets, including the audited returns of the L. office, were drawn up there, and then submitted to all the directors of the company for approval.

Held, that the company was a person residing in the United Kingdom at L., and liable to be assessed under section 2 of the Income Tax Act, 1853. Schedule D, par. 1, on the whole of the annual profits or gains arising or accruing from its trade, whether carried on in the United Kingdom or elsewhere.—DE BEERS CONSOLIDATED MINES *v.* HOWE, *K.B.D.*; 92 L. T. 388.

14. *Income tax—Deduction of tax—Interest on stock—Land charged with payment of interest—Right*

to deduct tax paid on annual value of land—"Payable out of profits or gains brought into charge"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Schedule A, No. IV., r.* 10; *s.* 102—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-section* 3.—The London County Council raised money on loan by the creation and issue of Metropolitan Consolidated Stock, which stock and the dividends thereon were charged on the lands, rents, and property of the council, and in addition the stockholders had the security of the rates. The council were in receipt of an annual income of £837,000 in cash, consisting of rents and interest on loans, on which income tax was paid under Schedules A and D of the Income Tax Acts. They were also possessed of land and buildings, which they occupied themselves, of the annual value of £118,000, and on this annual value they paid income tax under Schedule A. The annual interest on the Metropolitan Consolidated Stock was £1,371,000. The council used the whole of their cash income of £837,000 towards the payment of this interest, and they made up the deficiency out of the rates. On paying the interest to the stockholders they deducted income tax thereon.

Held, that the council were entitled to retain for their own use so much of the income tax thus deducted as would recoup them not only the tax which had been paid on the sum of £837,000, but also the tax which they had paid on the sum of £118,000, the annual value of the lands and buildings occupied by them.

Judgment of Channell, J. ([1904] 2 K. B. 635), affirmed.—ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL, *C.A.*, 677; [1905] 2 K. B. 375.

15. *Income tax—Deductions—"Disbursements exclusively laid out for the purposes of such trade"—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *cases* 1 *and* 2, *r.* 1; *and* 1853 (16 & 17 *Vict. c.* 34), *Schedule D.*—By section 100, cases 1 and 2, r. 1, of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), it is laid down that "no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern." To fall within the terms of this rule it is necessary that the expenses be incurred for the purpose of earning the profits of the trade, manufacture, adventure, or concern; the expenses must not come out of the profits after they have been earned.

A., an innkeeper, in an action brought against him for negligence, whereby B., a guest at the inn, was injured, was obliged to pay damages and costs. In estimating the profits for income tax purposes,

Held, A. was not entitled to deduct from the year's profits the damages and costs so paid, as being an expense wholly and exclusively incurred for the purpose of carrying on the inn.—STRONG *v.* WOODIFIELD, *C.A.*, 625; [1905] 2 K. B. 350; 74 L. J. K. B. 702.

16. *Income tax—Exemption—Company—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 163—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 34.—A company incorporated under the Companies Act is not entitled to claim exemption from income tax under section 163 of the Income Tax Act, 1842, and section 34 of the Finance Act, 1894, on the ground that its aggregate annual income does not exceed £160.—MYLAM *v.* MARKET HARBOROUGH ADVERTISER CO., *K.B.D.*, 478; [1905] 1 K. B. 708; 74 L. J. K. B. 205; 92 L. T. 94.

17. *Income tax—Inhabited house duty—Exemptions—Home for persons in reduced circumstances—Home not self-supporting—"Almshouse"—"House provided for the reception or relief of poor persons"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 61, *r.* 6—*House Tax Act*, 1808 (48 *Geo.* 3, *c.* 55), *Schedule B, Exemptions, case* 4.—An institution was founded and conveyed to trustees in fee simple as a home for ladies in reduced circumstances. Ladies to be eligible for admission to the home were required to be fifty years of age or upwards; and they were to be possessed or in the actual enjoyment of a fixed yearly income of not less than £25 and not more than £55, with power to the board of management to vary these amounts. Each inmate was to be entitled to the use of the common room or rooms with the other inmates and to the exclusive use of one or two rooms, unfurnished, as should from time to time be assigned to her, and was to be supplied with coals, gas, and attendance free of cost; but each inmate was to provide her own furniture, food, clothing, washing, and medical attendance; but the food was cooked and served by the staff. The founder furnished the home generally with the exception of the rooms exclusively used by each inmate, which were furnished by such inmate, and the founder provided the cooking and household utensils, and the trustees maintained the same. The income of the endowment fund was applied in paying the salaries of the staff, rates, repairs, up-keep of fabric and of cooking and household utensils, and in providing gas and coals for the inmates and staff. There were no subscriptions to the home from the public.

Held, that the institution was an "almshouse" within the meaning of section 61, No. 6, of the Income Tax Act, 1842, and was thereby entitled to exemption from income tax under Schedule A of that Act; and, further, that it was a "house provided for the reception or relief of poor persons" within the meaning of 48 Geo. 3, c. 55, Schedule B, Exemptions, case 4, and was thereby exempt from inhabited house duty.—HOME'S TRUSTEES *v.* ANDERSON, *K.B.D.*; 91 L. T. 457.

18. *Income tax—Loss in any trade, &c.—Adjustment of liability*—Certiorari.—By section 23 of the Customs and Inland Revenue Act, 1890, "Where any person shall sustain a loss in any trade, manufacture, or concern, or profession, employment, or vocation . . . it shall be lawful for him . . . to apply to the commissioners . . . for an adjustment of his liability by reference to the loss and to the aggregate amount of his income. . . ."

Held, that this does not apply to a particular loss in ascertaining the profits of a particular business which has occurred in the course of the business, but to a general loss resulting from the business—that is, a loss as the total result of the business operations. The commissioners under section 23 ought to consider the aggregate income of the person; then whether he has sustained a loss in any trade, manufacture, &c.; and if so, what is a proper adjustment of his liability to pay income tax by reference to that loss.

Held, further, on the facts, that it was not shown that the commissioners of income tax had acted outside their jurisdiction by considering a wrong question. If commissioners of income tax purporting to act under section 23 of the Act of 1890 consider a wrong question altogether, then their decision can be dealt with by a writ of *certiorari*, but if they consider the right question the court cannot interfere by *certiorari*, even although they may have gone wrong in point of fact or of law.—

REX *v.* COMMISSIONERS OF INCOME TAX FOR THE CITY OF LONDON, *K.B.D.*; 91 L. T. 94.

19. *Income tax—Minister—Grant from stipend augmentation fund—Annual profits or gains arising or accruing from any profession or vocation—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—The appellant, a minister, received a grant from the Ministers' Stipend Augmentation Fund, which was vested in trustees and managed by a committee, who were to apply the fund towards the augmentation of the stipends of such ministers as they should select. Grants could only be made for the current year, and, in making such grants, particular regard was to be paid to the state and condition of the congregation and to their ability to make adequate provision for their minister, and consideration was paid to the applicant's private income as well as the stipend received from his congregation, his age, training, and length and value of his services. The grants ceased at the recipient's death, resignation, or removal to another place, and any portion of the grant unpaid was not paid, nor was any part paid to his successor.

Held, that the appellant was not liable to pay income tax under section 2, Schedule D, of the Income Tax Act, 1853, on the amount received by him as a grant from this fund.—POYNTING *v.* FAULKNER, *K.B.D.*; 92 L. T. 383.

20. *Income tax—Person resident in the United Kingdom — Company registered abroad — Business carried on from London—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—A company, registered abroad, but not registered in the United Kingdom, which in fact carries on its business through a board of directors from a head office in London, is resident within the United Kingdom, and is assessable to income tax under section 2, Schedule D, paragraph 1, of the Income Tax Act, 1853, upon the whole of the profits of its business, wheresoever those profits are made.—GOERTZ & Co. *v.* BELL, *K.B.D.*, 64; [1904] 2 K. B. 136; 73 L. J. K. B. 448; 90 L. T. 675.

21. *Income tax—Profits—Trade carried on abroad —Exhaustion of nitrate grounds—Deduction—Income Tax Acts*, 1842 (5 & 6 *Vict c.* 35), *s.* 100, *Schedule D, case* 1, *rr.* 1, 3; *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—A company registered and having its head office in England purchased nitrate grounds abroad. The business of the company was to manufacture nitrates and iodine from the caliche which was dug up from the surface of the nitrate grounds. The chief value of the grounds consisted in the caliche, and when that had been worked out the land, machinery, and plant would be of little value. The exact amount of caliche used by the company in any year could be ascertained without difficulty. In assessing the profits of the company to income tax under Schedule D of the Income Tax Acts the company claimed a deduction in respect of the cost of the raw material caliche as being a disbursement or expense for the purpose of their trade.

Held, that the caliche represented capital of the company, and that the exhaustion of the caliche was in the nature of exhausted capital for which no deduction was allowable.

Judgment of Channell, J. (*ante*, p. 23, [1904] 2 K. B. 666), affirmed.—ALIANZA CO. *v.* BELL, *C.A.*, 257; [1905] 1 K. B. 184; 74 L. J. K. B. 219; 92 L. T. 184.

22. *Inhabited house duty—Dwelling-house—Occupation—Furnished house not lived in during year of assessment—House Tax Act*, 1851 (14 & 15 *Vict. c.* 36), *s.* 1.—Where the owner of a dwelling-house keeps it furnished and ready for habitation as a dwelling-house he is chargeable to inhabited house duty in respect thereof under section 1 of the House Tax Act, 1851, notwithstanding the fact that during the year of assessment no person has actually lived, dwelt, or slept in such house.—SMITH *v.* DAUNEY, *K.B.D.*, 254; [1904] 2 K. B. 186; 73 L. J. K. B. 646; 90 L. T. 760.

23. *Inhabited house duty—Exemptions—Dwelling-house and offices—Communication by doors on ground floor—Tenements occupied solely for business purposes —House "divided and let in different tenements"—Stables—House Tax Act*, 1808 (48 *Geo.* 3, *c.* 55), *Schedule B, rr.* 2, 3—*Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 13.—The appellant was the owner of a block of buildings, consisting of a house, offices, and stables, the offices being divided perpendicularly from the residential portion by a wall pierced by two doorways on the ground floor. The appellant let the residential portion at a fixed annual rental to his sister, who, with her two servants, had the exclusive use of two separate entrances to the main street, but she did not use any portion of the offices. The part used as offices was verbally let to a firm of solicitors of which the appellant was the senior partner, and they had the exclusive use of a separate entrance from the main street by which the offices were entered, and the door of which was locked from the outside when all had left the offices. The stables in the yard at the rear were let to a separate tenant at a fixed annual rent, and they had a separate entrance from another street to which they fronted.

The arrangement made between the appellant and the occupier of the residential portion was that the servants kept by her should clean the offices of the firm, and the servants were engaged to do that cleaning as well as their duties in the residential portion, and the firm paid to such occupier the wages of one of the servants. The only communication between the residential portion and the office portion was by two doors on the ground floor, and through these doors the servants passed and repassed to clean the offices. The occupier of the residential portion had the key of these doors, which she could lock and bolt from the inside, but not so as to prevent the servants from passing through to the offices, and she had the sole right to dismiss the servants, who lived and slept in the residential portion. The appellant himself did not occupy any part of the premises, which were separately rated to poor rate in the names of the three tenants.

Held, that the house was not separately "let in different tenements" within the meaning of section 13, sub-section 1, of the Customs and Inland Revenue Act, 1878; and that the building, consisting of the dwelling-house and the offices, formed one house chargeable in one *cumulo* sum to inhabited house duty under the House Tax Act, 1808, but that the stables did not form part of the house and were exempt.—KNIGHT *v.* MANLEY, *K.B.D.*; 92 L. T. 506.

24. *Land tax—Public underground lavatories provided and maintained by sanitary authority—Land Tax Act*, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 44, 45.—A metropolitan borough council, acting as sanitary authority, provided and maintained a number of public lavatories and sanitary conveniences in pursuance of section 44 of the Public Health (London) Act, 1891. The lavatories and conveniences were constructed under the surface of the public streets.

Held, by Collins, M.R., and Stirling, L.J. (Mathew, L.J., dissenting), that the borough

council were liable to be charged with land tax in respect of the lavatories and conveniences.

Judgment of Wright, J. (52 W. R. 350, [1904] 1 K. B. 19), reversed.—WESTMINSTER CORPORATION *v.* JOHNSON, *C.A.*, 4; [1904] 2 K. B. 737; 73 L. J. K. B. 774; 91 L. T. 334.

25. *Licence to deal in plate—Sale of packets of tea with coupons—Coupons entitling purchaser to plate as prize—Revenue Act*, 1867 (30 *&* 31 *Vict. c.* 90), *s.* 3.—Section 3 of the Revenue Act, 1867, provides that all persons who deal in plate without having in force a proper licence authorizing them to do so shall be liable to a penalty. The appellants, a firm of tea merchants, sold packets of tea, each packet containing a coupon, and they advertised that they would give away (*inter alia*) articles of plate as prizes in exchange for the largest number of coupons sent in to them during a certain period.

Held, that this was a dealing in plate within the meaning of section 3 of the Act of 1867.—SCOTT *v.* SOLOMON, *K.B.D.*, 459; [1905] 1 K. B. 577; 74 L. J. K. B. 262; 92 L. T. 325.

26. *Stamp duty—Agreement by county council with district council to maintain main roads—Proper stamp on—Agreement made "pursuant to the Highway Acts"—"Deed of any kind not described in schedule"—Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 11, *sub-sections* 1, 4—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *Schedule.*—When a county council make an agreement under seal with a district council under section 11, sub-section 4, of the Local Government Act, 1888, for the repairing, maintaining, and keeping in repair main roads in their district, such an agreement is not an agreement "made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways" within the meaning of the schedule to the Stamp Act, 1891, which would require a 6d. stamp, but comes within the heading in that schedule, "Deed of any kind whatsoever not described in this schedule," and therefore requires a 10*s.* stamp.—SOUTHAMPTON COUNTY COUNCIL *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*; 92 L. T. 364.

27. *Stamp—Assent of executor—Conveyance of property—Land Transfer Act*, 1897 (60 *&* 61 *Vict. c.* 65), *s.* 3—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 62.—An assent in writing made under the hand but not under the seal of an executor to a devise of real estate by his testator, pursuant to section 3, sub-section 1, of the Land Transfer Act, 1897, is not liable to duty as a conveyance or transfer, as being within the meaning of section 62 of the Stamp Act, 1891, "an instrument whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person."—KEMP *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*, 479; [1905] 1 K. B. 581; 74 L. J. K. B. 112; 92 L. T. 92.

28. *Stamp—Conveyance on sale—Land sold for lump sum and annual payment by purchaser to vendor—Annual payment made by purchaser in consideration of vendor paying tithe—Whether annual payment is "part of the consideration for conveyance on sale"—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 56, *sub-section* 2; *Schedule*, "*Conveyance on Sale.*"—The owners in fee simple of a certain piece of land offered the land for sale in lots as a building estate, and by an indenture which recited that the vendors had agreed with the purchaser for the sale to him of a certain lot or piece of the land for the sum of £50, the vendors granted the lot to the purchaser in fee simple in consideration of the sum of £50 then paid by the purchaser (amongst other conditions), subject to and charged with the payment to the vendors and their assigns of the annual sum of 1s., in accordance with a stipulation providing that the piece of land thereby conveyed was in consideration of the vendors paying the whole of the tithe in respect of the land of which the plot formed part, subjected to and charged with the payment to the vendors of the perpetual sum of 1s. per annum; and the purchaser for himself and his assigns covenanted to make this annual payment of 1s. to the vendors and to perform the other stipulations of the agreement. The payment of the 1s. was in consideration of the vendors paying the whole of the tithe. In assessing the stamp duty upon the indenture,

Held (affirming the decision of the commissioners), that the annual payment of 1s. per annum was part of the consideration for the sale; that the consideration for the sale was therefore the £50 plus the annual sum of 1s., and that, having regard to section 56, sub-section 2, of the Stamp Act, 1891, the whole consideration for the sale was £50 plus 1s. multiplied by twenty—namely, £51, and that the indenture was to be stamped as a conveyance on sale for a consideration of £51—namely, with a stamp of 7s. 6d.; but that even if the annual payment was not part of the consideration, the stipulation to pay it would be a separate collateral covenant which would require to be stamped as such.—MARTIN *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*; 91 L. T. 453.

29. *Stamp—Conveyance on sale—Purchase-money partly in cash and partly by shares in new company—Part of share capital only issued—Estimated value of amount that might be raised by shares—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 56 (2), 57, 59 (1).—A company agreed to sell its undertaking to a new company in consideration of a definite sum payable partly in cash and partly in shares in the new company. It was further agreed that the profits of the new company in respect of each year should be applied, first, in paying a cumulative dividend of 5 per cent. upon any shares for the time being issued by the new company; and, secondly, in paying to the vendor company "as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital . . . in the new company as shall for the time being have been issued by the new company."

Held, that this latter sum, though payable on a contingency, must be brought into account for the purpose of increasing the *ad valorem* duty payable in respect of the consideration for the sale.—UNDERGROUND ELECTRIC RAILWAYS *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 325; [1905] 1 K. B. 174; 74 L. J. K. B. 200; 92 L. T. 6.

30. *Stamp—"Marketable security"—"Given in substitution for a like security"—Debentures in different companies—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *Schedule*, "*Marketable Security*," *sub-head* 4.—The debenture-holders in a company registered in England under the Companies Acts agreed to accept, in satisfaction of the liability of the company under the debentures, debentures for an equivalent amount in a company to be incorporated under the laws of an English colony for the purpose of taking over the assets and liabilities of the English company. The colonial company was duly incorporated, and the debenture-holders delivered up the debentures of the English company, and in lieu thereof received debentures of the colonial company.

Held, that, inasmuch as the parties were different, the debentures of the colonial company

were not "given in substitution for a like security" within the meaning of the Stamp Act, 1891, Schedule, "Marketable Security," sub-head 4, and were therefore chargeable with stamp duty at the rate of 1s. for every £10.—MOUNT LYELL MINING AND RAILWAY CO. *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 225; [1905] 1 K. B. 161; 74 L. J. K. B. 4; 92 L. T. 134.

31. *Stamp—Old age endowment with life assurance—Policy of life insurance—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 98.—By an instrument headed "Old Age Endowment with Life Assurance" an insurance company agreed, in consideration of a weekly premium until the assured should attain the age of sixty-five or during the life of the assured, to make one or other of the following payments according to the event which happened: "(1) If the assured shall attain the age of sixty-five years, then, upon proof . . . the company shall pay to the assured such sum as, according to the age of the assured at entry, is ascertainable from the tables, or (2) in the alternative, if the assured shall die under the age of sixty-five, then upon proof . . . the company shall pay to the executors or administrators of the assured the sum of £30," subject to certain conditions.

Held, that the instrument was a policy of life insurance "within the meaning of section 98, sub-section 1, of the Stamp Act, 1891, and should be stamped as such, and not under the heading 'Mortgage, Bond, Debenture, Covenant.'"—PRUDENTIAL ASSURANCE CO. *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*, 108; [1904] 2 K. B. 658; 73 L. J. K. B. 734; 91 L. T. 520.

32. *Succession duty—Tenant for life—Tenant in tail—Disentailing deed—Conveyance to purchaser—Death of purchaser and tenant for life—Double duty.*—A tenant for life and the tenant in tail in remainder executed a disentailing deed. They then appointed the fee simple in possession to a purchaser. The purchaser devised the land and died. The devisee devised the land to the defendant, and died in the lifetime of the appointors. The defendant paid succession duty on this death. Subsequently the tenant for life died.

Held, that succession duty was payable upon this death also and must be calculated on the actuarial value of the interest of the defendant.—NORTHUMBERLAND (DUKE) *v.* ATTORNEY-GENERAL, *H.L.*; 74 L. J. K. B. 734.

INSURANCE:—

1. *Accident policy—Bodily injury caused by "violent, accidental, external, and visible means"—Exertion in ejecting drunken man—Death from dilatation of the heart—"Accident"—Right to recover under policy.*—An accident policy of insurance provided that the money due under the policy should be payable if "the assured shall sustain any bodily injury caused by violent, accidental, external, and visible means within the meaning of this policy . . . and such injury shall be the sole and immediate cause of death." The assured, who was apparently in good health and was able to discharge and was discharging the duties of his employment as a maltster's manager, attempted to eject a drunken man from the premises, using some physical exertion for that purpose by pushing and pulling to overcome the man's passive resistance. At the time of the occurrence his heart was in a weak and unhealthy condition, and the effect of this exertion was to make a greater demand on the heart, and to render it less capable of recovering its ordinary condition when the strain ceased. Immediately afterwards he went home and complained of a pain in the chest. Some hours after his heart began to dilate, and the dilatation of his heart caused his death a month afterwards. But for what happened on the day of the occurrence the assured might have lived for a considerable time. In a claim upon the policy,

Held, that, inasmuch as the injury was caused by the violent exertion of the assured in ejecting the drunken man, and as this exertion was intentional in the sense that the assured intended to do what he did in ejecting the man, and not accidental, there was no "accident," and the bodily injury was not caused by "accidental" means within the meaning of the policy, and therefore the money could not be recovered under the policy.—SCARR AND GENERAL ACCIDENT ASSURANCE CORPORATION, RE, *K.B.D.*; [1905] 1 K. B. 387; 74 L. J. K. B. 237; 92 L. T. 128.

2. *Life—Company—Tea and life assurance business combined—Life assurance fund—Accumulated profits—Separate accounts—Scheme, form of—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *s.* 4.—Form of scheme enabling a life assurance company to carry on other business (such as that of selling tea, &c.) besides that of life assurance so as to comply with section 4 of the Life Assurance Companies Act, 1870.—BRITISH WIDOWS' ASSURANCE CO., RE, *C.A.*; [1905] 2 Ch. 40; 74 L. J. Ch. 525.

3. *Life—Declaration—Mistake—Affirmation—Basis of contract.*—In 1888 a lady effected a policy of assurance on her life with an insurance company whereby £2,000 was to become payable to her upon her attaining the age of sixty. By mistake she stated in the proposal that her age was forty-one, whereas it was forty-four. She actually attained the age of sixty in 1904, whereas if her statement had been correct she would not attain that age until 1907. After discovery of the mistake the insurance company received two premiums upon the original footing without notifying an assignee of the policy of the discovery. Upon action brought by the assignee to enforce her security,

Held, that the company had elected to affirm the policy, that the premiums were payable upon the original footing, and that the sum assured became payable in 1904 when the assured actually attained sixty.—HEMMINGS *v.* SCEPTRE LIFE ASSOCIATION, *Ch.D. Kekewich, J.*; [1905] 1 Ch. 365; 74 L. J. Ch. 231; 92 L. T. 221.

4. *Life—Policy for benefit of creditor—Undertaking not to commit suicide—Warranty—Condition.*—An application for a policy of life insurance for five years, effected for the benefit of a creditor of the assured, was expressed to be the basis and a part of the proposed contract for insurance. It was signed by the assured, and it contained a number of statements which were warranted by him to be true. It also contained the following clause: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." Within the period of one year from the date of the policy the assured committed suicide during a fit of temporary insanity. In an action on the policy brought by the creditor,

Held, that the clause as to not committing suicide must be read as a condition, and that the fact of suicide rendered the policy void, and did not merely give the insurance company a cross-claim against the estate of the deceased for damages.

Judgment of Bigham, J. (52 W. R. 366, [1904] 1 K. B. 832), affirmed.—ELLINGER *v.* MUTUAL LIFE INSURANCE CO., *C.A.*, 134; [1905] 1 K. B. 31; 74 L. J. K. B. 38; 91 L. T. 733.

5. *Marine—Charterers—Right of charterers to sue on policy—Charterers not mentioned in policy—Intention—Construction of charter-party.*—Though the words of a policy are wide enough to cover all parties interested in the ship insured, yet to give third parties the benefit of the policy there must be evidence of intention on the part of the person executing the policy to give the third party the benefit of its terms. And when the sole evidence of such intention is to be inferred from the terms of the charter-party, a clause in the charter-party that the owners shall pay for the insurance of the vessel does not constitute an obligation on or authority to the owners to insure on behalf of the charterers, so as to enable the charterers to avail themselves of the wide terms of the policy of insurance.—BOSTON FRUIT CO. *v.* BRITISH AND FOREIGN MARINE INSURANCE CO., *C.A.*, 420; [1905] 1 K. B. 637; 74 L. J. K. B. 273; 92 L. T. 514.

6 *Marine—Discovery—Action against underwriters—Insurance on goods—Transit partly by land—Discovery of ship's papers.*—By a Lloyd's policy of insurance goods were insured during their transit from the United Kingdom to South Africa "from warehouse to warehouse," and the policy covered all loss or damage arising from any cause whatever.

Held (allowing the appeal), that, in an action against an underwriter upon the policy, the defendant was entitled to the usual order for discovery of ship's papers.

Henderson v. *Underwriting and Agency Association*, [1891] 1 Q. B. 557, and *Village Main Reef Gold Mining Co.* v. *Stearns*, 5 Com. Cas. 246, not followed.—HARDING *v.* BUSSELL, *C.A.*; [1905] 2 K. B. 83; 74 L. J. K. B. 500; 92 L. T. 531.

7. *Marine—Insurable interest—Foreign ship—Advances by ship's agents—Necessaries—Debt—Right to arrest.*—Agents for a foreign ship who have advanced money for necessaries within the meaning of section 6 of the Admiralty Court Act, 1840, having a right to arrest the ship, have in respect of that right an insurable interest in the ship for the balance of advances unsatisfied by exercising their lien on freight.—MORAN, GALLOWAY, & CO. *v.* UZIELLI, *K.B.D.*; 74 L. J. K. B. 494.

8. *Marine—Warranty "free from capture, seizure, and detention"—Detained by foreign government before war.*—Gold bullion, the property of a Transvaal company, was insured during transit from the mines to the United Kingdom by a policy which covered the risks of "arrests, restraints, and detainments" of rulers. The policy contained the following clause: "Warranted free of capture, seizure, and detention and the consequences thereof . . . whether before or after declaration of war." While in transit the gold was seized under orders from the Government of the South African Republic, within its own borders and in accordance with its laws, whilst war was impending but before the outbreak of hostilities.

Held, that the gold had been seized within the meaning of the warranty, and that the insurers were not liable.

Decision of the Court of Appeal (51 W. R. 105, [1902] 2 K. B. 489) affirmed.—ROBINSON GOLD MINING CO. *v.* ALLIANCE INSURANCE CO., *H.L.*, 160; [1904] A. C. 359; 73 L. J. K. B. 898; 91 L. T. 202.

9. *Marine—Warranty—"Not to proceed east of Singapore"—Voyage to a port east of Singapore—Vessel lost before Singapore reached.*—A time policy of marine insurance contained the following warranty: "Warranted not to proceed east of Singapore." The vessel was chartered to carry coals from Cardiff to a port east of Singapore. While on her voyage she was wrecked off the Tunis coast and lost.

Held, that the loss was covered by the policy, and that at the time of the loss there had been no breach of the warranty.—SIMPSON STEAMSHIP CO. *v.* PREMIER UNDERWRITING ASSOCIATION, *K.B.D.*, 512.

INTERNATIONAL LAW:—

Crown—Conquered state—Annexation—Petition of right—Demurrer—Liabilities of conquering state.—A conquering state is not bound by any general rule of international law to fulfil the obligations of the conquered state. — WEST RAND CENTRAL GOLD MINING CO. *v.* REX, *K.B.D.*, 660; [1905] 2 K. B. 391; 74 L. J. K. B. 753.

INTERPLEADER:—

Practice—Summary decision—Value of subject-matter in dispute over £50—Jurisdiction—Right of appeal—Ord. 57, rr. 8, 11.—The jurisdiction of a master on the hearing of an interpleader summons to order that the dispute between the claimants shall be decided in a summary manner under ord. 57, r. 8, is not limited to cases in which the value of the subject-matter in dispute does not exceed £50.

No appeal lies, even with leave, to the Court of Appeal, in such a case.—HARBOTTLE *v.* ROBERTS, *C.A.*, 291; [1905] 1 K. B. 573; 74 L. J. K. B. 310; 92 L. T. 723.

IRELAND, LAW of:—

Divorce—Decree nisi in English court—Operation in Ireland—Domicil.—Where there are doubts as to the operation in Ireland of a decree under the English Divorce Acts for the dissolution of the marriage of a domiciled Irishman, the proper course is to apply for an Act of Parliament confirming the decree. — MALONE'S DIVORCE BILL, RE, *H.L.*; [1905] A. C. 314.

JERSEY, LAW of:—

Action to restrain parish assembly—Delay and laches.—The Royal Court of Jersey has jurisdiction to interfere if the civil assembly of a parish proposes to apply the funds under its control to purposes not warranted by law. But in a case in which the petitioner delayed taking steps to put the court in motion until the act of the assembly, the legality of which he disputed, had been partly put into execution, by the acceptance of a tender and the commencement of the works ordered by virtue of the act,

Held (affirming the judgment of the court below), that the action could not be maintained.—ROBERTS *v.* EREAUT, *P.C.*; [1905] A. C. 61; 74 L J. P. C. 28; 71 L. T. 809.

JOINTURE—

Power—Bargain between husband and wife—Fraud on power.—The fact that consideration is given by a wife to a husband to induce him to exercise a power of jointuring in her favour does not invalidate the execution of the power, provided that the wife receives the jointure in full and no part of it is diverted from her under the bargain.

Baldwin v. *Roche*, 5 Ir. Eq. Rep. 110, approved and followed.

Whelan v. *Palmer*, 36 W. R. 587, overruled.—SAUNDERS *v.* SHAFTO, *C.A.*, 424; [1905] 1 Ch. 126; 74 L. J. Ch. 110; 91 L. T. 789.

JUSTICES:—

1. *Action against — No jurisdiction — Want of jurisdiction not brought to notice of—Materiality—*

Justices' Protection Act, 1848 (11 & 12 *Vict. c.* 44), *s.* 2.—Where it appears upon the face of a summons that a justice has no jurisdiction to entertain the matter, it is immaterial that the want of jurisdiction was not brought to his knowledge at the hearing of such summons, inasmuch as by section 2 of the Justices' Protection Act, 1848, where a justice of the peace does an act in a matter of which by law he has no jurisdiction, the person injured thereby may bring an action without alleging malice or want of reasonable and probable cause.—POLLEY *v.* FORDHAM (No. 2), *K.B.D.*; 91 L. T. 525.

2. *Appeal to quarter sessions—Fine and costs—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 5, 49—*Motor-car Act*, 1903 (3 *Ed.* 7. *c.* 36), *s.* 11.—A person who is adjudged to pay a fine under the Motor-car Act, 1903, has, under section 11, the right to appeal where the fine taken by itself exceeds 20s., but any costs which he may be ordered to pay cannot be taken into consideration in calculating the amount of the fine for the purpose of ascertaining whether he has the right of appeal.—REX *v.* NOVIS, *K.B.D.*; [1905] 2 K. B. 456; 74 L. J. K. B. 633.

3. *Conviction—Duplicity.*—C. was summoned and convicted of driving a motor-car in a public highway "at a speed or in a manner" dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which was actually at the time or which might reasonably be expected to be on the highway.

Held, that the conviction was bad.—REX *v.* WELLS, *K.B.D.*; 91 L. T. 98.

4. *Recognizance entered into on application to state case—Refusal of case—*Mandamus*—Death of surety—Fresh recognizance—Summary Jurisdiction Act*, 1857 (20 & 21 *Vict. c.* 43), *ss.* 3, 5.—Where on an application to justices to state a case the appellant had duly entered into the recognizances required by section 3 of the Summary Jurisdiction Act, 1857, and the justices refuse to state a case but were afterwards ordered by *mandamus* to do so, the appellant is not bound under section 5 of that Act to enter into fresh recognizances even although his surety has died in the meantime.—REX *v.* KETTLE, *K.B.D.*, 364; [1905] 1 K. B. 212; 74 L. J. K. B. 254; 92 L. T. 59.

See also Highway, 2; Licensing Law, 1-10; Public Authorities, 2.

LAND TRANSFER:—

Right of appeal—Forged deed—Indemnity—"Act, neglect, or default"—Taking deed to registry—Land Transfer Acts, 1875 (38 & 39 *Vict. c.* 87), *s.* 98; 1897 (60 & 61 *Vict. c.* 65), *s.* 7; *Land Transfer Rules*, 1903, 296-8.—When the registrar has, under section 7, sub-section 5, of the Land Transfer Act, 1897, awarded indemnity to an applicant who has suffered loss by the rectification of the register, the trustees of the insurance fund and the Treasury as guarantors of the fund have a right of appeal to the court as being "aggrieved persons" within section 96 of the Land Transfer Act, 1875, and rule 298 of the Land Transfer Rules, 1903. A transferee of a forged transfer took it to the Land Registry, where it was registered; subsequently on the forgery being discovered the register was rectified on the application of the true owner, whereupon the transferee applied to be indemnified out of the insurance fund.

Held, that the transferee was, under section 7, sub-section 4, entitled to indemnity out of the insurance fund, as he had suffered loss by the rectification, and that his act in taking the deed to be registered was not an "act, neglect, or default" within the meaning of section 7, sub-section 3, so as to disentitle him to indemnity.—ATTORNEY-GENERAL *v.* ODELL, *Ch.D. Kekewich, J.*, 541; 92 L. T. 621.

See also Charity, 5; Inland Revenue, 27.

LANDLORD AND TENANT:—

1. *Covenant — Dangerous trade — Increase of premium for fire insurance—Underlessee—Injunction.*—By a lease dated the 20th of December, 1897, D. demised certain premises to G., who covenanted for himself, his executors, administrators, and assigns (*inter alia*), not to use or occupy the same or any part thereof as a dwelling-house or sleeping place, or to use the same so as to cause a nuisance, annoyance, or damage to the owners or occupiers of the offices or rooms in the same house or adjoining houses, and not to carry on any noisy or dangerous trade, and also not to do or suffer to be done upon the said demised premises or any part thereof anything which might render any increased or extra premium payable for the insurance of the premises against fire, or which might make void or voidable any policy for insurance. There was also a covenant not to assign without licence.

In August, 1903, G. assigned to E. with the lessor's consent, and on the 18th of October, 1904, E. sub-demised to D.

On the 12th of November, 1904, the lessor consented to the underlease, but no explanation of what was intended to be done was given him, and no copy of the agreement was shown.

The sub-lessee exhibited and sold an incandescent lamp in which petrol was used.

The insurance company at the expiration of the period for which the premises were insured refused to renew, and although negotiations were entered into for the renewal of the insurance at 12s. 6d. instead of 2s. per cent. they fell through.

The lessor now applied for an injunction restraining the sub-lessee from breaking the covenants.

Held, that the defendant must be restrained by injunction from using the premises in a manner prohibited by the lease of which he had constructive notice.—TEAPE *v.* DOUSE, *Ch.D. Swinfen Eady, J.*; 92 L. T. 319.

2. *Covenant not to underlet without licence—Licence not to be "unreasonably withheld."*—Where there was a covenant not to assign or underlet without the landlord's written consent, "such consent not to be unreasonably withheld,"

Held, under the circumstances, it was reasonable for the landlord to stipulate for a similar covenant between the undertenant and himself.—SPARK'S LEASE, RE, BERGER *v.* JENKINSON *Ch.D. Swinfen Eady, J.*, 376; [1905] 1 Ch. 456; 74 L. J. Ch. 318; 92 L. T. 537.

3. *Farming agreement—Crops to be consumed on farm—Destruction by fire—Whether contract broken.*—Tenants held a farm under agreement, one of the clauses of which bound them to stack on the the premises all the hay and corn arising from the farm, to consume on the farm (*inter alia*) all the hay, straw, and chaff arising therefrom, and to carry out and spread the resulting manure on the land. An accidental fire having destroyed some of the crops so stacked,

Held, that the clause was only for the regulation of acts of husbandry when such acts were capable of being performed, and that if no such acts could be done it had no application. Therefore there had been no breach of the tenants' agreement to

consume crops and spread manure.—HULL AND LADY MEUX'S ARBITRATION, RE, *C.A.*, 389; [1905] 1 K. B. 588; 74 L. J. K. B. 252; 92 L. T. 74.

4. *Lease—Release against forfeiture for non-payment of ground-rent—Underlease—Necessary parties—Original lessee and assignee—Mortgagee by sub-demise—Time—Practice—Costs—Common Law Procedure Acts*, 1852 (15 & 16 *Vict. c.* 76), *ss.* 210, 211, 212; *and* 1860 (23 & 24 *Vict. c.* 126), *s.* 1.—In an action by the mortgagees of a leasehold house, holding by sub-demise of an underlease, claiming relief from forfeiture of the lease for non-payment of rent, the lessor, who had recovered possession of the premises in an action of ejectment for non-payment of rent, disputed their right to relief under the equitable jurisdiction and the Common Law Procedure Acts, 1852 and 1860, s. 1, on the ground that the original lessee and an assignee had not been made parties to the action.

Held, that as under the circumstances the original lessee had become bankrupt in 1877, and that his trustee had assigned the lease to an assignee who had disappeared and had not been heard of for twenty-six years, the general rule that in an application for relief by underlessees against forfeiture of the head lease, the original lessee should be made a party to the proceedings might be dispensed with, both as regards the original lessee and the assignee.

Hare v. *Elms*, 41 W. R. 297, [1893] 1 Q. B. 604, discussed.

The order in *Howard* v. *Fanshawe*, 43 W. R. 645, [1895] 2 Ch. 581, as to the costs of the applicants for relief followed.

Newbolt v. *Bingham*, 72 L. T. 852, 43 W. R. Dig. 89, distinguished.—HUMPHREYS *v.* MORTEN, *Ch.D. Swinfen Eady, J.*, 552; [1905] 1 Ch. 739; 74 L. J. Ch. 370; 92 L. T. 834.

5. *Weekly tenancy—Defective state of premises—Covenant to repair—Notice of want of repair—Personal injuries.*—The defendant sublet the first floor of a house, of which he himself was the lessee under a repairing lease, to the husband of the plaintiff upon a weekly tenancy made verbally. The plaintiff went one day from her front room on to the balcony, when it gave way and she fell to the pavement, receiving very serious injuries. The defective condition of the balcony was suspected by no one.

Held, assuming that the defendant had undertaken with the plaintiff's husband to keep the premises in repair (as to which the evidence was contradictory), nevertheless the defendant, not having received notice of any defect in the balcony and not knowing that it was unsafe, was not liable.—TREDWAY *v.* MECHIN, *C.A.*, 136; 91 L. T. 310.

See also Distress, 2-4; Fixtures, 1.

LANDS CLAUSES ACTS:—

1. *Compensation — Lands injuriously affected — Assignment of right to compensation—Land Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.—A claim, under section 68 of the Lands Clauses Consolidation Act, 1845, to compensation in respect of an interest in lands, injuriously affected within the meaning of that section, is not a claim to damages for a wrongful act, but a claim of a right to compensation for damage which might be done in the lawful exercise of statutory powers, and such a claim is capable of assignment.

Judgment of Wright, J. ([1904] 1 K. B. 277). reversed.—DAWSON *v.* GREAT NORTHERN AND CITY RAILWAY CO., *C.A.*; [1905] 1 K. B. 260; 74 L. J. K. B. 190; 92 L. J. 137.

2. *Compulsory purchase—Reinvestment of purchase-moneys in land—Granting lease as part of purchase agreement—Expenses of reinvestment—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 81.—Where land has to be bought for the reinvestment of purchase-moneys obtained by a compulsory sale, the costs of granting a lease to the vendors of such land will not be held to be expenses incidental to reinvestment within the meaning of section 81 of the Lands Clauses Consolidation Act, 1845, even where the agreement to grant such lease is a part of the agreement to purchase the land.—THAVIE'S ESTATE, EX PARTE. *Ch.D. Farwell. J.*. 346; [1905] 1 Ch. 403; 74 L. J. Ch. 326; 92 L. T. 287.

3. *Easement under church — Church injuriously affected—Basis of compensation.*—By a private Act incorporating the Lands Clauses Acts the appellant company were authorized to take the site of a church in London for the purposes of their railway.

A subsequent Act contained clauses providing that, notwithstanding anything contained in the previous Act, the company should not purchase or take any part of the church, but might take an easement, or right of using the subsoil under any part of the church, including the crypt and the foundations, and should at all times make good any damage to the church caused by the railway or works; and that the compensation to be paid for the subsoil, crypt, &c., should be assessed by an arbitrator.

The company took the subsoil and crypt, and constructed a station under the church.

The arbitrator assessed the compensation upon the basis that the site of the church might at some future time become available as building land, under the Union of Benefices Act, 1860, and had been injuriously affected by the taking of the crypt and subsoil, and the construction of the railway underneath.

Held, that the compensation had been properly assessed on this basis.

Judgment of the court below affirmed.—CITY AND SOUTH LONDON RAILWAY CO. *v.* ST. MARY WOOLNOTH, *H.L.*; [1905] A. C. 1; 74 L. J. K. B. 147; 92 L. T. 34.

4. *Notice to treat—Lease of adjoining land after service of notice—Injurious affection—Right to compensation of such lessee—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 68.—Where a landowner, after the service of a notice to treat for certain land under section 18 of the Lands Clauses Act, 1845, granted a lease of adjoining land, and subsequently a sum was agreed upon between the owner and the undertakers as to the compensation payable under the notice to treat, and the undertakers proceeding under their powers injuriously affected the lessee's land,

Held, that the lessee (who claimed under section 68) was not entitled to compensation from the undertakers.

Decision of the Court of Appeal (51 W. R. 308, [1903] 1 K. B. 652) affirmed.—MERCER *v.* ST. HELEN'S AND SOUTH LANCASHIRE RAILWAY CO., *H.L.*, 241; [1904] A. C. 461; 73 L. J. K. B. 960; 91 L. T. 605.

See also Defence Acts, 1.

LEASE:—

Covenant against assignment without consent—Partners.—An assignment of leasehold premises by one partner to another is an assignment in breach of a covenant not to assign.—LANGTON *v.* HENSON, *K.B.D.*; 92 L. T. 805.

LEGITIMACY:—

Husband and wife—Presumed marriage.—From 1856 to 1866 a man and woman lived together as man and wife and had five children. There was evidence they had been treated as man and wife by friends and neighbours, and that their children had been recognized by the head of the father's family. In 1866 the woman left the man, who in 1874, while she was still alive, married another woman. In 1904 the question of the legitimacy of the children was raised.

Held, that the presumption in favour of a marriage having taken place had been established. —THOMPSON, RE, LANGHAM *v.* THOMPSON, *Ch.D. Kekewich, J.*; 91 L. T. 680.

See also Will, 18.

LIBEL:—

1. *Company—Servant of company—Publication—Agency—Scope of employment.*—A limited company is responsible for a libel published by one of its officers, where the act is done in the course of employment which is authorized by the company. —CITIZENS' LIFE ASSURANCE CO. *v.* BROWN, *P.C.*, 176; [1904] A. C. 423; 73 L. J. P. C. 102; 90 L. T. 739.

2. *Disparagement of goods of trader—Special damage—Cause of action.*—The plaintiff was a paving contractor, and an importer of American red gum wood blocks for street paving. The defendant company were importers of Australian wood for street paving.

While the plaintiff's tender for paving a street with red gum blocks was being considered by a local authority, a letter was written on behalf of the company to the local authority and sent to each member, as follows: "We understand that your council propose laying the roadway of . . . with American red gum blocks. We would strongly recommend that, before deciding upon this, you should pay a visit of inspection to . . . the roadways of which have been paved with American red gum only from six to eighteen months ago, and are now in a rotten condition. We venture to say that the result of such a visit would certainly remove from your minds any idea of using such material for roadways in your district."

In consequence of that letter the plaintiff suffered special damage. The jury found a verdict in favour of the plaintiff.

Held (dismissing the appeal), that the letter was not incapable of bearing a meaning defamatory of the plaintiff's goods, and that the action could be maintained.—ALCOTT *v.* MILLAR'S KARRI AND JARRAH FORESTS (LIMITED), *C.A.*; 91 L. T. 722.

See also Practice, 7.

LICENSING LAW:—

1. *Exemption from closing—"Populous places"—Public market or lawful trade*—Certiorari—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 26.—In order to ground jurisdiction under section 26 of the Licensing Act, 1872, to grant an order exempting from the provisions of the Act with respect to the closing of licensed premises, the local authority must take into consideration some evidence that it would be for the accommodation of a considerable number of persons attending a public market or following a lawful trade, that is to say, a market which is held as a matter of course or a trade that is habitually carried on at hours during which, but for the order of exemption, the licensed premises would be closed.

When justices are sitting in petty sessions to act upon evidence which is brought before them, then, if they act beyond their jurisdiction by acting upon evidence which is not legal evidence of any matter which may be tried before them, *certiorari* will lie.

Queen v. *Sharman*, 46 W. R. 367, [1898] 1 Q. B. 578, discussed.—REX *v.* JOHNSON, *K.B.D.*, 655; [1905] 2 K. B. 59; 74 L. J. K. B. 585; 92 L. T. 654.

2. *Forfeiture of licence—Application by owners to special sessions for grant of a licence—Refusal by justices—Grounds of refusal—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict c.* 27), *s.* 19—*Wine and Beerhouse Act*, 1870 (33 & 34 *Vict. c.* 29), *s.* 7—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 15.—The licensee of a beerhouse which had been licensed for the sale of beer by retail on the 1st of May, 1869, and continuously since that date up to July, 1903, was convicted for the first time in July, 1903, of having sold spirits without having a spirit licence. The beerhouse was thereupon closed for the sale of beer, and was not again opened for such sale until the following October.

In September in the same year the owners of the beerhouse applied at the special licensing sessions for the grant of a licence for the sale of beer by retail in respect of the house to their nominee, who was the then real resident and occupier of the premises. This application was made under section 15 of the Licensing Act, 1874.

The justices refused the application upon grounds other than one of the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869.

Upon appeal the quarter sessions and the Divisional Court held that the justices had no jurisdiction to refuse the application, except upon one of the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869.

Held, by the Court of Appeal, that an application under section 15 of the Licensing Act, 1874, cannot be successful unless the applicant shows that the licence has been continuously renewed since the 1st of May, 1869, and is in force at the date of the application.

Held, also, that upon the conviction of the licensee in July, 1903, the licence in respect of the beerhouse ceased to exist.

Held, therefore, that the jurisdiction of the justices at special sessions to refuse the application of the owners was not limited to one or more of the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869.

Ex parte Flinn & Sons (*No.* 2), [1899] 2 Q. B. 607, disapproved.—TOWER JUSTICES *v.* CHAMBERS, *C.A.*; [1904] 2 K. B. 903; 73 L. J. K. B. 951; 91 L. T. 643.

3. *Justices—Jurisdiction—Licence—Alehouse Act*, 1828 (9 *Geo.* 4 *c.* 61), *ss.* 4, 14.—Sections 4 and 14 of the Alehouse Act, 1828, must not be read as separate enactments. Section 14 enumerates the special cases referred to in section 4: "In the cases hereinafter directed."

The non-sale of excisable liquors in a place kept as an inn is not conclusive in law that the place is not being kept as an inn so as to deprive the licensing justices of the jurisdiction given to them under section 4 of the afore-mentioned Act. The question is one of fact.

Reg. v. *Cotham*, [1898] 1 Q. B. 802, explained.—WILSON *v.* CREWE JUSTICES, *K.B.D.*, 382; [1905] 1 K. B. 491; 74 L. J. K. B. 394; 92 L. T. 164.

4. *Opening during prohibited hours—Completion of sale—Appropriation—Delivery, when a material part of the contract—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.—If a term of the contract for the sale of intoxicating liquor is that it be delivered during

the period when the licensed premises are required to be closed, then—Lord Alverstone, L.C.J., and Kennedy, J. (Ridley, J., dissenting)—whether the said intoxicating liquor be appropriated to the purchaser or not, if delivery takes place in pursuance of the contract during prohibited hours, an offence is committed under section 9 of the Licensing Act, 1874.—NOBLETT *v.* HOPKINSON, *K.B.D.*, 637; [1905] 2 K. B. 214; 74 L. J. K. B. 544; 92 L. T. 462.

5. *Order by justices directing alterations in licensed premises—Appeal to recorder—Alehouse Act*, 1828 (9 *Geo*, 4, *c.* 61), *s.* 27—*Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 11 (4).—On an application by the owner and licensee of a fully-licensed house for the renewal of his licence, the licensing justices granted a renewal, but made an order under section 11, sub-section 4, of the Licensing Act, 1902, directing certain alteration on the premises.

Held (by Lord Alverstone, L.C.J., and Wills, J., Kennedy, J., dissenting), that an appeal against such order may be made to the recorder of the city in which the licensed premises are situated.—REX *v.* BATH (RECORDER OF), *K.B.D.* 252; [1904] 2 K. B. 570; 73 L. J. K. B. 848; 91 L. T. 383.

6. *Removal of licence — Attaching conditions — Jurisdiction of Justices.*—Upon an application for the removal of an existing licence the justices are not entitled to impose the condition which they are empowered by section 4 of the Licensing Act, 1904, to impose in the case of a grant of a new licence.—REX *v.* DRINKWATER, *K.B.D.*; [1905] 2 K. B. 469; 74 L. J. K. B. 722.

7. *Renewal—New duties devolving on justices—Reference to quarter sessions—Report of licensing justices that house is not needed—Notice to holder of licence—Evidence—Licensing Acts*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42; 1904 (4 *Ed.* 7, *c.* 23), *s.* 1, *sub-section* 2.—By section 1 (2) of the Licensing Act, 1904, where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for renewal of licences are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to quarter sessions unnecessary, any other person appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district) an opportunity of being heard, and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.

Held, that under the above section notice of objection must be given to the licence-holder so as to give him an opportunity of being heard, as required by section 42 of the Licensing Act, 1872, and that the justices were only entitled to report to quarter sessions that the house was not needed after hearing evidence given on oath, although such evidence need not be so full as if they had finally to decide the question of renewal. Therefore the rules *nisi* for *mandamus* were made absolute in all those cases where the justices had reported without first giving the licensees an opportunity of being heard, and in every case the rules *nisi* for prohibition were discharged.—REX *v.* TOLHURST, *K.B.D.*, 619; [1905] 2 K. B. 478; 74 L. J. K. B. 652.

8. *Renewal of on-licence—Condition to renewal—Undertaking by applicant—Power of justices of licensing district—Licensing Act*, 1904 (4 *Ed.* 7, *c.* 23), *ss.* 1, 9.—The justices of a licensing district have no power, under the Licensing Act, 1904, to require, as a condition to the renewal of an existing on-licence, that the applicant should give any undertaking as to the conduct or management of the premises, apart from the matters mentioned in section 1, sub-section 1, as grounds for refusing the renewal.

So held by Collins, M.R., and Cozens-Hardy, L.J., Mathew, L.J., dissenting.

Decision of the Divisional Court in *Rex* v. *Dodds* (*ante*, p. 377), reversed.—REX. *v.* DODDS, *C.A.*, 559; [1905] 2 K. B. 40; 74 L. J. K. B. 599.

9. *Selling by retail without a licence — Charge proved — Information dismissed because offence of trifling nature—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.—Selling intoxicating liquor without a licence for nine days is not an offence of a trifling nature which justifies justices in dismissing information therefor merely because the transfer sessions are not held for that period, and there is a *bonâ fide* intention to apply for a transfer of the licence at such sessions.—BARNARD *v.* BARTON, *K.B.D.*; 92 L. T. 859.

10. *Undertaking—Renewal of licence—Beerhouse—Mandamus—Licensing Act*, 1904 (4 *Ed.* 7, *c.* 23), *s.* 9.—Upon an application for the renewal of an existing on-licence, the licensing justices have power under section 9 of the Licensing Act, 1904, to require the licence-holder to give such reasonable undertakings, as the justices deem fit, as a condition to the renewal of the licence, provided that, by section 9, sub-section 3, of the said Act, the aforesaid power cannot be exercised in respect to licences to which section 19 of the Wine and Beerhouse Act, 1869, and section 7 of the Wine and Beerhouse Amendment Act, 1870, apply.—REX *v.* GRIMWADE, *K.B.D.* 377; [1905] 2 K. B. 50.

See also Club, 1.

LIGHT.—See Easement, 1-4.

LIMITATIONS, STATUTE OF

1. *Acknowledgment of debt—Conditional promise to pay—Construction of document*—21 *Jac.* 1, *c.* 16.—A debtor wrote to his creditor a letter in which he said he was willing to sell 5,230 shares in a certain company for the sum of £816 4s. 6d., and in the event of his doing so, he would with the money pay the call due on 629 of the shares and the balance in settlement of his account with the creditor, amounting at the 31st of December last to £501 14s. 6d.

This letter was written before the expiration of six years after the debt was incurred.

The sale of shares mentioned in the letter did not take place.

Held (reversing the decision of Phillimore, J., reported 90 L. T. Rep. 460), that the letter was not in itself sufficient to take the case out of the Statute of Limitations.—BARRETT & SON *v.* DAVIES, *C.A.*, 91 L. T. 736.

2. *Possession—Disability—Claim of infant barred —Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57).—Where the adverse possession of a trespasser commences as against an owner who is under no disability and is continued as against a subsequent owner who is an infant, the infancy of the subsequent

owner does not arrest the operation of the statute, but the trespasser's title becomes absolute at the same date as it would have done had the ownership of the original owner continued.—GARNER *v.* WINGROVE, *Ch.D. Buckley, J.*, 588 [1905] 2 Ch. 233; 74 L. J. Ch. 545.

3. *Simple contract debt—Real estate devised—Tenant for life and remaindermen—Part payment by tenant for life—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16).—The part payment by a devisee for life of a simple contract debt of his testator and of interest thereon is sufficient to keep the debt alive, notwithstanding the lapse of time, not only as against the devisees in remainder after the life estate, but also as against devisees of other real estate of the testator.

In re Hollingshead, Hollingshead v. *Webster*, 36 W. R. 660, 37 Ch. D. 651, followed.

The principles of *Roddam* v. *Morley*, 5 W. R. 510, 1 D. G. & J. 1, and *Dibb* v. *Walker*, 41 W. R. 427, [1893] 2 Ch. 429, applied.—CHANT, RE, BIRD *v.* GODFREY, *Ch.D. Warrington, J.*, 526; [1905] 2 Ch. 225; 74 L J. Ch. 542.

See also Covenant, 2; Public Authorities, 3, 4.

LITERARY and SCIENTIFIC INSTITUTION:—

Mechanics' and working men's institute—Objects—Power to mortgage premises—Improvements to building—Billiard-room—Necessary repairs—Literary and Scientific Institutions Act, 1854 (17 & 18 *Vict. c.* 112), *ss.* 18, 19, 33.—An institute of the kind provided for by the Literary and Scientific Institutions Act, 1854, cannot raise money by way of mortgage or charge upon its premises except as expressly authorized by the Act.

Such a body has no implied power of borrowing such as is incident to a trading or commercial undertaking.

The providing of a billiard-room is outside the purposes which the Act contemplates.

If the trustees of such an institute expend money of their own on necessary repairs of the building, they are, apart from the statute, entitled to a lien on the property of the institute for the money so spent. —BADGER, RE, MANSELL *v.* COBHAM, *Ch.D. Buckley, J.*; [1905] 1 Ch. 568; 74 L. J. Ch. 327; 92 L. T. 230.

See also Rating, 3.

LOCAL GOVERNMENT:—

1. *Adjustment—Formation of county borough—Loss of profitable area—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 32.—The county council of D. and the council of the county borough of W. H. had respectively claimed certain payments in addition to those allowed on an award made with regard to the financial adjustment to be made on the creation of the county borough of W. H.

The county council claimed in respect of repair, maintenance, and improvement of (1) county bridges, and (2) main roads, and (3) in respect of discontinued contributions and miscellaneous expenses, being the expenditure of the county council on salaries, registration of voters other than Parliamentary ownership voters, law charges, printing, and stationery, weights and measures and health departments, election and county rate basis expenses, petty sessional courts in the county and office expenses, on the ground that owing to and since the constitution of the county borough they had been deprived of, and would in future be deprived of, all contributions from the area of the county borough towards these expenses.

The council of the county borough claimed that they should be paid by the county council, in addition to the sums they were to be paid under the award, sums (4) in respect of children in industrial schools and reformatories, (5) in respect of subsidized roads, and (6) in respect of fines, on the grounds as to (4) of the increased burden thrown on the area within the county borough, and as to (5) by reason of the loss which that area had sustained by reason of the discontinuance of contributions by the county council, and as to (6) by reason of the loss of the allocation of an excess of fines levied in the area.

Held, that under section 32 of the Local Government Act, 1888, items 1, 2, and 3, as well as items 4, 5, and 6, were the subjects of valid claims.—DURHAM COUNTY COUNCIL *v.* WEST HARTLEPOOL CORPORATION, *K.B D.*; [1904] 2 K. B. 340; 91 L. T. 685.

2. *Borough councillor—Disqualification—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 41.—By section 12 (1) of the Municipal Corporations Act, 1882, "A person shall be disqualified for being elected and for being a councillor, if and while he . . . (*c*) has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council"; and by section 41 (1) "If any person acts in a corporate office . . . after becoming disqualified, he shall for each offence be liable to a fine not exceeding fifty pounds, recoverable by action."

The defendant was a town councillor and trustee of a Wesleyan chapel, to which was attached a non-provided school. Fuel for warming was supplied by the defendant to the trustees, and by arrangement the town council paid the trustees for such of the fuel as was used for the purpose of warming the school building during the time when it was used as a non-provided school. Orders were given by the trustees to the defendant on the 4th and 23rd of January and the 2nd of February, and were fulfilled on the 11th and 25th of January and the 3rd of February respectively. The defendant voted as councillor on the 1st and 5th of February, and on these dates the fuel ordered had not been paid for.

Held, that he was not disqualified from voting on these dates.—COX *v.* TRUSCOTT, *K.B.D.*; 92 L. T. 650.

3. *Bye-law—Borough—Evidence of publication—Authenticated copy.*—By the Municipal Corporations Act, 1882, s. 24, the production of a copy authenticated with the corporate seal shall, until the contrary be proved, be evidence of a bye-law.

Held, that such a copy was *primâ facie* evidence that the requirements of section 23 had been complied with, and that no further evidence of publication need be given.—ROBINSON *v.* GREGORY, *K.B.D.*; [1905] 1 K. B. 534; 74 L J. K. B. 367; 92 L. T. 171.

4. *Bye-law—Sale of paper devoted wholly to giving probable result of races and other competitions—Validity of bye-law—Local Government Act*, 1888 (51 & 52 *Vict. c.* 4), *s.* 16.—A county council purporting to act under the powers granted to them by section 16 of the Local Government Act, 1888, made a bye-law imposing a penalty on any person frequenting and using any street or other public place "for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions."

Held (by Lord Alverstone, L.C.J., and Kennedy, J., Phillimore, J., dissenting), that the bye-law was invalid, as it was in its terms unreasonable.—SCOTT

v. PILLINER, *K.B.D.*, 284; [1904] 2 K. B. 855; 73 L. J. K. B. 998; 91 L. T. 658.

5. *Contract—Validity—Pecuniary penalty—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 174, *sub-section* 2.—An urban authority contracted with a rural authority to supply the latter with water in bulk, water so taken to be paid for quarterly. It was provided that in case any such quarterly payment was in arrear for one month interest should become chargeable at the rate of five per cent.

Held, that the contract was not within section 174, sub-section 2, of the Public Health Act, 1875; but, *semble*, if it were, the payment of interest as aforesaid would be sufficient pecuniary penalty to satisfy the statute.—SOOTHILL UPPER URBAN COUNCIL *v.* WAKEFIELD RURAL COUNCIL, *Ch.D. Swinfen Eady, J.*, 250; [1905] 1 Ch. 53; 74 L. J. Ch. 116; 91 L. T. 800.

6. *Drain or sewer—Notice to abate nuisance—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 94.—The defendant had for some years discharged the sewage from his house into a pipe running alongside a country road, which pipe had been laid down by an adjoining owner for his own protection for the purpose of carrying off the surface water from the highway and so preventing it from flowing on to his premises. A breakage having occurred in the pipe it became stopped up and caused a nuisance. The local authority took proceedings against the defendant to compel him to abate the nuisance.

Held, that it was no defence for the defendant to show that the pipe was a sewer which the local authority were liable to repair, and that under the circumstances it was not a sewer.—WINCANTON RURAL COUNCIL *v.* PARSONS, *K.B.D.*; [1905] 2 K. B. 34; 74 L. J. K. B. 533.

7. *Education — Scheme — Education committee — Appointment by local authority—Power of local authority to determine order by retirement of members —Determination by local authority—Subsequent variation of order of retirement—Validity—Education Act*, 1902 (2 *Ed.* 7, *c.* 42), *ss.* 17 (1), 21 (3)—A district council, as the local education authority under the Education Act, 1902, established an education committee, which was constituted in accordance with a scheme made by the council and approved by the Board of Education. The scheme provided that the committee should consist of nine members, each of whom was to hold office for three years; but it was provided that one-third go out of office on the 1st of May, 1904, and in each succeeding year. The council was to determine the order in which they should retire. The council resolved that the plaintiff should be a member of the committee, and should retire on the 1st of May, 1905. Subsequently the council resolved that he should retire on the 1st of May, 1904.

Held, that the second resolution was *ultra vires*.—MILWARD *v.* BARRY URBAN COUNCIL, *Ch.D. Buckley, J.*, 21; [1904] 2 Ch. 481; 73 L. J. Ch. 804; 91 L. T. 290.

8. *Education—School board—Borough council—Acts of Parliament—Transfer of property—Vesting—Consols—Instrument of transfer—National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22—*National Debt (Stockholders' Relief) Act*, 1892 (55 & 56 *Vict. c.* 39), *s.* 4—*Education Act*, 1902 (2 *Ed.* 7, *c.* 42), *ss.* 5, 25; *Schedule II., clause* 1.—On the appointed day on which the Education Act, 1902, comes into operation in any particular district the school board of that district is abolished by section 5 of the Act, and ceases to exist, and by virtue of clause 1 of Schedule II. of the Act the property of the school board is thereupon transferred to and becomes vested in the new education authority without the necessity of any instrument of transfer. This applies to stocks which, under the National Debt Act, 1870, could only be transferred by entry in books of transfer kept by the Bank of England, and the bank, consequently, cannot require such entry to be made or any further instrument of transfer to be executed even with regard to such stock.—OLDHAM CORPORATION *v.* BANK OF ENGLAND, *C.A.*, 243; [1904] 2 Ch. 716; 73 L. J. Ch. 785; 91 L. T. 582.

9. *Infectious disease — Premature discharge of patient from hospital—Infection of other persons—Liability of corporation.*—Where a corporation provide a hospital under the Public Health Act, 1875, for patients suffering from infectious diseases there is no absolute obligation upon the corporation not to discharge a patient who may cause contagion. If, therefore, by the negligence of a competent and duly qualified medical man appointed by the corporation, a patient is prematurely discharged and contagion is thereby caused to other persons, the corporation are not liable for such negligence of the medical man.—EVANS *v.* LIVERPOOL CORPORATION, *K.B.D.*; 74 L. J. K. B. 742.

10. *Sewer or drain—Drain on private ground—Draining several houses—"Single private drain"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.—A drain conveying the drainage of two or more houses belonging to the same owner into a single private drain (as described by section 19 of the Public Health Amendment Act, 1890) is a sewer, and not affected by section 41 of the Public Health Act, 1875.

Decision of the Divisional Court affirmed.—JACKSON *v.* WIMBLEDON URBAN COUNCIL, *C.A.*, 485; [1905] 2 K. B. 27; 74 L. J. K. B. 641; 92 L. T. 553.

11. *Sewer — Drain — "Single private drain" — Houses belonging to different owners—Nuisance—Apportionment of expenses—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.—A pipe, which was laid in private property, received the drainage of several houses belonging to different owners, and was then connected with a public sewer. A nuisance having arisen in the pipe, the local authority gave notice in writing to the owner of the premises where the nuisance existed to remedy the same, and, the owner having made default in complying with the notice, the local authority did the work and sued the owner to recover the expenses.

Held, first, that the pipe was a "single private drain" within section 19 of the Public Health Acts Amendment Act, 1890, and that therefore the local authority were entitled to require the owner of the premises to abate the nuisance under section 41 of the Public Health Act, 1875; and, secondly, that as the nuisance existed on the premises of one owner only, no question of apportionment arose, and the owner was liable to pay the whole of the expenses.

Self v. *Hove Commissioners*, 43 W. R. 300, [1895] 1 Q. B. 685, and *Bradford* v. *Mayor, &c., of Eastbourne*, 45 W. R. 31, [1896] 2 Q. B. 205, approved and followed.

Judgments of the Divisional Court ([1904] 2 K. B. 1), 52 W. R. Dig. 143, and of Channell, J. ([1904] 2 K. B. 507), reversed.—THOMPSON *v.* ECCLES CORPORATION, *C.A.*, 211; [1905] 1 K. B. 110; 74 L. J. K. B. 130; 91 L. T. 750.

12. *Streets—Paving expenses—Owner at time of completion of the works—Owner in default—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.—The owner of the premises when the works are completed is the person liable to summary proceedings in respect to expenses incurred by the local authority in respect of work executed by such authority for which notice has been given under section 150 of the Public Health Act, 1875, although he be not the owner at the time the notice was served.—EAST HAM URBAN COUNCIL *v.* AYLETT, *K.B.D.*, 492; [1905] 2 K. B. 22; 74 L. J. K. B. 471; 92 L. T. 420.

13. *Street—Private street works—Recovery of expenses—Liability of owner of premises—Change of ownership before demand—Continuing liability of former owner—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.—The expenses of private street works executed by the urban authority under section 150 of the Public Health Act, 1875, are recoverable from the person who was owner of the premises abutting on the street when the notice was served and the work completed, although he had ceased to be owner of the premises before the expenses were demanded.

Decision of the Divisional Court (90 L. T. 489, 52 W. R. Dig. 143) reversed.

Reg. v. *Swindon Local Board*, 27 W. R. 732, [1879] 4 Q. B. D. 305, not approved.—MILLARD *v.* BALBY-WITH-HEXTHORPE URBAN COUNCIL, *C.A.*, 165; [1905] 1 K. B. 60; 74 L. J. K. B. 45; 91 L. T. 730.

LUNACY:—

1. *Asylum—Charges for maintenance of pauper lunatics not settled within the county or borough to which the asylum belongs—Limit of such charges—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 283, *sub-sections* 1 *and* 3.—The weekly charge to be fixed by the visiting committee under section 283 of the Lunacy Act, 1890, for the expenses of maintenance and other expenses of pauper lunatics in an asylum must not exceed 14s. for each pauper lunatic, even though the pauper lunatic in respect of whom the charge is made is sent from or settled in a parish or place outside the county or borough to which the asylum belongs.

Decision of the Divisional Court (*ante*, p. 153) affirmed.—FITCH *v.* BERMONDSEY GUARDIANS, *C.A.*, 308; [1905] 1 K. B. 524; 73 L. J. K. B. 250; 92 L. T. 343.

2. *Illegitimacy—Disposition of property after death—Deed of trust executed by lunatic after inquisition—Application to test validity or perpetuate testimony—Rights and duties of the Crown—Conflict of control—Lunacy Act*, 1890 (53 *Vict. c.* 5), *s.* 120.—The court cannot recognize, or regard as otherwise than void, a deed executed by a lunatic, after inquisition, disposing of his property after death; and therefore will not, at the lunatic's instance, order a trial for testing the validity of such deed, or for perpetuating testimony of capacity to execute it.

Ex parte Sir Benjamin Wright, 1 Vern. 155, discussed.—E. V. WALKER, RE, *C.A.*, 177; [1905] 1 Ch. 160; 74 L. J. Ch. 86; 91 L. T. 713.

3. *Jurisdiction—Person lawfully detained as a lunatic—Person appointed to exercise powers of committee of the estate—Joint power to appoint among children—Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 116, 120, 128.—A joint power to appoint among children is a power vested in the lunatic in the character of trustee, and the judge in lunacy may, under section 128 of the Lunacy Act, 1890, directs its exercise by a person appointed to exercise powers of a committee of the estate.

Per Cozens-Hardy, L.J., *dissentiente.*—In section 128 the words "in the character of trustee" do not apply where the consent is required as a check on the undue exercise of the power.—A. (A PERSON OF UNSOUND MIND), RE, *C.A.*, 1; [1904] 2 Ch. 328; 73 L. J. Ch. 648; 91 L. T. 238.

See also Probate, 3.

MALICIOUS PROSECUTION:—

Evidence—Province of judge and of jury—New trial—Practice.—In an action for malicious prosecution the onus is on the plaintiff throughout of establishing to the satisfaction of the judge who tries the case that there was no reasonable or probable cause for instituting the prosecution. But in a case in which the judge at the trial improperly left the question of reasonable and probable cause to the jury, instead of dealing with it himself on the facts found by the jury, and the jury found upon the facts that there was no reasonable and probable cause, if the court is of opinion that there was no evidence to support this finding, or that it was against the weight of evidence, there must be a new trial. Judgment of the court below affirmed.

Metropolitan Railway Co. v. *Wright*, 11 App. Cas. 152, followed.—COX *v.* ENGLISH, SCOTTISH, AND AUSTRALIAN BANK, *P.C.*; [1905] A. C. 168; 74 L. J. P. C. 62; 92 L. T. 483.

MANOR:—

1. *Land parcel of a manor—No copyhold tenants—Lease for a term of inclosure from waste of manor—Long continued possession—Free or cottage holding—Quit rent—Additions to holding and variations in lord's rent.*—Land parcel of a manor in which there were no copyholds, and in which there were three classes of tenants—(1) rack renters, (2) freehold tenants, and (3) cottagers—was early in the eighteenth century inclosed from the waste of the manor, the rent payable to the lord at that time being 1s. annually. In 1732 the tenant purported to grant a long lease of the original premises at a peppercorn rent, and in 1757 the then tenant granted another lease of the same premises and an additional piece of ground at the rent of a red rose. Defendants claimed by divers mesne assignments the interests in the two long terms, asserting that their lessors were freehold tenants of the manor at a quit rent. The rents paid to the lord of the manor had increased from 1s. in 1732 to 1s. 2d. in 1757, 2s. in 1791, and 5s. in 1837. No addition to the premises before the two latter years respectively to which the increase in the rent could be attributed was shown.

Held, that the defendants' claim to be included in the class of freehold tenants of the manor failed.—FOLJAMBE *v.* SMITH'S TADCASTER BREWERY CO., *Ch.D. Kekewich, J.*; 73 L. J. Ch. 722; 91 L. T. 312.

2. *Rights of common—Quarry—Right to get stone—Freehold and copyhold tenants—Evidence—Court rolls.*—The copyhold tenants of a manor may by custom have a right of common to get stone and sand out of the lord's waste to be used by them on their respective tenements within the manor, and there is no legal objection to the existence of a similar right in the freehold tenants. Such a right is not unreasonable, and the court rolls may be given in evidence of its existence. The lord cannot inclose against such a right of common; and the fact that an amercement rent was at one time paid in respect of the quarry from which the stone was taken cannot affect the tenants in respect of the right in question.—HEATH *v.* DEANE, *Ch.D. Joyce, J.*; [1905] 2 Ch. 86; 74 L. J. Ch. 466; 92 L. T. 643.

MARKET:—

Infringement—Injunction.—By letters patent in the sixteenth year of his reign James I. granted a right to a Friday market for the town of W. By an Act of 48 Geo. 3, after reciting the letters patent, it was enacted that it should be lawful for the person entitled to keep the market to take tollage of markets holden on Wednesday and Saturday.

On the 13th of June, 1887, the market rights were conveyed and assigned to the W. Local Board. In 1880 bye-laws were made regulating the use of the market-place. Bye-law 15 provided that a market for the sale of goods, meat, fish, poultry, provisions, fruit, vegetables, plants, flowers, hardware, furniture, apparel, and all other goods, merchandise, and marketable commodities should be held on every day except Sunday, Christmas Day, and Good Friday.

By a charter in the fifty-fourth year of Henry III. a Tuesday market in P. was granted, which became vested in Queen's College, Oxford, who conveyed to the plaintiff. Under section 19 of the Local Government Act, 1899, a scheme was made for W. and an Order in Council was made extending the boundaries of W. so as to include P. No provision was made for charging tolls, but power to do so was given by the Woolwich Borough Council Act, 1903, s. 4.

The plaintiffs asked for an injunction to restrain the defendants from hawking, selling, or offering or exposing for sale within the borough of W. (except in their own dwelling-houses or shops) any articles or commodities usually sold in public markets except in a market-place of the borough of W., and after payment of the tolls payable to the plaintiffs. Some of the defendants claimed a right to sell in the market without paying toll, and proved that they had sold without paying toll for a number of years.

Held, that as the right to take tolls was not given by the charter, but by the Act of 1903, no right was acquired by nonpayment of tolls for a considerable period. No trace of the defendants acquiring a right adverse to the rest of the world could be discovered, and and an injunction must be granted.—WOOLWICH CORPORATION *v.* GIBSON, *Ch.D. Swinfen Eady, J.*; 92 L. T. 538.

MARRIAGE:—

Contract—Illegality—Marriage brokage—Introductions with a view to marriage—Contract for reward to bring about introductions — Expense incurred in carrying out contract—Recission of contract—Recovery of money paid.—A contract for reward to introduce another to persons of the opposite sex, with a view to marriage with one of those persons, is a marriage brokage contract and illegal; and money paid under such a contract can be recovered back by the person who paid it, although the other party to the contract has brought about introductions and has incurred expense in so doing.—HERMANN *v.* CHARLESWORTH, *C.A.*; [1905] 1 K. B. 123; 74 L. J. K. B. 620.

See also Settlement, 2.

MARRIED WOMAN:—

1. *Judgment — Separate property — Restraint on anticipation—Income due after judgment—Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 19.—Income of a married woman which she is restrained from anticipating, accrued due since a judgment against her, cannot be taken in execution under that judgment.

Whiteley v. *Edwards*, 44 W. R. 530, [1896] 2 Q. B. 48, approved.—BOLITHO *v.* GIDLEY, *H.L.*, 498; [1905] A. C. 98; 74 L. J. K. B. 430; 92 L. T. 369.

2. *Restraint on anticipation — Removal—Costs—Married Women's Property Act,* 1893 (56 & 57 *Vict. c.* 63), *s.* 2.—Where a married woman possessed of separate estate, subject to restraint upon anticipation, was a plaintiff in an action which was dismissed with costs,

Held, that the *onus* is on the married woman to show that the jurisdiction under section 2 of the Married Women's Property Act, 1893, to remove the restraint upon anticipation should not be exercised; but that the order will not be made as a matter of course.—PAWLEY *v.* PAWLEY, *Ch.D. Buckley, J.*, 375; [1905] 1 Ch. 593; 74 L. J. Ch. 344; 92 L. T. 457.

3. *Restraint on anticipation — Costs— Appeal — Married Women's Property Act,* 1893 (56 & 57 *Vict. c.* 65), *s.* 2.—Where a married woman applies unsuccessfully for a new trial of an action in which she is the plaintiff, the Court of Appeal has jurisdiction, under section 2 of the Married Women's Property Act, 1893, to order payment of the defendant's costs of the application out of separate property of the married woman which she is restrained from anticipating.

Hood Barrs v. *Cathcart*, [1894] 3 Ch. 376, and *Hood Barrs* v. *Heriot*, 45 W. R. 507, [1897] A. C. 177, considered.—DRESEL *v.* ELLIS, *C.A.*, 353; [1905] 1 K. B. 574; 74 L. J. K. B. 401; 92 L. T. 816.

See also Husband and Wife, 1, 2; Jointure, 1; Separation Deed, 1.

MASTER AND SERVANT:—

1. *Employers' liability—Accident—Compensation—Accident arising out of and in course of employment —Accident before commencement of work—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant was employed on a building operation, and that each of the men employed on the work was supplied with a ticket which he had to deposit every morning at a ticket office on the premises within three minutes of the time for commencing work. To the knowledge of the employers a number of the men who lived at a distance, including the applicant, arrived each morning by a train which brought them to the works twenty minutes before the time for commencing work, and were in the habit, after depositing their tickets, of going to a mess-cabin provided by the employers on the works for the purpose of getting refreshment. It was necessary for them to travel by this train in order to arrive at the works in time. The applicant had arrived as usual twenty minutes before the time for commencing work, and was proceeding to deposit his ticket before going on to the mess-cabin, when he accidentally fell into an evacuation in the ground close to the ticket office.

Held, that the accident arose out of and in the course of the applicant's employment within the meaning of section 1, sub-section 1, of the Workmen's Compensation Act, 1897. — SHARP *v.* JOHNSON & Co., *C.A.*, 597; [1905] 2 K. B. 139; 74 L. J. K. B. 566; 92 L. T. 675.

2. *Employers' liability—Accident—Compensation—Building—Scaffolding — Ladder — Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the deceased workman was employed on the work of constructing or repairing a building more than thirty feet in height, and that he and his fellow workmen made use of a ladder by standing on the rungs for the purpose of enabling them to do certain parts of the work.

Apart from the ladder nothing in the nature of scaffolding was used in the work. The county court judge found that the ladder was used as a scaffolding, and held that it was a scaffolding within the meaning of the Act.

Held, that the decision of the county court judge could not be interfered with.—O'BRIEN *v.* DOBBIE & SON, *C.A.*, 374; [1905] 1 K. B. 346; 74 L. J. K. B. 268; 92 L. T. 721.

3. *Employers' liability—Accident—Compensation—"Building"—Steam crane platform—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.—The applicant's employer entered into a contract to erect a steam crane platform for the purpose of carrying a crane wherewith to raise building materials for the construction of a permanent building by another contractor. The platform was constructed of timber supported by three long wooden legs, each leg consisting of four uprights connected together by cross-pieces of wood. Each leg was let into the ground, and where so let in it was surrounded by loose bricks to keep it firm. In order to construct the platform planks were placed resting on the cross-pieces, and ladders were placed on the planks to enable the workmen to go up and down. The ladders and planks were the scaffolding by means of which the crane platform was being erected, and when it was completed they would be removed. While the applicant was working at the erection of the crane platform he fell and was injured. At the time of the accident the structure was sixty-two feet high, but the permanent building was less than thirty feet high. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that the crane platform was a "building" within section 7, sub-section 1, of the Act, and that it was being constructed by means of a scaffolding, and he made an award of compensation.

Held, that, though the structure was a temporary wooden structure, the county court judge was entitled to find that it was a "building" within the Act.—AYLWARD *v.* MATTHEWS, *C.A.*, 292; [1905] 1 K. B. 343; 74 L. J. K. B. 336; 92 L. T. 189.

4. *Employers' liability—Accident—Compensation—Building "being constructed"—Measuring up plumbing work—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A contractor for the construction of a factory sub-contracted with another contractor whereby the latter agreed for a lump sum to do the plumbing work in the factory. The plumbing work was part of the work of construction, and under the contract with the plumbing contractor it was necessary that the plumbing work should be measured up. A firm of engineers had entered into an independent contract with the owner to erect and fix the necessary machinery and steam-pipes. After the building contractor had finished the work of building, and after the plumbing work had been finished, the plumbing contractor sent one of his workmen, who had been employed on the plumbing work, to measure up the work. While measuring it up he was injured by an accident. At this time the contractors for the erection of the machinery and steam-pipes were engaged upon their work, which was part of the work of construction of the building, and for that purpose they had erected a scaffolding. The building was over thirty feet high. In proceedings against the plumbing contractor to have compensation assessed under the Workmen's Compensation Act, 1897,

Held, that, as the measuring up of the plumbing work was incidental to and a necessary part of that work, which was itself part of the work of construction, the measuring up of the work was part of the work of construction, and that therefore the injured workman was at time of the accident employed by the undertakers on, in, or about a building which was being constructed by means of a scaffolding, and was therefore entitled to compensation.—PLANT *v.* WRIGHT & Co., *C.A.*, 358; [1905] 1 K. B. 353; 74 L. J. K. B. 331; 92 L. T. 720.

5. *Employers' liability—Accident—Compensation—"Building which exceeds thirty feet in height"—Extension of existing building over thirty feet in height—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.—The owners of a building which exceeded thirty feet in height contracted with a builder for the erection of an extension to the building. The extension was to be erected on land adjoining the existing building, the intention being to make openings through what was the outside wall of the existing building, which would become an inside wall when the extension was completed, so that the existing building and the extension might then be used as one building for one purpose.

A workman was injured by accident arising out of and in the course of his employment in the erection of this extension. At the time of the accident the extension was less than thirty feet in height, and no part of it had actually been connected with the existing building; but the footings of the walls of the extension had been put in, and were in touch with the walls of the existing building.

Held, that the employment of the workman was on, in, or about a building which exceeded thirty feet in height within section 7, sub-section 1, of the Workmen's Compensation Act, 1897.—HARTLEY *v.* QUICK, *C.A.*; [1905] 1 K. B. 359; 74 L. J. K. B. 257; 92 L. T. 191.

6. *Employers' liability—Accident—Compensation—Coal mine—Certified manager—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7 (2).—A certified manager of a coal mine was paid a salary of £400 a year, payable monthly, and provided with a house rent free and coals for domestic use. While engaged in his duties in the mine he met with an accident, which proved fatal.

Held, that the widow was not entitled to compensation, because the position held by the deceased man was not that of a "workman" within the meaning of that term, as used in the Workmen's Compensation Act, 1897. Whether a man was a "workman" or not depended upon the particular facts in each case, and in the present instance there was ample evidence upon which the county court judge could come to the conclusion that the deceased man was not a "workman," and the employers therefore not liable to pay compensation.—SIMPSON *v.* EBBW VALE STEEL, IRON, AND COAL Co., *C.A.*, 390; [1905] 1 K. B. 453; 74 L. J. K. B. 347; 92 L. T. 282.

7. *Employers' liability—Accident—Compensation—Discretion of county court judge.*—In awarding compensation under the Workmen's Compensation Act to workmen partially incapacitated, a county court judge cannot lay down any general rule as to the amount of compensation which he will award. He must exercise his discretion with regard to the circumstances of the particular case.

The decision of the Court of Appeal ([1904] 1 K. B. 218) affirmed by consent upon terms.—WEBSTER *v.* SHARP & Co., *H.L.*; [1905] A. C. 284; 74 L. J. K. B. 776; 92 L. T. 373.

8. *Employers' liability—Accident—Compensation—Disease—Anthrax contracted from infected wool—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.—A workman employed in a wool factory contracted anthrax in one of his eyes from the wool which he was sorting.

Held, that this was an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897.

Decision of the Court of Appeal (52 W. R. 195, [1904] 1 K. B. 328) affirmed (Lord Robertson dissenting).—BRINTONS *v.* TURVEY, *H.L.*, 641; [1905] A. C. 230; 74 L. J. K. B. 474; 92 L. T. 578.

9. *Employers' liability—Accident—Compensation—Disease—Lead poisoning—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—Lead poisoning caused by continual handling of white and red lead in the work of caulking ships held not to be an injury by accident within the Workmen's Compensation Act, 1897.—STEEL *v.* CAMMELL, LAIRD, & Co., *C.A.*, 612; [1905] 2 K. B. 232; 74 L. J. K. B. 610.

10. *Employers' liability—Accident—Compensation—Earnings—Average weekly earnings—Costs of appeal—Workmen's Compensation Act*, 1897, *Schedule I.* (1) (*b*).—There is no presumption for the purposes of the Workmen's Compensation Act, 1897, that a casual labourer employed by the hour will continue in his employment for more than one hour.

Where an applicant under the Workmen's Compensation Act appeals unsuccessfully against the amount of compensation awarded him, the costs of appeal will be set off against his costs in the court below.—CASE *v.* COLONIAL WHARVES (LIMITED), *C.A.*, 514.

11. *Employers' liability—Accident—Compensation "Earnings"—Lodging allowance—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *First Schedule, clause* 1 (a) (i).—A goods guard, in the employment of a railway company, received in addition to his ordinary wages a certain sum per night for lodging allowance when he was obliged to sleep away from home on the company's business. The object of the allowance was to cover the guard's out-of-pocket expenses, and its amount about equal to the reasonable cost of board and lodging. No inquiry was ever made as to the actual expenses incurred by the guard, or whether he spent the amount or any part thereof.

Held, that the allowance must be taken as part of his "earnings" within the meaning of Schedule 1 (*a*) (*i*) of the Workmen's Compensation Act, 1897.

Decision of the Court of Appeal (51 W. R. 481, [1903] 2 K. B. 26) affirmed.—MIDLAND RAILWAY Co. *v.* SHARPE, *H.L.*, 114; [1904] A. C. 349; 73 L. J. K. B. 666; 91 L. T. 181.

12. *Employers' liability—Accident—Compensation—"Earnings"—Railway servant's uniform—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37) *Schedule I.* (1) (a) (i).—In an arbitration under the Workmen's Compensation Act, 1897, in respect of the death of a railway guard, it appeared that the deceased was provided by the railway company with a uniform, which he was required to wear when on duty, but which remained the property of the company, and which by the rules and regulations of the company he would be bound to deliver up on leaving the service of the company.

Held, that the value to the deceased of the right to wear the uniform ought to be taken into consideration in calculating his earnings during the three years preceding the injury.—GREAT NORTHERN RAILWAY Co. *v.* DAWSON, *C.A.*, 309; [1905] 1 K. B. 331; 74 L. J. K. B. 271; 92 L. T. 145.

13. *Employers' liability—Accident—Compensation—Employment—Fall owing to epileptic fit—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—The applicant was employed by the respondents in unloading coal from a steamer at their wharf. The coal was put into a bucket, which was raised from the hold by a hydraulic crane, and the bucket when emptied was lowered into the hold again. The applicant's duty was to stand upon a stage next to the opening into the hold and to guide the bucket when it was being lowered into the hold by the crane, and to give signals to the man who was working the crane. While so employed he was seized with an epileptic fit and fell into the hold and was injured. In proceedings for the assessment of compensation under the Workmen's Compensation Act, 1897,

Held, that the injury to the applicant was caused by an "accident" which arose "out of" his employment within section 1, sub-section 1, of the Act.—WILKES *v.* DOWELL & Co., *C.A.*, 515; [1905] 2 K. B. 225; 74 L. J. K. B. 572; 92 L. T. 677.

14. *Employers' liability—Accident—Compensation—Engine-driver injured by stone thrown at train—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—An engine-driver while driving an engine belonging to the respondent railway company was injured by a stone intentionally dropped on the train by a boy from a bridge over the line.

Held, that this was an "accident," and that as the risk of being injured by stone-throwing was one that could reasonably be considered as incidental to the ordinary employment of an engine-driver, the accident arose "out of" his employment within section 1 (i.) of the Workmen's Compensation Act, 1897, and the company were liable, although the accident was caused by the mischievous or tortious act of a stranger.

Armitage v. *Lancashire and Yorkshire Railway Co.*, [1902] 2 K. B. 178, 50 W. R. Dig. 112, considered and explained.—CHALLIS *v.* LONDON AND SOUTH-WESTERN RAILWAY Co., *C.A.*, 613; [1905] 2 K. B. 154; 74 L. J. K. B. 569.

15. *Employers' liability—Accident—Compensation—Engineering work—Work ancillary to engineering operations—Unloading rails at station where they were to be stored—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—Contractors had entered into a contract to take up the rails of certain existing horse-tramways in a town and to replace them by new ones for a new tramway to be worked by electric power. The new rails were brought to the town by railway, and by arrangement between the railway company and the contractors they were stored in the railway company's yard until they were required for the purposes of the new tramway. The applicant was employed by the contractors in unloading and stacking in the station yard rails which had come in by train, and while thus employed met with an accident. At that time the only work commenced under the contract was the taking up of the old tramway rails in a street at a distance of about 700 yards from the station yard.

Held, that the workman was not entitled to compensation, because at the time of the accident he was not employed on or in or about an "engineering work" within the meaning of that term as used in section 7 of the Workmen's Compensation Act, 1897, since those words point to employment within the physical area of the engineering work actually

being carried out, and do not refer to the labour bestowed on such work, but to the locality where such labour is being bestowed.—BACK *v.* DICK, KERR, & CO., *C.A.*, 615; [1905] 2 K. B. 148; 74 L. J. K. B. 596.

16. *Employers' liability—Accident—Compensation—Indemnity—Contractor and sub-contractor—Right to sue—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 3; *s.* 4.—A contractor for the construction of a building entered into a contract with a sub-contractor whereby the latter agreed to execute part of the work. A workman in the employment of the sub-contractor was injured by an accident while at work on the building, and became entitled to compensation under the Workmen's Compensation Act, 1897. He claimed compensation under section 4 of the Act from the contractor, who agreed to pay him a certain weekly sum during incapacity. The sub-contrator was no party to this agreement. The contractor claimed to be indemnified by the sub-contractor under section 4 in respect of his liability to the workman, and brought an action in the High Court to enforce the indemnity. The sub-contractor contended that the indemnity could only be enforced by means of an arbitration under the Act.

Held, that, as the amount of the weekly payment to the workman had been settled by agreement, and there had been no arbitration proceedings to settle the amount, the action was maintainable.—EVANS *v.* COOK, *C.A.*, 81; [1905] 1 K. B. 53; 74 L. J. K. B. 95; 92 L. T. 43.

17. *Employers' liability—Accident—Compensation—Redemption of weekly payment—Limitation of sum in request for arbitration—Jurisdiction of arbitrator—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c* 37), *Schedule I., par.* 13.—Where an employer requests an arbitration with respect to the redemption of a weekly payment of compensation under the Workmen's Compensation Act, 1897, he has no right to limit the jurisdiction of the arbitrator by stating in his request for arbitration the highest sum which he is willing to pay by way of redemption.—CASTLE SPINNING CO. *v.* ATKINSON, *C.A.*, 360; [1905] 1 K. B. 336; 74 L. J. K. B. 265; 92 L. T. 147.

18. *Employer's liability—Accident—Compensation—Request for arbitration—Answer by respondent—Abandonment of proceedings—Right to institute subsequent proceedings under the Employers' Liability Act*, 1880—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1 (2) (*b*).—The plaintiff, a workman, having in the course of his employment sustained personal injuries, gave notice thereof to the defendant, his employer, and made a formal request for arbitration under the Workmen's Compensation Act, 1897. The defendant filed an answer that the building on which the plaintiff was working at the time of the accident did not exceed thirty feet in height, and that consequently the Act did not apply. The plaintiff thereupon gave notice of his abandonment of his claim for compensation under that Act, and the proceedings were abandoned, the defendant being paid the costs incurred by him in consequence thereof. Subsequently the plaintiff commenced an action claiming damages from the defendant in respect of the same injuries under the Employers' Liability Act, 1880.

Held, that the workman, by filing the request for arbitration under the Workmen's Compensation Act, and by abandoning his claim under that Act when he found that the Act did not apply, and having costs allowed against him, had not exercised his option under section 1, sub-section 2 (*b*), of the Workmen's Compensation Act, 1897, so as to debar him from bringing his action under the Employers' Liability Act, 1880.—ROUSE *v.* DIXON, *K.B.D.*, 237; [1904] 2 K. B. 628; 73 L. J. K. B. 662; 91 L. T. 436.

19. *Employers' liability—Accident—Compensation—Seaman—Ship in dock—Factory Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1 (*v.*) (b)—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1 *and* 7.—A sailor working as such on a ship afloat within a dock is not a workman entitled to the benefit of the Workmen's Compensation Act, 1897.

Decision of the Court of Appeal (52 W. R. 323, [1904] 1 K. B. 510) reversed (Lord James of Hereford dissenting).

Raine v. *Jobson*, 49 W. R. 705, [1901] A. C. 404, distinguished.—HOULDER LINE *v.* GRIFFIN, *H.L.*, 609; [1905] A. C. 220; 74 L. J. K. B. 466; 92 L. T. 580.

20. *Employers' liability—Accident—Compensation—Warehouse—Workmen's Compensation Act*, 1897, *s.* 7, *sub-sections* 1 *and* 2—*Factory and Workshop Act*, 1901, *s.* 149, *sub-section* 5, *Schedule VI., Part I.* (*II.*).—A yard is not a warehouse for the purposes of the Workmen's Compensation Act, 1897, merely because waste material, some of which is occasionally sold in order to get rid of it, is stored there.—BUCKINGHAM *v.* FULHAM CORPORATION, *C.A.*, 628.

21. *Employers' liability—Accident—Compensation—Workman—Partnership—Partner employed as workman—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1; *s.* 7, *sub-section* 2.—By an arrangement between three persons who had entered into a partnership for the purpose of working a mine, one of them worked in the mine as an ordinary workman and received weekly wages out of the profits of the business, independently of what he received as a partner. On his death, in consequence of an accidental injury sustained by him while working in the mine, his widow claimed compensation from the two surviving partners under the Workmen's Compensation Act, 1897.

Held, that the deceased man was not a workman within the Act, as the Act contemplated two opposite parties, an employer and a workman, and did not apply to cases where the same person was both employer and employed.—ELLIS *v.* ELLIS & CO., *C.A.*, 311; [1905] 1 K. B. 324; 74 L. J. K. B. 229; 92 L. T. 718.

22. *Nurse supplied by nursing association—Negligence by nurse—Liability of committee of association.*—By the carelessness of a nurse supplied by the defendants, the committee of an association formed to supply trained nurses to attend on patients during illness, the female plaintiff, while under the influence of anæsthetics, was seriously burned by a hot-water bottle placed by the nurse in direct contact with her body. In an action to recover damages for the injury so sustained,

Held, that under the rules of the association the latter did not undertake to nurse the patient, but only to supply, so far as reasonable care could ensure it, a duly certified nurse, who was to be under the control and instructions of the medical man. Therefore at the time of the alleged negligent act the relation of master and servant did not exist between the association and the nurse, and the defendants were not responsible for her negligence.—HALL *v.* LEES, *C.A.*, 17; [1904] 2 K. B. 602; 73 L. J. K. B. 819; 91 L. T. 20.

23. *Truck Acts—"Lace clippers"—Wages paid for piece-work done at workman's home—Deductions from wages—"Workman"—Truck Act*, 1896 (59 & 60 *Vict. c.* 44), *s.* 2, *sub-section* (*i.*)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10.—The provisions of the Truck Acts are only applicable to payments made to a workman whose contract with the employer requires that the whole or part of the work contracted to be paid for is to be done personally by the workman.

Ingram v. *Barnes*, 5 W. R. 232, 7 E. & B. 115, followed.—SQUIRE *v.* MIDLAND LACE CO., *K.B.D.*, 653; [1905] 2 K. B. 448; 74 L. J. K. B. 614.

MERCHANDIZE MARKS:—

1. *False trade description — Tea weighed with paper—Gross weight.*—The respondent, having asked for a quarter of a pound of tea, was handed by an assistant of the appellants a packet already folded and tied with string. A ticket was inserted under the string, on one side of which was: "Star Tea Co. (Limited). Quarter pound 2s. 8d. tea ticket . . . " and on the other a notice that every purchaser of a quarter of a pound and upwards was given some useful article. The tea was wrapped in a piece of lead paper, on which was printed "Quarter pound gross weight." The tea by itself was short by ¼oz. of a quarter of a pound but with the paper was slightly in excess.

Held, that the appellants were rightly convicted under section 1 (2) of the Merchandize Marks Act, 1887, of applying a false trade description to the tea by means of the ticket.—STAR TEA CO. *v.* WHITWORTH, *K.B.D.*; 91 L. T. 87.

2. *Trade description — Invoice — Kilderkin — Merchandize Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2.—G. having ordered one kilderkin of mild ale received a cask of ale together with an invoice which stated: "Bought of North-Eastern Breweries (Limited). Oct. 21, 1903. Kils 1. Mild Ale B.M. Per Brl. 48s.—£1."

The cask held seventeen gallons one quart and one pint, and a kilderkin is a cask holding eighteen gallons. It was found as a fact that the appellants knew that the process of coopering casks had the effect of diminishing their holding capacity.

Held, that the appellants were rightly convicted of applying a false trade description within section 2 (1) (*d*) of the Merchandize Marks Act, 1887.—NORTH-EASTERN BREWERIES *v.* GIBSON, *K.B.D.*; 91 L. T. 78.

METROPOLIS:—

1. *Building—General line of buildings—Appeal from superintending architect—Costs.*—Where the general building line is to be defined and drawn within section 22 of the London Building Act, 1894, is a question of fact which ought to be decided with reference to the physical aspect of the street and buildings, &c.

Therefore on an appeal to the tribunal of appeal from the certificate of the superintending architect, that tribunal in fixing the building line can take different points from which and to which they will define the general building line, to those which the superintending architect has chosen.

The tribunal of appeal can award a lump sum for costs to a successful appellant instead of simply awarding costs.—LONDON COUNTY COUNCIL, RE, *K.B.D.*; 91 L. T. 501.

2. *Buildings—Illuminated advertisements affixed to buildings — Projection beyond building line — "Building or structure"—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 200 (3).—The respondents erected upon the front walls of a building twelve advertisement cases constructed of sheet iron, supported by wrought iron supports, which were pinned through the front walls. The outer side of each case was covered with a wooden frame carrying canvas or linen lined with advertisements, and provision was made for illuminating the interior of the cases by electric light. The cases varied in width from two to five feet, and in height from five to seven feet. Each of the cases stood out ten inches in front of a front wall of the building beyond the general line of building, but each projection was less than the projection of the existing cornice over the shop, which was two feet from the face of the main building. The respondents had not obtained the consent of the London County Council to the erection of the cases.

Held (by Lord Alverstone, L.C.J., and Kennedy, J., Wills, J., dissenting), that the cases were not structures within the meaning of section 22 of the London Building Act, 1894, which provides that "no building or structure shall, without the consent of the council, be erected beyond the general line of buildings in any street."—LONDON COUNTY COUNCIL *v.* ILLUMINATED ADVERTISEMENT CO., *K.B.D.*, 220; [1904] 2 K. B. 886; 73 L. J. K. B. 1034; 91 L. T. 352.

3. *Building—Party structure—Building owner's notice—Adjoining owner's notice of requisitions—Difference in respect of execution of works—Arbitration—Jurisdiction of arbitrators—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 88 (7), 89, 90, 91.—Where the owner of a house in London has given an adjoining owner a building owner's notice, under section 90 of the London Building Act, 1894, of his intention to pull down a party structure and rebuild it under section 88, sub-section 7, and the adjoining owner has thereupon given the building owner a notice under section 89 requiring him to execute certain specified works, and a difference with respect to the execution of such works is referred to arbitration under section 91, the jurisdiction of the arbitrators is limited to settling differences with regard to the execution of the works to which the notice relates. An award providing that the adjoining owner shall be entitled at some future time to build on the party structure is to that extent *ultra vires*. If the adjoining owner at some future time wishes to build on the party structure, he must, notwithstanding any such award, give a fresh building owner's notice.—LEADBITTER *v.* MARYLEBONE CORPORATION, *C.A.*, 118; [1904] 2 K. B. 893; 73 L. J. K. B. 1013; 91 L. T. 639.

4. *Building—Party structure—Building owner's notice—Limitation of time for exercise of rights under notice—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90, *sub-section* 4.—The limitation of six months mentioned in section 90, sub-section 4, of the London Building Act, 1894, applies to cases in which, a building owner having served a party-wall or structure notice, the adjoining owner consents thereto. It does not apply where differences arise between the building owner and the adjoining owner with regard to the notice, and arbitrators are appointed to settle the differences.—LEADBITTER *v.* MARYLEBONE CORPORATION (No. 2), *C.A.*, 470; [1905] 1 K. B. 661; 74 L. J. K. B. 507; 92 L. T. 819.

5. "*Dwelling-house to be inhabited or adapted to be inhabited by persons of the working class*"—*Intention and adaptation of a dwelling-house.*—Houses constructed in such a way that it is practically certain that when constructed—meaning at the time of construction or building, and not ultimately—they

would be inhabited by persons of the working class, then the fact that the builder intends them for occupation by anyone who would take them, meaning thereby any person who might come along, and who might be willing to take a particular house and not occupy or underlet it for the purposes of persons of the working class, would not be sufficient to prevent the houses being houses that were intended "to be inhabited . . . by persons of the working class" within section 13 (5) of the London Building Act, 1894. The words "to be inhabited" or "adapted to be inhabited" in section 13 (5) constitute two distinct conditions. The first means "intended to be inhabited," and the second means in some respects "having features of construction which point to the use of the houses by persons of the working class as their natural use."—CROW *v.* DAVIS (No. 2), *K.B.D.*; 91 L. T. 88.

6. *Public health—Nuisance—"Acts or defaults" of two or more persons—Right to contribution—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 5, 120.—The defendant's premises were drained through a drain running under the plaintiff's premises, which drain for part of its length carried only the defendant's drainage, and for the rest of its length carried the drainage of both premises. The defendants had a right so to use the drain. A nuisance having arisen on the plaintiff's premises owing to the whole of the drain being defective and permitting sewage to escape, the sanitary authority took proceedings against him, under sections 4 and 5 of the Public Health (London) Act, 1891, and obtained an order upon him to do the work necessary to abate the nuisance. The plaintiff did the work and abated the nuisance, all the work being done upon his own premises.

Held, that the plaintiff could not recover from the defendants a proportionate part of the costs of abating the nuisance as being one of two or more persons "by whose act or default" the nuisance had been caused, within the meaning of section 120 of the Public Health (London) Act, 1891.—NATHAN *v.* ROUSE, *K.B.D.*; [1905] 1 K. B. 527; 74 L. J. K. B. 285; 92 L. T. 321.

7. *Street — Commencing to form or lay out—Passage to shops—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 7.—A passage-way, thoroughfare, or courtyard leading to shops, even although some part of the user may be restricted to certain times, which is intended and used as a market or bazaar, may be a "street" within the meaning of the London Building Act, 1894, and the person responsible therefor may be convicted under section 7 of that Act for commencing to form and lay out a street.—LONDON COUNTY COUNCIL *v.* DAVIS, *K.B.D.*, 91 L. T. 555.

8. *Street—Paving expenses—"Owner" of land—Land abutting on street—Bank of public navigable river—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 122), *s.* 77.—The defendants, a statutory corporation created for the purpose of maintaining and managing the navigation of the River Lee as a public navigable river, were the owners of a strip of land which had been acquired by their predecessors under statutory powers for the purpose of making a retaining bank for the river. The bank had been made and was twenty-six feet wide at the base and five feet wide at the top. It was used solely as a retaining bank, and there were no buildings upon it.

The bank abutted on a new street, which was paved by the plaintiffs under section 105 of the Metropolis Management Act, 1855.

Held (reversing the judgment of Wright, J.), that the defendants were the "owners" of the bank within the meaning of section 250 of the Metropolis Management Act, 1855, and were therefore liable to contribute to the expenses of paving the new street, under section 77 of the Metropolis Management Act, 1862.—HACKNEY CORPORATION *v.* LEE CONSERVANCY BOARD, *C.A.*; 91 L. T. 13.

9. *Street—Paving expenses—"Owner"—Strip of land fenced off and planted as ornamental garden—Land rendered incapable of yielding rent for the benefit of an individual—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Midland Railway Act*, 1900 (63 & 64 *Vict. c. cxliii.*), *s.* 18 —By section 18, sub-section 2, of the Midland Railway Act, 1900, the company, for the protection of the owner of certain land acquired by them for the purpose of sidings, were to acquire from the owner all the land up to a certain road, but were to leave a strip of the land so taken along the whole length of the road to be fenced and planted out with shrubs and trees and maintained as an ornamental garden. The local authority subsequently paved the road under section 105 of the Metropolis Management Act, 1855, and apportioned part of the expenses on the railway company under section 77 of the Metropolis Management Act, 1862.

Held, that the provision in the private Act restricting the user of land in such a way as to render it incapable of yielding a rent being imposed for the benefit of an individual who might release it by agreement, and the land be thus capable of yielding a rent without the aid of further legislation, did not prevent the persons to whom the land belonged from being "owners" within section 250 of the Metropolis Management Act, 1855, and as such liable to contribute to the expenses incurred by the local authority in making up the street upon which the land in question abutted.—HAMPSTEAD CORPORATION *v.* MIDLAND RAILWAY CO., *K.B.D.*, 187; [1904] 2 K. B. 802; 73 L. J. K. B. 896; 91 L. T. 661.

10. *Street widening — Compulsory purchase — Borough council — London County Council.* — The metropolitan borough of H. had formally adjudged certain land to be an obstruction to the widening of a street, within section 80 of 57 Geo. 3, c. xxix., and had served notice to treat for this land on the owners, the vicar and churchwardens of St. P.'s, H. This "adjudication" had been made in pursuance of an agreement to assist the London County Council in a scheme for constructing electric tramways in the street. It was argued for the vicar and churchwardens, who had brought an action against the borough council, and now applied for an *interim* injunction to restrain them from enforcing their compulsory powers under the Act, that this was not a *bonâ fide* exercise of their statutory powers by the borough council, and that they ought to be restrained from acquiring the land in this way.

Held, that upon the facts this was a *bonâ fide* adjudication by the borough council, even though the necessity for widening the street was brought about by the action of the London County Council in proposing to run a tramway down it, and that the motion must be refused.—PARRY *v.* METROPOLITAN BOROUGH OF HAMMERSMITH, *Ch.D.* *Warrington, J.*; 92 L. T. 161.

MINES:—

1. *Coal mines—Checkweigher—Acts of interference with workmen — Removal — Coal Mines Regulation*

Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 13, *sub-sections* 3, 4.—By sub-section 3 of section 13 of the Coal Mines Regulation Act, 1887, it is provided that a checkweigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine, but shall be authorized only to take such account or determine the deductions as provided by the Act. Sub-section 4 provides that if the owner, agent, or manager of the mine desires the removal of a checkweigher on the ground that the checkweigher has impeded or interrupted the working of the mine, or interfered with the weighing or any of the workmen, or with the management of the mine, or has, at the mine, to the detriment of the owner, agent, or manager done anything beyond taking such account, determining such deductions, or giving such information as aforesaid, he may complain to a court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient *primâ facie* ground for the removal of the checkweigher, shall call on the checkweigher to show cause against his removal.

Held, that the expression "interfere with any of the workmen" in these sub-sections was not limited to interference by a checkweigher *virtute officii*, nor to acts of interference on the mine premises only. —SYKES *v.* BARRACLOUGH, *K.B.D.*, 205; [1904] 2 K. B. 675; 73 L. J. K. B. 920; 91 L. T. 560.

2. *Lease—Covenant—Construction—"Fairly, duly, and honestly win" the whole of the coal demised.*—A mining lease of a seam of coal for twenty-one years reserved an annual rent of £100 for an acre of the coal as soon as the lessees should commence working the coal, and until then an annual rent of £5. The lease contained a covenant by the lessees that they would, at all times during the said term, "fairly, duly, and honestly win, work, recover, obtain, and get the whole of the" seam of coal thereby demised "in a proper and workmanlike manner."

After working the seam for some years the lessees abandoned it on finding that in consequence of faults the coal could not be worked except at a heavy loss.

The lessors brought an action for damages against the lessees for breach of their covenant to work the coal.

Held (reversing the decision of Channell, J.), that the intention of the covenant was to oblige the lessees to work the coal, and that the addition of the words "fairly, duly, and honestly" did not relieve them in any way of their obligation to work the coal.

Walker v. *Jeffreys*, 1 Hare, 341, and *Jervis* v. *Tomkinson*, 1 H. & N. 195, followed.—WATSON *v.* CHARLESWORTH, *C.A.*; [1905] 1 K. B. 74; 74 L. J. K. B. 155; 92 L. T. 46.

3. *Right to let down surface—Inclosure of commons —Award—Reservation of manorial rights—Working of mines—Damage to surface owners—Support—Inclosure Act*, 1758 (31 *Geo.* 2, *c. x.*).—By an Inclosure Act and award certain waste land was allotted amongst commoners. The Act provided that nothing therein contained should be construed to diminish the rights of the lord of the manor in respect to his seignory and royalties except in respect of his ownership of the soil to be inclosed. And, further, that the lord and his successors should hold and enjoy all mines and quarries under the waste, together with liberty of searching for, winning, and working the same, as fully and freely as if that Act had not been passed, and that without making or paying any satisfaction for so doing.

Held, that there was nothing in the Act to deprive the surface owners of their common law right of support.—BISHOP AUCKLAND INDUSTRIAL SOCIETY *v.* BUTTERKNOWLE COLLIERY CO., *C.A.*; [1904] 2 Ch. 419; 73 L. J. Ch. 635; 91 L. T. 441.

See also Railway, 2; Settled Land, 3.

MISTAKE. — See Compromise, 1; Garnishee, 1; Insurance, 3; Victoria, Law of, 2.

MONEY-LENDERS:

1. *Business — "Primary object" — Company promoting—Advancing money—Bonus of shares—Impecunious person—"Harsh and unconscionable bargain"—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 6.—When a lender is in the habit of lending money to impecunious persons who are engaged in promoting companies and taking shares in such companies from them by way of bonus for so doing, without the money so advanced being necessarily lent to facilitate the promoting of such companies, such a lender is a "money-lender" within the meaning of the Money-lenders Act, 1900.

Where the amount of such bonus has no ascertainable relation to the accommodation rendered, but is fixed arbitrarily with more regard to the necessities of the borrower than the risks which the vendor runs, the court will order the transactions to be reopened, on the ground that they are "harsh and unconscionable."—BONNARD *v.* DOTT, *Ch.D. Kekewich, J.*, 678; 92 L. T. 822.

2. *Practice—Application for judgment under ord.* 14, *r.* 1—*Action by money-lender—Harsh and unconscionable transaction—Interest charged* primâ facie *excessive—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.—Where in an action by a money-lender to recover money lent with interest it appears that *primâ facie* the interest charged was excessive, the special jurisdiction conferred by the Money-lenders Act, 1900, comes into operation. Therefore that part of the claim for interest cannot be dealt with upon an application for summary judgment under order 14, but the action must go to trial for the purpose of having it determined whether the interest is so excessive as to entitle the defendant to relief under the Act.—WELLS *v.* ALLOTT, *C.A.*, 195; [1904] 2 K. B. 842; 73 L J. K. B. 1023; 91 L. T. 749.

3. *Re-opening transactions—Harsh and unconscionable—Excessive interest—Absence of risk—Default clause—Re-opening former account—Relevancy to transaction sued on—Power to order repayment—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1 (1) (2).—A transaction may be harsh and unconscionable within the meaning of section 1 (1) of the Money-lenders Act, 1900, merely by reason of an excessive rate of interest, but a rate not in itself excessive may become so through a total absence of risk, especially when coupled with a condition making a loan immediately repayable on an instalment falling into arrear.

The power of the court under section 1 (1) "to re-open any account already taken" refers only to an account relevant to the transaction sued on; but a court having jurisdiction under section 1 (1) can, under section 1 (2), at the instance of the borrower, surety, or other person liable, re-open a transaction at any stage, and, if the loan has been repaid, can, if necessary, order the money-lender to refund.—SAUNDERS *v.* NEWBOLD, *C.A.*, 162; [1905] 1 Ch. 260; 74 L. J. Ch. 120; 92 L. T. 67.

MORTGAGE :—

1. *Entry into possession by mortgagee—Relation back of right of possession—Trespass antecedent to entry—Right of action.*—After entry by a mortgagee of land his right of possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for trespass committed at a time antecedent to the entry.

Barnett v. *Guildford*, 11 Ex. 19, approved and applied.—OCEAN ACCIDENT AND GUARANTEE CORPORATION *v.* ILFORD GAS CO., *C.A.*; [1905] 2 K. B. 493.

2. *Equitable mortgagee—Right to receive rents—Claim by tenant for repayment.*—Although an equitable mortgagee has no legal right to be paid the rents of the mortgaged property, yet if he has been paid rent by a tenant of the equitable mortgagor after notice to the tenant that the rent is claimed by him as equitable mortgagee, he cannot be compelled to refund the rent to the tenant.—FINCK *v.* TRANTER, *K.B.D.*; [1905] 1 K. B. 427; 74 L. J. K. B. 345; 92 L. T. 297.

3. *Foreclosure action—Second action for principal and interest during pendency of foreclosure action—Vexatious proceedings.*—In a foreclosure action in the Chancery Division the indorsement on the writ contained no claim for payment of principal and interest. While this action was still pending the mortgagee brought a second action in the King's Bench Division, the writ being specially indorsed with a claim for payment of the principal and interest due up to date. In an application in the second action for leave to sign judgment under order 14,

Held, that the bringing of the second action was improper and an abuse of the process of the court.

Earl Poulett v. *Viscount Hill*, [1893] 1 Ch. 277, followed.—WILLIAMS *v.* HUNT, *C.A.*; [1905] 1 K. B. 512; 74 L. J. K. B. 364; 92 L. T. 192.

4. *Mortgagee in possession—Redemption—Rests—Accounts—Sale of part of the mortgaged property—Proviso for capitalization of interest—Right to compound interest.*—Under a proviso in a mortgage for the capitalization of interest in arrear for twenty-one days, on the default of the mortgagor, a mortgagee in possession is not entitled, on the accounts being taken, to charge the mortgagor with compound interest, unless he can show that, after crediting the rents received each half year, the interest was actually in arrear at the time specified in the proviso. Sale by a mortgagee in possession of part of the mortgaged property does not by itself entitle the mortgagor to an account with a general rest of the rents and profits as well as of the proceeds of sale, as on the date of the receipt of such proceeds.—WRIGLEY *v.* GILL, *Ch.D. Warrington, J.*, 334; [1905] 1 Ch. 241; 74 L. J. Ch. 160; 92 L. T. 491.

5. *Mortgagee in possession—Sale of part of mortgaged estate—Redemption—Account—Rests.*—A mortgagee in possession from time to time sold portions of the mortgaged property. He had in his hands at the dates of such sales a balance of rents and profits over disbursements.

Held, that the accounts were properly taken without making rests in the account of rents and profits at the date of each sale.

Thompson v. *Hudson*, 18 W. R. 1081, L. R. 10 Eq. 497, considered and explained.

Wrigley v. *Gill*, [1905] 1 Ch. 241, followed.

Held, also, that the expenses of a sale of mortgaged property are correctly deducted from the gross proceeds of the sale, and only the net proceeds must be brought into the account, although the mortgagee has in his hands a balance of rents and profits sufficient to pay such expenses.—AINSWORTH *v.* WILDING, *Ch.D. Joyce, J.*, 281; [1905] 1 Ch. 434; 74 L. J. Ch. 256; 92 L. T. 679.

6. *Sub-mortgage by deposit—Notice of sub-mortgage not given to mortgagor—Re-mortgage by mortgagor and mortgagee—Employment of mortgagee as solicitor—Constructive notice—Fraud by solicitor—Rights of sub-mortgagee.*—B. mortgaged in January, 1886, certain freeholds to C., a solicitor. In August, 1886, C. sub-mortgaged them by deposit of the deeds to certain bankers to secure his account with the latter. The bankers gave B. no notice of the sub-mortgage. C. subsequently obtained from H. and W. advances to the amount of the greater part of the original mortgage debt, and gave them new mortgages, in which B. concurred, expressed to be freed and discharged from the original mortgage. B. gave C. another mortgage for the balance due under the original mortgage. C. acted as solicitor for B., H., and W. in the transaction. Interest was regularly paid on the sub-mortgage and on the mortgages to H. and W. In 1902 C. was adjudicated a bankrupt. Neither B. nor H. nor W. had any actual notice of the sub-mortgage.

In an action brought by the bankers against B., transferees of H. and W.'s mortgages, and C.'s trustee in bankruptcy, for an account of what was due on the original mortgage of January, 1886, on the footing that none of it had been paid off, and on the sub-mortgage, foreclosure in respect of both mortgages in default of payment, and a declaration of priority for the plaintiffs' security,

Held, that H. and W. were affected with constructive notice of the sub-mortgage notwithstanding the fraud of their solicitor, C., that fraud being one which an honest and competent solicitor would have discovered, and that the plaintiffs therefore had a first charge on the property, but that constructive notice of the sub-mortgage ought not to be imputed to B., since the plaintiffs had neglected to give him notice of it.—BERWICK & CO. *v.* PRICE, *Ch.D. Joyce, J.*; [1905] 1 Ch. 632; 74 L. J. Ch. 249; 92 L. T. 110.

See also Bankruptcy, 11; Evidence, 1; Fixtures, 2; Landlord and Tenant, 4; Literary and Scientific Society, 1; Principal and Agent, 6; Ship, 28.

MOTOR-CAR :—

1. *Parks Regulation Act*, 1872 (35 & 36 *Vict. c.* 15), *s.* 9—*Statutory Rules and Orders*, 1904, No. 979, *r.* 4.—By rule 4 of the Statutory Rules and Orders, 1904, No. 979: "Cars propelled or drawn by mechanical means shall only be admitted [into Royal parks] subject to such regulations as may from time to time be passed by the Commissioners of his Majesty's Works and Public Buildings, and published by notice exhibited in the parks."

These rules were made under the Parks Regulation Act, 1872, and were duly laid before Parliament.

The commissioners published a notice, which was posted at the park gates, that no car propelled or drawn by mechanical means was to be allowed to proceed at a greater pace than ten miles per hour. This notice was not laid before Parliament.

Held, that the regulation contained in this notice was good.—MUSGRAVE *v.* KENNISON, *K.B.D.*; [illegible] L. T. 865.

2. *Reckless driving—"Having regard to all the circumstances of the case"—Motor-car Act*, 1903 (3 *Ed.* 7, *c.* 36), *s.* 1, *sub-section* 1.—The offence

created by section 1, sub-section 1, of the Motor-car Act, 1903, of driving a motor-car on a public highway recklessly or at a speed which is dangerous to the public, having regard to all the circumstances of the case, is not committed when the speed is in itself reasonable and the person injured is a person not on the highway but on the car itself.—TROUGHTON v. MANNING, *K.B.D.*, 493; 92 L. T. 855.

See also Justices, 2, 3.

NAVAL RESERVE:—

False statement on entering—Naval Enlistment Act, 1853 (16 & 17 *Vict. c.* 69), *s.* 16.—*Naval Volunteers Act*, 1853 (16 & 17 *Vict. c.* 73), *s.* 17—*Royal Naval Reserve (Volunteer) Act*, 1859 (22 & 23 *Vict. c.* 40), *ss.* 15, 16.—Section 16 of the Naval Enlistment Act, 1853, does not apply to a person who makes a false statement on entering, or offering to enter, the Royal Naval Reserve, which was created by the Royal Naval Reserve Act, 1859.—WESTHORPE v. POWLEY, *K.B.D.*, 366; [1905] 1 K. B. 286; 74 L. J. K. B. 150; 92 L. T. 57.

NEGLIGENCE:—

1. *Action by father for death of daughter—Damages—Funeral expenses.*—A daughter living with her father having been killed owing to defendants' negligence,

Held, that the father could recover the funeral expenses as damages.—CLARK v. LONDON GENERAL OMNIBUS CO., *K.B.D.*; 92 L. T. 691.

2. *Contract to repair van—Negligence in repairing—Injury to driver — Liability of repairer.*— The defendant agreed with a mineral water manufacturer to keep his vans in good and substantial repair for a period of three years. During the period a servant of the defendant negligently repaired a van, and in consequence thereof one of the wheels came off and the plaintiff, who was a driver in the employment of the mineral water manufacturer and who was driving the van at the time, was thrown off and injured. Neither the defendant nor his servant knew of the defective condition of the van after it was repaired. In an action by the driver against the defendant to recover damages for personal injuries caused by the negligence of the defendant,

Held, that in the circumstances the defendant owed no duty to the plaintiff, there being no contractual relation between them, and the action was not maintainable.—EARL v. LUBBOCK, *C.A.*, 145; [1905] 1 K. B. 253; 74 L. J. K. B. 121; 91 L. T. 830.

3. *Damage by explosion—Absence of exact proof*—Where the precise cause of an accident is not known, there still may be sufficient evidence to render the defendant liable, as when an explosion occurs and the jury acting as reasonable men find under the whole circumstances that there was negligence on the defendants' part, although of the exact cause there is no evidence, or it is unascertainable.—MCARTHUR v. DOMINION CARTRIDGE CO., *P.C.*, 305; [1905] A. C. 72; 74 L. J. P. C. 30; 91 L. T. 698.

4. *Landlord and tenant—Building let in flats—Roof retained by landlord—No express covenant by landlord to keep roof in repair—Negligence in user of roof by landlord.*—The defendant was the owner of a building let out in flats, and the plaintiff was a tenant of one of the flats. The roof was not demised, but remained in the possession and under the control of the defendant. The defendant neglected to clean out the gutters and pipes, and further neglected to repair them after notice had been given to him by the plaintiff, whereby the plaintiff suffered damage.

Held, that apart altogether from any implied obligation upon the defendant to repair the roof retained in his possession and under his control, if there be evidence of negligent user of the roof by him whereby his tenant suffered damage, an action is maintainable by the tenant. — HARGROVES, ARONSON, & CO. v. HARTOPP, *K.B.D.*, 262; [1905] 1 K. B. 472; 74 L. J. K. B. 233; 92 L. T. 414.

NEW SOUTH WALES, LAW of:—

1. *Lunacy Act (No. 45 of 1898)—Procedure—Substituted service of petition—Dispensing with examination of alleged lunatic.*—By section 106 (2) of the Lunacy Act of 1898: "Where personal service" of a petition in lunacy "cannot be effected or is inexpedient, then substituted service may be effected in such manner as may be prescribed by Rules of Court, or as may be ordered by the court."

By section 110: "If it appears to the court to be unnecessary or inexpedient that" an alleged lunatic "should be examined by the court or the jury, the court . . . may dispense with any examination whatever."

In a case in which there was evidence that personal service of the petition was likely to aggravate the malady of the alleged lunatic,

Held, that the court had jurisdiction to direct the petition to be served on the Master in Lunacy, leaving it to him to take all necessary steps in the matter, and that, although the power of dispensing with the examination of the alleged lunatic should be exercised with great caution, it was within the jurisdiction of the court to do so, if a sufficient case was made out.

Judgment of the court below affirmed. — MCLAUGHLIN, RE, *P.C.*; [1905] A. C. 343; 92 L. T. 670.

2. *Public Works Act*, 1900, *s.* 116—*Compensation—Costs of arbitration and action.*—The respondents had become liable to pay to the appellants compensation for preventing them from working minerals belonging to them, and tendered a sum which the appellants refused to accept. The matter was referred to arbitration under the Public Works Act, 1900, of the colony, and the arbitrators awarded a sum smaller than the appellants claimed, but considerably larger than the sum which the respondents had tendered. The respondents, being dissatisfied with the award, gave notice that they desired to have the compensation settled by a jury. The jury awarded a somewhat smaller sum than the arbitrators had awarded, but considerably more than the respondents had originally tendered.

Held, that under section 116 (2) (*b*) of the Public Works Act, 1900, the appellants were liable for the costs of the action and also of the arbitration and award.

Judgment of the court below affirmed.—PACIFIC CO-OPERATIVE STEAM COAL CO. v. RAILWAY COMMISSIONERS, *P.C.*; [1904] A. C. 795; 73 L. J. P. C. 86; 91 L. T. 540.

3. *Sydney Corporation Act*, 1879—*Regulation of sale-yards — Tolls — Bye-law* — Ultrà vires.—The Sydney Corporation Act, 1879 (43 Vict. No. III.), by section 139 empowers the corporation to take tolls "in respect of any cattle intended for slaughter yarded or brought for sale by auction to any sale-yards or premises in the city of Sydney, or within the distance of fourteen miles therefrom."

Held, that the section did not apply to a person bringing his own cattle to his own private yard

and killing them there, and that a bye-law purporting to impose charges in such a case was *ultra vires.*

Judgment of the court below affirmed.—SYDNEY MUNICIPAL COUNCIL *v.* AUSTRAL FREEZING WORKS, *P.C.*; [1905] A. C. 161; 74 L. J. P. C. 33; 92 L. T. 280.

NEW ZEALAND, LAW of:—

1. *Chartered company—Surrender of rights to the Crown—Claim against the Crown.*—Where a statute provided that a chartered land company might surrender the charter of the company to the Crown, and all claim and title to the lands granted to them in the colony, and that on such surrender all the powers and privileges of the company should cease and determine, and all the lands, tenements, and hereditaments of the company in the colony should "thereupon revert to and become vested in her Majesty as part of the demesne lands of the Crown in New Zealand, subject nevertheless to any contracts which might then be subsisting in regard to any of the said lands,"

Held, that on such surrender taking effect the Crown did not assume the position which the company occupied before the surrender, but that all the property of the company reverted to and vested in the Crown in absolute and unqualified dominion, free from any trust cognizable and enforceable by any court of law or equity.

Judgment of the court below affirmed.—RIDDIFORD *v.* REX, *P.C.*; [1905] A. C. 147; 74 L. J. P. C. 37; 92 L. T. 247.

2. *Magistrates' Courts Act,* 1893 (56 *Vict. No.* 55) —*Jurisdiction of stipendiary magistrates.*—The effect of the Magistrates' Courts Act, 1893, is to abolish all separate local jurisdiction in the magistrate's court, and to make every stipendiary magistrate appointed under the Act a magistrate throughout the whole colony, and therefore any magistrate who receives in his official capacity a petition presented under the Alcoholic Liquors Sale Control Act Amendment Act, 1895, and assumes the duty of dealing with it, has jurisdiction to act in the matter.

Judgment of the court below reversed.—BASTINGS *v.* CALLAGHAN, *P.C.*; [1905] A. C. 351; 92 L. T. 734.

3. *Municipal Corporations Act,* 1900, *s.* 219—"*Adjacent*" *borough.*—By the Municipal Corporations Act, 1900, of New Zealand, s. 219, where the council of a borough desires to construct a public work which "will in its opinion be of advantage and benefit to the whole or any considerable portion of the inhabitants of an adjacent borough or county or other district," it may obtain an order that a portion of the cost of construction shall be paid by such other local authority.

Held (affirming the judgment of the court below), that an order to come within the section such "adjacent" borough or district need not be actually contiguous to the borough constructing the work. —WELLINGTON CITY *v.* LOWER HUTT CORPORATION, *P.C.*; [1904] A. C. 773; 73 L. J. P. C. 80; 91 L. T. 539.

4. *Public Works Act,* 1894—*Mining Act,* 1898, *ss.* 109, 233—*Claims for compensation—Method of determining.*—The effect of section 233 of the Mining Act of 1898 is that every claim for compensation in respect of a proclamation made under section 109 of the Act must, if not settled by agreement, be determined by a judge or magistrate, and cannot be treated as undisputed under section 44 of the Public Works Act, 1894, which is incorporated in the Mining Act, even if no notice disputing it is served.

Judgment of the court below affirmed.—HESLOP *v.* MINISTER OF MINES FOR NEW ZEALAND, *P.C.*; [1904] A. C. 781; 73 L. J. P. C. 117; 91 L. T. 544.

5. *Registration of title—How far conclusive—Fraud—Crown grant—Procedure—Resulting trust—City of Glasgow Bank Act,* 1882.—The effect of the Land Transfer Acts of New Zealand is that, in the absence of fraud by the registered owner or his agents, registration is conclusive, and confers a good title on the registered owner, and defects in the proceedings in the Native Land Courts cannot affect the title, but can only give rise to an action for damages.

The fraud which must be proved in order to invalidate the title of a registered purchaser for value must be brought home to the person whose title is impeached, or to his agents. He cannot be affected by the fraud of persons through whom he claims unless knowledge of it is brought home to him or his agents.

Gibbs v. *Messer,* [1891], A. C. 248, explained and distinguished.

A registered owner cannot be considered as a trustee for a person setting up an adverse claim to the land.

Solicitor-General v. *Mere Tini,* 17 N. Z. L. Rep. 773, not followed.

Persons whose duty it is to act upon orders brought to them should act on such an order if good upon the face of it, and should not take any notice of errors in procedure; and therefore it is not the duty of a district land registrar to examine into the validity of a Crown grant, nor to inquire how a governor's warrant was obtained, or into the proceedings of a Native Land Court.

Semble, that a Crown grant, or a warrant or certificate having the statutory effect of a Crown grant, can only be impeached at the instance of the Crown, or in an action to which the Crown is a party; and that a registrar's power to rectify is limited to matters intervening after the Crown grant, or equivalent instrument, which originally brought the land on to the register.

The City of Glasgow Bank Liquidation Act, 1882 (45 & 46 Vict. c. clii.), was not intended to override or control the Colonial Land Transfer Acts.

Judgments of the court below reversed.—ASSETS CO. *v.* MERE ROIHI, *P.C.*; [1905] A. C. 176; 74 L. J. P. C. 49; 92 L. T. 397.

NUISANCE:—

1. *Injunction—Damages—Undertaking—Pleading—Exaggeration in plaintiff's evidence—Special or general damage—Costs.*—Where a plaintiff in action for nuisance by noise and vibration claims an injunction which, or its equivalent undertaking, is granted by the court, and also asks for general damages as ancillary to the real remedy sought, he is not entitled to substantial damages, but is entitled to recover something, not as compensation, but acknowledgment of the wrong he has suffered.

In the absence of misconduct a successful plaintiff who has not failed wholly on one issue in the action will not, subject to the large discretion of the court, be deprived of costs because some of his witnesses have been guilty of exaggeration in their evidence. — LIPMAN *v.* PULMAN, *Ch.D. Kekewich, J.*; 91 L. T. 132.

2. *Trees overhanging neighbour's ground—Damage to neighbour's ground—Right of action.*—The plaintiff was the owner of a fruit garden. The branches of ash trees growing on the defendant's land overhung into the defendant's garden and caused damage to the garden.

Held, that he had a right of action for the damage so caused.—SMITH *v.* GIDDY, *K.B.D.*, 207; [1904] 2 K. B. 448; 73 L. J. K. B. 894; 91 L. T. 296.

PARTITION:—

Sale not claimed—Defendants objecting to partition—Costs to date of hearing—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 10.—The owners of five equal undivided twelfth shares in certain freehold properties brought a partition action against the owners of the remaining seven-twelfths, but did not ask for a sale. The defendants objected to partition.

An order for partition with the usual inquiries having been agreed to, the question arose as to how the costs up to the date of the hearing should be borne, it being agreed that subsequent costs must be shared rateably between plaintiffs and defendants.

Held (following *Richardson* v. *Feary*, 59 L T. Rep. 59, 39 Ch. D. 45), that, having regard to the circumstances of the case, there should be no order as to costs up to the date of the hearing of the action.—HILLS *v.* ARCHER, *Ch.D. Farwell, J.*; 91 L. T. 166.

See also Ceylon, Law of, 1.

PARTNERSHIP:—

1. *Sale to managing partner of another's share—Assets undisclosed*—Uberrima fides—*Action for purchase-money—Action for fraudulent misrepresentation—Settlement of actions—Further discovery of assets—Rescission—Election.*—In a transaction between copartners for the sale by one to the other of a share in the business, the duty rests on the purchaser, who knows, and is aware that he knows more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the assets, and not to conceal what he alone knows; and unless such information has been furnished the sale may be set aside.

Maddeford v. *Austwick*, 1 Sim. 89, approved.

But if the vendor, having learnt from a third party that there are undisclosed assets, and suspecting there may be more, recognizes the sale by suing for an unpaid balance of the purchase-money—still more if he brings an action alleging fraud in the transaction and settles it by accepting even an inadequate sum in discharge of all his claims—then there is a binding election, and there is a no further duty to disclose on the part of the purchaser which will preclude his relying on it as a defence to an action to rescind the sale.—LAW, RE, LAW *v.* LAW, *C.A.*, 227; [1905] 1 Ch. 140; 74 L. J. Ch. 169; 92 L. T. 1.

2. *Stockbroking business—Goodwill—Asset of partnership—Division of assets—Dissolution—Sale.*—T. B. Hill and the defendant carried on business as stockbrokers in London under articles of partnership which contained no mention of goodwill. After the term for which the partnership was constituted expired the business was carried on by them as partners at will, the conditions of the articles being maintained as far as practicable. T. B. Hill died, and the defendant continued to carry on the business under the style of the old firm by permission of the committee of the Stock Exchange. Defendant accounted for Hill's capital, but declined to pay anything in respect of goodwill.

Held, that the nature of a stockbroker's business was not such that there could not be a saleable goodwill thereof; and that, in the absence of any provisions to the contrary in the articles, the goodwill must be sold and the proceeds accounted for.

Wilson v. *Williams*, [1892] 29 L. R. Ir. 176, 40 W. R. Dig. 166, distinguished.—HILL *v.* FEARIS, *Ch.D. Warrington, J.*, 457; [1905] 1 Ch. 466; 74 L. J. Ch. 237.

3. *Trustee—Reversion purchased by trustee—Leaseholds forming part of the trust estate—No right of renewal—Ownership of the fee.*—The doctrine that wherever the reversion on a lease which forms part of a trust estate is purchased by the trustee of the lease the purchase is for the benefit of the trust estate applies only to leaseholds which are renewable by custom or contract. Consequently, in the case of a lease which is not thus renewable, the trustee may buy the reversion on the lease and, in the absence of fraud, hold it for his own benefit.

Longton v. *Wilsby*, 76 L. T. 770, 45 W. R. Dig. 165, explained and followed.—BEVAN v. WEBB, *Ch.D. Warrington, J.*, 651; [1905] 1 Ch. 620; 74 L. J. Ch. 300.

See also Bankruptcy, 8; Practice, 1.

PATENT:—

1. *Infringement—Combination—Subject-matter—Repair.*—The defendants made by way of repair a new rubber tyre for an old patent rim of the plaintiffs and fitted it into the rim to replace the previous rubber tyre, which was worn out. This was done *bonâ fide* by way of repair. The plaintiffs admitted that anyone was entitled to make and sell rubber tyres to fit the rims. The infringement alleged was placing the tyre in the rim.

Held, it is a question of fact in each case whether the work which has been done may fairly be termed a "repair," regard being had in each case to the exact nature of the invention.

Where a subordinate integer is specified and claimed, and a larger combination, of which this integer is part, is also claimed, the patentee is at the peril of justifying the combination, as matter which ought properly to form the subject of a patent of invention; and he does not discharge this burden where there is no novelty or invention in the larger claim, but the combination is merely an obvious one if the subordinate integer is to be used at all.—SIRDAR RUBBER CO. *v.* WALLINGTON & CO, *Ch.D. Swinfen Eady, J.*, 346; [1905] 1 Ch. 451; 74 L. J. Ch. 315; 92 L. T. 564.

2. *Original claim framed in good faith and with reasonable skill and knowledge—Amendment of specification—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 20.—Where, in an action for infringement of their patent, patentees have amended the original specification by way of disclaimer under section 19 of the Patents, &c., Act, 1883, and established at the trial their claim for an infringement of the amended specification as it stands, the court will not, for the purpose of certifying under section 20 that the original specification was framed in good faith and with reasonable skill and knowledge, read the erased portions of the specification; to do so would be in effect to allow the plaintiffs to raise a fresh issue after judgment.—JANDUS ARC LAMP AND ELECTRIC CO. *v.* ARC LAMPS (LIMITED), *Ch.D. Kekewich, J.*; 92 L. T. 447.

See also Design, 1; Trade-Mark, 1, 2.

PERPETUITY—See Charity, 10; Covenant, 1; *Cy-près*, 1; Election, 1, 2; Will, 25, 27.

POOR LAW:—

1. *Maintenance of children—Running away leaving children chargeable to parish—Conviction for—Omission on expiration of imprisonment to remove children from workhouse—Fresh offence—Liability to second conviction—Defect in form of information—Vagrancy*

Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 19.—A person who has been convicted and imprisoned under section 4 of the Vagrancy Act, 1824, and section 19 of the Divided Parishes and Poor Law Amendment Act, 1876, for running away and leaving his children whereby they have become chargeable to the parish, may be proceeded against and convicted a second time for running away and leaving his children chargeable, unless on his release from prison he takes his children out of the workhouse and removes their chargeability, as the leaving his children in the workhouse chargeable to the parish after his release from prison constitutes a fresh substantive offence, for which he may be punished a second time; and he may be convicted for this fresh offence upon an information which charges him with running away and leaving his children whereby they have become and are now actually chargeable to the parish," as the defect in the form of the information by reason of the children being already chargeable can be cured by section 1 of the Summary Jurisdiction Act, 1848. —BANNISTER *v.* SULLIVAN, *K.B.D.*; 91 L. T. 380.

2. *Pauper—Disobedience of order of workhouse officer—"Misbehaviour"—Poor Relief Act*, 1815 (55 *Geo.* 3, *c.* 137), *s.* 5.—Wilful disobedience of the lawful order of an officer of a workhouse is not "misbehaviour" within section 5 of the Poor Relief Act, 1815.—MILE END GUARDIANS *v.* SIMS, *K.B.D.*; [1905] 2 K. B. 200; 74 L. J. K. B. 647; 92 L. T. 238.

3. *Pauper—Wilful refusal to maintain himself—Refusal of work offered on certain conditions at labour colony—Reasonableness of refusal—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.—The respondent, who was an able-bodied man aged thirty-nine years, became an inmate of a workhouse. The labour master took him and other paupers to the labour colony at Hadleigh, Essex, which was established with the sanction of the Local Government Board by the Salvation Army for the reception and employment of destitute men. On signing an agreement to be bound by the rules of the colony the respondent could have started work on probation, receiving in return food and free lodging and 6d. a week. If he had remained on he might have been employed at digging clay for bricks, at which employment he might have earned up to 30s. a week. He, however, refused to sign the agreement, and on subsequently again becoming chargeable to the union was charged as an idle and disorderly person under section 3 of the Vagrancy Act, 1824, by the guardians. The police magistrate before whom the charge was heard refused to convict, but stated a case for the High Court. At the hearing the court decided to remit the case to consider the conditions upon which work had been offered, and whether the pauper's refusal to accept it was or was not in the circumstances reasonable. The magistrate found that the agreement contained conditions by which the colonist was required to undertake to discourage other colonists from entering premises where intoxicating liquors were sold, and to attend the Saturday night roll-call, and other special meetings, which were explained to be a form of (Salvation Army) church parade, and was to attend some place of service once on Sunday. He was of opinion that these were not reasonable conditions to attach to the employment, and consequently that the respondent was justified in refusing work on those conditions, and he accordingly dismissed the information. The guardians again appealed.

Held, that as the conditions, admirable as they were in themselves, had no relation to the work, the refusal to comply with them did not place the respondent in the position of a person who had wilfully refused to maintain himself by work, and therefore the magistrate's decision must be upheld. —POPLAR UNION *v.* MARTIN, *K.B.D.*, 398; [1905] 1 K. B. 728; 74 L. J. K. B. 306; 92 L. T. 197.

4. *Pauper infant—Legacy—Cost of maintenance—Statute of Limitations—Poor Law Act*, 1849 (12 & 13 *Vict. c.* 103), *s.* 16.—Where a pauper infant was chargeable to the guardians of the poor, and became entitled while so chargeable to a legacy under a will,

Held, that the guardians were not limited to the recovery of the cost of one year's maintenance by section 16 of the Poor Law Act, 1849, but could recover the amount expended in maintaining the infant during a period of six years.—CLABBON, RE, *Ch.D. Farwell, J.*, 43; [1904] 2 Ch. 465; 73 L. J. Ch. 853; 91 L. T. 316.

5. *Rating—Poor rate—Application for distress warrant—Objection—Retrospective rate—Jurisdiction of justices—Title of rate—Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 14.—An objection to a rate that it is retrospective cannot be taken on an application for a distress warrant to enforce payment.

The title of a rate complies with section 14 of the Poor Rate Assessment and Collection Act, 1869, if it states the date of the making of the rate and the date up to which the expenses that it is estimated to meet will be incurred.—CHENEY *v.* TALLOWIN, *K.B.D.*; [1904] 2 K. B. 763; 73 L. J. K. B. 943; 91 L. T. 552.

6. *Settlement—Child under sixteen residing with parent—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.—A child, whether legitimate or illegitimate, living with a parent cannot while under the age of sixteen acquire for itself an independent settlement.—WOOLWICH UNION *v.* FULHAM GUARDIANS, *K.B.D.*; [1905] 2 K. B. 203; 92 L. T. 838.

7. *Settlement — Division and amalgamation of parishes.*—A pauper having acquired a settlement by residence in the parish of B., that parish was by the Local Government Act, 1894, divided, part remaining the parish of B. and part becoming the parish of W. The pauper had resided in that portion that became the parish of W.

In 1902, by a provisional order made by the Local Government Board and duly confirmed by a statute, the parish of W., part of the parish of B., together with other parishes, were amalgamated to form the new parish of W., and it provided that "for all purposes of settlement and removal residence prior to the commencement of this order in any part of the existing parishes of B., H., W., T., or W. shall have been deemed to have been residence in the parish in which the part is included by this order."

Held, that the settlement of the pauper in the old parish of B. having been destroyed in 1894, it was not revived by the order of 1902, and that the pauper had not acquired a settlement in the new parish of W.—PRESTON UNION *v.* LEWISHAM UNION, *K.B.D.*; 91 L. T. 498.

8. *Settlement—Husband and wife—Settlement by residence for one year—Departure of husband before completion of year—Continued residence of wife—Whether wife removable when husband has no settlement—Poor Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Union Chargeability Act*, 1865 (28 & 29 *Vict.*

c. 79), s. 8—*Divided Parishes Act*, 1876 (39 & 40 *Vict.* c. 61), s. 35.—A married woman who was married to a foreigner with no settlement of his own went to live in the parish of Birmingham. Before a year had elapsed the husband left the parish, intending to return. The woman remained on, and ultimately became chargeable to the parish.

Held, following *Reg.* v. *St. George's-in-the-East*, L. R. 5 Q. B. 364, that she had become irremovable by virtue of the Poor Removal Act, 1846, s. 1, as amended by section 8 of the Union Chargeability Act, 1865, by which it is provided that no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant for removal. —TEWKESBURY UNION *v.* BIRMINGHAM UNION, *K.B.D.*, 268; [1904] 2 K. B. 395; 73 L. J. B. 797; 90 L. T. 787.

9. *Settlement—Order adjudicating—Judgment* in rem—*Abortive appeal—Conclusiveness of order.*—An order adjudicating on the settlement of a pauper is conclusive as a judgment *in rem* as to the settlement of such pauper, and is none the less conclusive because an abortive appeal has been made against such order, which appeal failed because the notice of appeal was out of time and so was not heard on its merits.—UXBRIDGE UNION *v.* WINCHESTER UNION, *K.B.D.*; 91 L. T. 533.

See also Distress, 1, 5; Public Authorities, 1; Rating, 1, 4.

POWER:—

1. *Appointment—Bankruptcy of donee—Capacity of trustee to release power—Settlement—Limited power of appointment—Ultimate reversion in donee—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), s. 44—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), s. 52—*Lunacy Act*, 1890 (53 & 54 *Vict.* c. 5), s. 120.—Order of Farwell, J. ([1904] 2 Ch. 348), discharged by consent.

On the point decided by Farwell, J.—namely, that the trustee in the bankruptcy of the donee of a limited power of appointment could not release the power for the benefit of the bankrupt's estate, the Court of Appeal expressed no opinion.—ROSE, RE, HASLUCK *v.* ROSE, *C.A.*; [1905] 1 Ch. 94; 74 L. J. Ch. 22; 91 L. T. 821.

2. *Appointment to a class—Donee of power one of class—Right of donee to appoint to herself.*—Where the donee of a power of appointment limited to the members of a certain class is a member of that class herself, it is competent to her to appoint to herself. —TAYLOR *v.* ALLHUSEN, *Ch.D. Kekewich, J.*, 523; [1905] 1 Ch. 529; 74 L. J. Ch. 350; 92 L. T. 382.

See also Election, 1; Jointure, 1; Lunacy, 3.

PRACTICE:—

1. *Action by firm in firm name—Disclosure of partners' names — Affidavit — Cross-examination on affidavit — Issue to determine who were partners—Jurisdiction to direct issue — Ord.* 48A, *rr.* 1, 2.—When an action is brought in the name of a firm and the plaintiffs have, under the provisions of ord. 48A, rr. 1 and 2, stated the names of the persons who were partners in the firm and verified the statement by affidavit, there is no jurisdiction either to order a cross-examination upon the affidavit or to direct an issue to try the question whether those persons were partners.—ABRAHAMS *v.* DUNLOP PNEUMATIC TYRE CO., *C.A.*; [1905] 1 K. B. 46; 74 L. J. K. B. 14; 91 L. T. 11.

2. *Costs—"Costs of the action"—Costs of the application not dealt with in order—"Costs reserved" —Costs "in any event"—"Costs, charges, and expenses of trustee."*—It is the duty of a taxing-master to include in the "costs of the action" all costs expressly disposed of in that way, and the costs of applications the costs of which are not expressly reserved by the order. Where costs are expressly reserved by any order (whether costs of a trustee or beneficiary or both), such costs must be expressly dealt with by the judge, and the effect is that the incidence of those costs, not only as between the plaintiff and defendant, is reserved, and it is the duty of the taxing-master to see they are not included in the bill without further direction from the court.

A trustee who makes an unsuccessful application which is dismissed with costs to the other party "in any event" cannot obtain reimbursement of his own costs under the order giving him costs, charges, and expenses properly incurred; the result being that the trustee must pay personally not only his opponent's costs, but his own.

General observations by the court on the proper method of dealing with "costs of the action."—HOW *v.* WINTERTON, *Ch D. Kekewich, J.*; 91 L. T. 763.

3. *Costs—Security for costs—Bond of foreign company—Ord.* 65, *r.* 7.—There is no general rule that the bond of a foreign company will not be accepted as security for costs.—ALDRICH *v.* BRITISH GRIFFIN CHILLED IRON AND STEEL CO., *C.A.*, 1; [1904] 2 K. B. 850; 74 L J. K. B. 23; 91 L. T. 729.

4. *Costs—Successful defendant—Exercise of judicial discretion—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), s. 49—*R. S. C.*, 1883, *ord.* 65, *r.* 1.—Misrepresentations on matters concerning the public, but which do not in any way concern a plaintiff or the right in respect of which he sues, are not grounds upon which a judge in the exercise of judicial discretion can deprive a successful defendant of costs. Should a defendant be deprived of costs on such grounds he may appeal.—KING *v.* GILLARD, *C.A.*, 598; [1905] 2 Ch. 7; 74 L. J. Ch. 421; 92 L. T. 605.

5. *Costs—Taxation—Action for recovery of land—Landlord and tenant—Costs occasioned by making all persons in possession defendants—Ord.* 65, *r.* 27 (20). —The plaintiff was the holder of four leases for long terms comprising fifty-two houses. The plaintiff's predecessors in title had granted four sub-leases, each comprising a portion of the houses, all of which became vested in the defendant H. Both the leases and the sub-leases contained covenants to repair and conditions for re-entry on breach of covenant. H. let the houses to weekly tenants. The premises having got out of repair, the freeholder served notices under section 14 of the Conveyancing Act, 1881, on the plaintiff. The plaintiff entered into a correspondence with H., from which it appeared that the plaintiff looked to H. as the proper person to do the repairs, and that H. was ready to meet any proceedings that might be taken for non-repair. The plaintiff commenced four actions to recover possession of the houses, the defendants named on the writs being the weekly tenants, who were 119 in number. H. obtained leave to defend the actions, and, having put the houses into repair, applied for relief against forfeiture. Four orders were made by consent, one in each action, granting the defendant H. relief against forfeiture, and directing him to pay the plaintiff's costs as between solicitor and client. On taxation the master taxed the costs of the four actions, and allowed the costs of serving the various defendants with notice of the writs in the respective actions.

Held, that the master ought, having regard to

the object with which the actions were brought, to have disallowed all the costs occasioned by the weekly tenants having been made defendants, but that the form of the consent orders was a bar to the objection that only one action was necessary.—GEEN *v.* HERRING, *C.A.*, 326; [1905] 1 K. B. 152; 74 L. J. K. B. 62; 92 L. T. 37.

6. *Costs—Taxation—Bill paid by executor—Application for taxation by creditor of testator—"Party interested"—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 39.—A creditor of a deceased person, out of whose personal estate an executor has paid, or is liable to pay, a bill of costs, is entitled to obtain taxation of such bill.—JONES & EVERETT, RE, *Ch.D. Buckley, J.*, 59; [1904] 2 Ch. 363; 73 L. J. Ch. 706; 91 L. T. 286.

7. *Discovery—Interrogatory—Libel—Privilege—Information on which libel founded—Name of informant.*—In an action for libel in which the defence of privilege was set up the plaintiff sought to administer an interrogatory as to what information the defendants received which induced them to make the statement and from whom the information was derived.

Held, that the part of the interrogatory which asked from whom the information was derived must be disallowed.—EDMONDSON *v.* BIRCH, *C.A.*; [1905] 2 K. B. 523.

8. *Discovery—Production and inspection of documents—Liberty to take copies—Right to make copies—R. S. C.*, 1883, *ord.* 30, *rr.* 14, 15; *ord.* 65, *r.* 27, *sub-rule* 18.—Under an order for production of documents in the common form, giving the person obtaining the order liberty to inspect and peruse the documents produced, and to take copies and extracts therefrom, the person obtaining such order has the same right to make copies of the documents himself as he had under such an order by the old practice of the Court of Chancery before the passing of the Judicature Acts. Such right is not taken away by sub-rule 18 of rule 27 of order 65, the object of that sub-rule being only to deal with the costs in cases in which an application for copies of documents is made to the opposing party.—ORMEROD, GRIERSON, & CO. *v.* ST. GEORGE'S IRONWORKS, *C.A.*, 502; [1905] 1 Ch. 505; 74 L. J. Ch. 373; 92 L. T. 544.

9. *Frivolous and vexatious applications—Abuse of process of the court—Order prohibiting further applications.*—Before the trial of the action the defendant made twenty-four interlocutory applications, most of which were dismissed and the remainder proved abortive. None of the costs incurred in these applications had been paid by the defendant.

Held, that there was jurisdiction to make an order prohibiting any further application by the defendant without the leave of the judge in chambers. — KINNAIRD *v.* FIELD, *C.A.*; 74 L. J. Ch. 554.

10. *Interrogatories—Action for libel—Plea of privilege—Name of informant.*—In an action against a trade protection association for libel for having published a statement as to the plaintiffs' solvency, the plaintiffs applied for leave to administer two interrogatories, the first asking whether the defendants before publishing the statement complained of made any and what inquiries as to the truth thereof, and from whom they obtained the information on which they relied in making the statement; and the second asking the defendants to give by reference to their books or otherwise the names of the companies, firms, and persons to whom the book containing the statement complained of was shown by them or their agents. The defendants objected to the last part of the first interrogatory and to the second interrogatory. The judge at chambers having allowed them,

Held, that as the plaintiffs could ask as to the inquiries made by the defendants before publishing the statement complained of, the name of the person giving the information on which they relied in making the statement was material as to the value to be attached to the information, and that therefore the interrogatory was allowable; but that the second interrogatory was oppressive and ought not to be allowed.—WHITE & CO. *v.* CREDIT REFORM ASSOCIATION, *C.A.*, 369; [1905] 1 K. B. 653; 74 L. J. K. B. 419; 92 L. T. 817.

11. *Joint debtors—Judgment signed against one joint debtor—Bar to further proceedings—Ord.* 14, *r.* 5.—Ord. 14, r. 5: If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has no such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

A. took out a summons under ord. 14, r. 2, against B., C., and D., who were alleged to be jointly indebted to him. B. took no further part in the proceedings, but C. and D. showed cause by filing affidavits. On the hearing of the summons leave was given to sign judgment against B., and liberty to C. and D. to defend. A. signed judgment against B.

Held, although B., C., and D. were sued as jointly liable and judgment was signed against B., yet that was not a bar to further proceedings against C. and D., the general rule of law, as laid down in *McLeod v. Powell*, [1898] 2 Ch. 295, being no longer applicable to cases falling under ord. 14, r. 5.—WALTON & CO. *v.* TOPAKYAN & CO., *C.A.*, 657.

12. *Judgment—Interest—Action for unliquidated damages—Judgment reversed by Court of Appeal and entered for plaintiff—Date from which interest runs—Ord.* 41, *r.* 3; *ord.* 58, *rr.* 1, 4.—Where in an action in the High Court to recover unliquidated damages judgment is entered for the defendants at the trial, but this judgment is reversed on appeal and directed to be entered for the plaintiff for damages to be assessed, interest is payable on the amount of the damages when assessed as from the date of the judgment of the Court of Appeal and not as from the date of the original judgment at the trial, unless the Court of Appeal, acting under ord. 41, r. 3, ante-dates the judgment. The power of ante-dating a judgment ought only to be exercised upon some good ground, as, for instance, where the damages have been wrongfully withheld, or where there has been some unreasonable act on the part of the defendant causing the delay in the ascertainment of liability.—BORTHWICK *v.* ELDERSLIE STEAMSHIP CO., *C.A.*, 643; [1905] 2 K. B. 516; 74 L. J. K. B. 772.

13. *New trial—Excessive damages—Power of Court of Appeal to reduce—Consent of both parties.*—In an action for tort the Court of Appeal has no jurisdiction to order the reduction of the damages given by the jury without the consent of both parties to the litigation.

Belt v. *Lawes*, 32 W. R. 607, 12 Q. B. D. 356, overruled.—WATT *v.* WATT, *H.L.*, 547; [1905] A. C. 115; 74 L. J. K. B. 438; 92 L. T. 480.

14. *Order* 14 — *Action on foreign judgment — Substantial question for trial.*—Leave should not be given to sign judgment under order 14 unless it is clear that there is no real substantial question to be tried. Therefore, when, in an action on a foreign judgment, the defendant made an affidavit that the judgment had been obtained by fraud,

Held (reversing the judgment of the court below), that the plaintiff should not be allowed to sign judgment under order 14.—CODD *v.* DELAP, *H.L.*; 92 L. T. 510.

15. *Payment into court—Admission of liability as to part of a claim—Denial of liability as to rest of claim—Costs—Issues on which defendants fail—R. S. C.*, 1883, *ord.* 22, *rr.* 1, 6; *ord.* 65, *r.* 1.—Payment into court—with an admission of liability as to part of a claim but denial of liability as to the rest—of a sum larger than is eventually recovered by the plaintiff in the action, does not relieve the defendant so paying from the necessity of paying the costs of issues on which he fails.—HUBBACK *v.* BRITISH NORTH BORNEO CO., *C.A.*, 70; [1904] 2 K. B. 473; 73 L. J. K. B. 654; 91 L. T. 672.

16. *Payment out of court—Evidence—Presumption of death—Security to refund.*—Where an application is made for payment out by persons claiming as upon a presumption of death, and the court is satisfied with the evidence, it is not in accordance with modern practice for the court to require security to refund before making the order for payment out.—B——'s TRUSTS, RE, *Ch.D. Warrington, J.*, 491.

17. *Pleading—General allegations of title—Embarrassing statement of claim—Further and better particulars—Ord.* 19, *rr.* 4, 21.—The statement of claim in an action to restrain alleged trespass on the bed of a watercourse set out that the plaintiffs were, as owners in fee and occupiers of a watermill and appurtenances, entitled in fee in possession to the bed, and also to certain specified easements and rights over the banks. The defendants having obtained an order for particulars, the plaintiffs delivered an amended statement of claim, which represented that the fee simple of the watercourse was, by a deed of the 23rd of February, 1805, the parties to which were specified, conveyed to a specified person, "the predecessor in title of the plaintiffs," and passed under a general conveyance therein of watercourses belonging to the mill. Alternatively the plaintiffs pleaded a possessory title. With respect to the rights and easements, the amended statement of claim alleged that the plaintiffs were entitled to them by prescription, or alternatively by admissions contained in a memorandum of agreement dated the 1st of November, 1886, and made between a specified party and "the plaintiffs' predecessor in title." An application by the defendants for further and better particulars having been refused, they moved to discharge the order, and for an order for such particulars, and that unless they were delivered proceedings might be stayed; or alternatively that the words "predecessor in title" might be struck out as embarrassing.

Held, that the amended statement of claim was not embarrassing, as it made plain to the defendants what case they had to meet, and what the point in dispute would be; and that the application must therefore be refused.—PLEDGE *v.* POMFRET, *Ch.D. Joyce, J.*; 74 L. J. Ch. 357; 92 L. T. 560.

18. *Service—Writ—Scottish corporation—Branch office in England—"Statutory provision regulating service of process"—Citation Amendment (Scotland) Act*, 1882 (45 & 46 *Vict. c.* 77), *s.* 3—*Ord.* 9, *r.* 8.—The plaintiff, who was resident in Scotland, issued a writ in England against the Bank of Scotland in respect of a cause of action which arose in Scotland. The bank was incorporated by an Act of the Parliament of Scotland, where its head office was, but neither in that Act nor in any subsequent Act relating to the bank was there any provision as to service of process on the bank. The writ was served on the manager of the London branch of the bank at the London office.

Held, that the bank was in the same position as a foreign corporation carrying on business within the jurisdiction, and could be served here under ord. 9, r. 8, there being no "statutory provision regulating service of process," the Citation Amendment (Scotland) Act, 1882, only applying to process issued from the courts of Scotland.—LOGAN *v.* BANK OF SCOTLAND, *C.A.*, 39; [1904] 2 K. B. 495; 73 L. J. K. B. 794; 91 L. T. 252.

19. *Service out of the jurisdiction—Writ—Contract to be performed within the jurisdiction—Action for price of goods sent abroad—No express stipulation as to place of payment—Ord.* 11, *r.* 1 (*e*).—The court has jurisdiction to allow service of a writ or notice of a writ out of the jurisdiction under ord. 11, r. 1 (*e*), if it appears, having regard to the contract generally and the circumstances, that the contract is one which ought to be performed within the jurisdiction, although it does not state in express terms that it is to be performed within the jurisdiction.

The rule to the above effect laid down in *Reynolds* v. *Coleman*, 35 W. R. 813, 35 Ch. D. 453, and followed in *Rein* v. *Stein*, [1892] 1 Q. B. 753, 40 W. R. Dig. 191, has not been overruled by *Comber* v. *Leyland*, [1898] A. C. 524, 47 W. R. Dig. 159.—DUVAL & CO. *v.* GANS, *C.A.*, 106; [1904] 2 K. B. 685; 73 L. J. K. B. 907; 91 L. T. 308.

20. *Striking out defence—Motion for judgment in default of defence—Joinder of motions—Ord.* 27, *r.* 11—*Ord.* 31, *r.* 21.—Where a plantiff moves, under ord. 31, r. 21, to have a defendant's defence struck out for non-compliance with an order to answer interrogatories, there is no objection to his joining with such motion a motion for judgment as upon his statement of claim in default of defence, but such motion for judgment must be set down and two separate orders should be made.

In re Hartley, 91 Law Times Journal, 229, discussed and followed.—SALOMON *v.* HOLE, *Ch.D. Warrington, J.*, 588.

21. *Striking out statement of claim—"Reasonable cause of action"—Agreement not to be performed within a year—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4—*Ord.* 25, *r.* 4.—In an action brought upon an alleged breach of agreement, it appeared from the statement of claim that the agreement was one which was not to be performed within one year from the making thereof, but there was nothing in the statement of claim or the particulars to indicate the existence of any memorandum or note of the agreement in writing to satisfy the requirements of section 5 of the Statute of Frauds.

Upon an application by the defendant that the statement of claim should be struck out under ord. 25, r. 4,

Held, that the statement of claim disclosed a reasonable cause of action, and therefore ought not to be struck out.—FRASER *v.* PAPE, *C.A.*; 91 L. T. 340.

22. *Third party—Reinsurance—Action on policy of marine insurance—Right of underwriter to bring in reinsuring underwriter—Ord.* 16, *r.* 48.—In an

action on a policy of marine insurance against an underwriter who has effected a policy of re-insurance, the original underwriter cannot bring in the reinsuring underwriter as a third party under ord. 16, r. 48.—NELSON *v.* EMPRESS ASSURANCE CORPORATION, *C.A.*, 648; [1905] 2 K. B. 281; 74 L. J. K. B. 699.

23. *Writ—Amended writ—Filing—Non-appearing defendant—Re-service—Direction of court—R.S.C.*, 1883, *ord.* 9, *r.* 2; *ord.* 16. *r.* 13; *ord.* 17, *r.* 4; *ord.* 19, *r.* 10; *ord.* 28, *rr.* 1, 10; *ord.* 67, *rr.* 4, 5.—An amended writ is not a document in respect of which personal service is requisite by the Rules of the Supreme Court, and may, therefore, under rule 4 of order 67 be served on a defendant who has not appeared by filing it with the proper officer. When this is done the court has jurisdiction to try the action as against such a defendant. But though there is no hard and fast rule requiring service of an amended writ on a non-appearing defendant, the court has a discretion in the matter, and if by the amendment of the writ a substantial alteration is made in the character of the action, the court may either require re-service of such amended writ on the non-appearing defendant as a term of permitting the amendment, or on the case coming on for hearing may direct it to stand over until the alteration that has been made has been brought to the personal notice of the defendant.—JAMAICA RAILWAY CO. *v.* COLONIAL BANK, *C.A.*, 564; [1905] 1 Ch. 677; 74 L. J. Ch. 410; 92 L. T. 548.

PRINCIPAL AND AGENT:—

1. *Action—Election—Judgment against agent—Setting aside—Reviving rights against principal.*—Two defendants, M. and W., having been sued in the High Court for goods sold and delivered, judgment was entered against M., and the action as against W. was remitted for trial to the county court. At the trial it was found that the debt was contracted by W. alone, and that M. had merely acted as his agent.

Judgment was postponed, and the judgment against M. was set aside. The learned county court judge then entered judgment against W.

Held, that the judgment against W. was wrong, as the plaintiffs had conclusively elected to enforce their remedy against M.—CROSS *v.* MATTHEWS, *K.B.D.*; 91 L. T. 500.

2. *Commission—Sale of house—"When and if the purchase is completed by private treaty."*—The defendant, who had a house for sale, agreed with the plaintiff that if the latter introduced to him a person within a week who should become the purchaser of the house, he would pay the plaintiff as and by way of commission a sum of £50 "when and if the purchase is completed by private treaty." The plaintiff introduced a lady, who signed a contract to purchase the house and paid the defendant a deposit. The lady was, however, unable to carry out the contract, and an arrangement was come to between her and the defendant that the latter should release from the contract and should retain the deposit, and this was done. The plaintiff having claimed commission,

Held, that the commission was payable only in the event of the purchase being completed in the ordinary legal meaning of the word by the execution of the conveyance and the handing over of the purchase-money, and that, as the purchase went off through no default of the vendor, the plaintiff was not entitled to commission.

Judgment of the Divisional Court (52 W. R. 478) reversed.—CHAPMAN *v.* WINSON, *C.A.*, 19.

3. *Delivery of goods—Duty at custom house—Delay—Obligation undertaken.*—Apart from express provision, it is no part of a shipping agent's duty to expedite the passing of goods through the custom house so as to escape a contemplated duty, where such duty is equally in the knowledge of his principal, and no wilful misconduct is imputed to the agent.—COMMONWEALTH PORTLAND CEMENT CO. *v* WEBER, *P.C.*, 337; [1905] A. C. 66; 73 L. J. P. C. 25; 91 L. T. 813.

4. *Misrepresentation of authority—Liability of agent—Measure of damages.*—A person who induces another to contract with him as the agent of a third party by an unqualified assertion of his authority to act as such agent is answerable to the person who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. But the measure of damages is the loss actually sustained by the principal in consequence of the misrepresentation, and does not extend to profits which he might have made if the representation had been true.

Collen v. *Wright*, 8 E. & B. 647, distinguished.

Judgment of the court below affirmed, with a variation.—SALVESEN *v.* STEAMSHIP "OSCAR II.," *H.L.*; [1905] A. C. 302; 92 L. T. 575.

5. *Moneys intrusted to agent for special purpose—Moneys not accounted for—Recovery—Fiduciary relation—Express trust—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—Where an action was brought to recover from the defendant the balance of certain moneys remitted to him by the plaintiffs for a special purpose and not accounted for, and it was found on the evidence that the defendant was the agent, and consequently an express trustee for the plaintiffs of the moneys so remitted to him, and also fraudulent, the Statute of Limitations, upon which the defendant relied as a defence to the action, was, under the circumstances of the case, held to be unavailable.

Decision of Kekewich, J. (89 L. T. 602), affirmed.—NORTH AMERICAN LAND AND TIMBER CO. *v.* WATKINS, *C.A.*; [1904] 2 Ch. 233; 73 L. J. Ch. 626; 91 L. T. 425.

6. *Power of attorney given by mortgagee—No reference to exercise of mortgagee's statutory power of sale—Power to give receipts—Insufficiency of power—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-section* (i.); *s.* 21, *sub-section* 4.—A power of attorney empowering the attorney "to ask, demand, sue for, recover, and receive all sums of money . . . owing or payable" to the donor of the power "by virtue of any security . . . and to give, sign, and execute receipts, releases, and other discharges for the same, . . . also to sell any real or personal property now and hereafter belonging to" the donor was held not to authorize the attorney to exercise the statutory power of sale vested in the donor as mortgagee in possession of real estate by virtue of section 19, sub-section (*i.*), of the Conveyancing and Law of Property Act, 1881.

Decision of Kekewich, J., affirmed.

Section 21, sub-section 4, of the same Act does not extend to every one who has the power of giving receipts and discharges, and does not include a person who has that power only as an agent, but is intended to apply merely to those persons who are either mortgagees or have vested in them the property of mortgagees—*e.g.*, executors.—DOWSON AND JENKINS' CONTRACT, RE, *C.A.*; [1904] 2 Ch. 219; 73 L. J. Ch. 684; 91 L. T. 121.

7. *Secret commission—Out of pocket expenses—*

Receipt by agent of discount on printers' and advertising bills—Bona fides—*Right to commission.*—The defendants, who were auctioneers, were employed by the plaintiff to sell certain articles, and they were to receive a certain commission and to be paid all out of pocket expenses.

In their accounts they rendered to the plaintiff the gross amount of the printing and advertising, although in fact they received a discount. They retained these discounts *bonâ fide* believing they were entitled to do so by a custom, and did not disclose the fact of such retention to the plaintiff.

Held, that the plaintiff was entitled to these discounts, but that as the defendants had acted *bonâ fide*, and that as the duty to account for out of pocket expenses was incidental and had no bearing upon the duty that the defendants had to perform as auctioneers, they were entitled to their commission.

Andrew v. *Ramsay*, 89 L. T. Rep. 450, [1903] 2 K. B. 635, considered and distinguished.—HIPPESLEY *v.* KNEE, *K.B.D*; [1905] 1 K. B. 1; 74 L. J. K. B. 68; 92 L. T. 20.

8. *Secret commission—Right of principal to recover from sub-agent—Fiduciary relation—Declaration with respect to commission payable in the future.*—The defendants, being desirous of raising money by the issue of debentures in a company which they were promoting, applied to the plaintiffs for that purpose, offering them commission on the amount of the debentures issued. The plaintiffs arranged with C. that he should endeavour to obtain the required sum for the defendants from a certain society, and that he should receive a share of the commission. C. accordingly introduced the defendants to the the society, and the society found the required sum and the debentures were issued through their instrumentality. C. received a secret commission from the society, and by an agreement between him and them certain further sums were to be payable by them to him in the way of commission on the transaction. The plaintiffs having brought an action against the defendants to recover the commission agreed between them, the defendants counterclaimed against the plaintiffs and C. to recover the amount of the secret commission.

Held, that the defendants were entitled to recover from C. the amount of the secret commission which he had received, and also to a declaration that, if C. should at any time receive further sums as commission from the society, he should become indebted to the defendants for such sums as he should receive them; but that they were not entitled to a declaration that C. was a trustee for them in respect of money which he might thereafter receive from the society.—POWELL *v.* EVAN JONES & Co., *C.A.*, 277; [1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430.

PROBATE:—

1. *Will—Codicils of even date—Inconsistency—Simultaneous execution—Admissibility to probate—Function of a Court of Probate—Limit of parol evidence—Person entitled to administration.*—Where a testator leaves two varying testamentary documents of even date or undated, and it is not known which was executed last, both are *primâ facie* admissible to probate. In such a case a Court of Probate must act as a court of construction so far as to ascertain whether the documents can stand together. If one of them purports wholly to revoke the other, or they be wholly irreconcilable, then neither document can be proved; but if they can be reconciled in part, they should both be admitted to probate and their effect afterwards determined by a court of construction.

Testatrix, by will in 1863, executed in favour of her husband a power of appointment in the marriage settlement, and bequeathed to him all her property, appointing him sole executor. On the 6th of October, 1891, she executed two holograph codicils, each commencing "Whereas I have bequeathed all my property to my husband, now in case I survive him I hereby appoint A. and B. to be executors. At the decease of my husband and myself . . . " here followed in each codicil a number of legacies and a gift of residue. These provisions were in great measure identical in both documents, but there were some important differences, and there was no evidence as to which had been executed last. Testatrix died in 1892, and her husband in 1902 without having obtained probate. On the residuary legatees seeking to establish the will and codicils,

Held, that the codicils were not conditional on the wife surviving her husband, and that the condition only affected the appointment of executors.

Held, further (*dissentiente* Cozens-Hardy, L.J.), that the codicils were not so inconsistent as to be incapable of standing together, and that both must be admitted to probate as simultaneously executed, and their effect afterwards determined by a court of construction.

And held, that since the husband, as executor, had not obtained probate, though he had intermeddled in the estate, his executor was not entitled to administration.

Lemage v. *Goodban*, L. R. 1 P. & D. 57, 14 W. R. Prob. Dig. 21; *In the Goods of Petchell*, 22 W. R. 353, L. R. 3 P. & D. 153; and *Jenner* v. *Ffinch*, 28 W. R. 520, 5 P. D. 106, approved and followed.—TOWNSEND *v.* MOORE, *C.A.*, 338; [1905] P. 66; 74 L. J. P. 17; 92 L. T. 335.

2. *Costs—New rule—R. S. C., ord.* 65, *r.* 14 (*d*).—Under the additional rule (ord. 65, r. 14 (*d*)) the court ordered the costs of both plaintiff and defendant to be charged on and paid out of the *corpus* of certain real estate devised by the will to successive life tenants.

[In another case, the costs of all parties were ordered to be paid out of the residuary shares of four defendants (there being six in all, interested under the will in the residuary estate of the testator), these four defendants being held to have caused the litigation.]—DEAN *v.* BULMER, *P.D. & Ad.D.*; [1905] P. 1; 74 L. J. P. 12; 92 L. T. 426.

3. *Lunacy of one of the executors after proving will—Revocation of probate—Fresh grant to remaining executors—Form of grant—Practice.*—Where one of the three executors, who had proved a will, subsequently became of unsound mind, the court, on the application of the others, revoked the grant and made a fresh grant of probate to the applicants, reserving power to the lunatic, in case he should become of sound mind and apply, to join in the probate.—SHAW, IN THE ESTATE OF, *P.D. & Ad.D.*; [1905] P. 92; 74 L. J. P. 39; 92 L. T. 428.

4. *Misconduct—Administration—Grant—Citation—Practice—Administration of Estates Act*, 1529 (21 *Hen.* 8, *c.* 5)—*Widow passed over on account of marital misconduct.*—On an application for a grant of administration to the son of an intestate, passing over the widow on the ground of marital misconduct, which had been established in a suit by the intestate, the court made the grant to the son without requiring the widow to be cited.

In the Goods of Middleton, (1888) 14 P. D. 23, distinguished.—FROST, IN THE ESTATE OF, *P.D.*

& Ad.D.; [1905] P. 140; 74 L. J. P. 53; 92 L. T. 667.

5. *Revocation — Dependent relative revocation—Unfulfilled intention to execute fresh will.*—The doctrine of dependent relative revocation may apply to a case where the document intended to be substituted for that which was destroyed is non-existent and has never existed as a valid testamentary paper. (So held by Gorell Barnes, J.)

Upon a finding of fact that the testator destroyed his will with the intention that it should be revoked conditionally on his executing a fresh will.

Held (by Gorell Barnes, J.), that, as he did not execute a fresh will, the will destroyed was entitled to probate.—DIXON *v.* SOLICITOR TO THE TREASURY, *P.D. & Ad.D.*; [1905] P. 42; 74 L. J. P. 33; 92 L. T. 427.

6. *Revocation—Will appointing executor—Suppression of will—Letters of administration—Grant of—Revocation of grant—Acts of administrator.*—A grant of letters of administration obtained by suppressing a will which appointed an executor is void *ab initio*, and all dispositions of the assets by the supposed administrator are void also, except acts done in a due course of administration.

Abram v. *Cunningham* (1677) 2 Lev. 182, and *Graysbrook* v. *Fox*, (1564) 1 Plowd. 275, examined and applied.—ELLIS *v.* ELLIS, *Ch.D. Warrington, J.*, 617; [1905] 1 Ch. 613; 74 L. J. Ch. 296; 92 L. T. 727.

7. *Sureties—Practice — Administration — Nominee of Board of Education—Sureties dispensed with.*—The court dispensed with sureties to the administration bond where the person applying for administration was a nominee of the Board of Education.—BRYAN, IN THE ESTATE OF, BOARD OF EDUCATION *v.* REUBELL, *P.D. & Ad.D.*; [1905] P. 88; 74 L. J. P. 41; 92 L. T. 426.

See also Will, 2, 23.

PUBLIC AUTHORITIES:—

1. *Guardians—Time for bringing action or proceedings—Liabilities of public authority under contract — Arbitration — Time fixed for payment — Public Authorities Protection Act*, 1893 (56 & 57 *Vict.* c. 61) —*Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict.* c. 49), *ss.* 1, 3.—Guardians contracted with S. to convert a house into a suitable residence for their poor children. The contract contained an arbitration clause.

The guardians paid S. the sum agreed, and S. made a further claim against them in respect of damage sustained by him through their default, and the claim was referred to arbitration. The reference took place more than a year after the work was finished and the original sum mentioned in the contract paid.

The guardians at the arbitration took two preliminary legal objections (1) that the claim made by S. was a claim arising in respect to a public duty of the guardians, and that proceedings to enforce such claim should have been commenced within six months' time under the Public Authorities Protection Act, 1893; (2) that the claim of S. could not, in view of the time that had elapsed, be legally satisfied under the Poor Law (Payment of Debts) Acts, 1859, it being impossible to pay the same within the half year in which the same became due, or within three months after the expiration of such half-year.

An action was by agreement brought by S. against the guardians in the Chancery Division to determine these points.

Held, (1) that the duty of the guardians to S. was of a private and not of a public character, and that the Public Authorities Protection Act, 1893, had no application; (2) that the sum owing to S. in respect of his claim did not become due within the meaning of the Poor Law (Payment of Debts) Act, 1859, until the same had been fixed by arbitration.—SHARPINGTON *v.* FULHAM GUARDIANS, *Ch.D. Farwell. J.*; [1904] 2 Ch. 449; 73 L. J. Ch. 777; 91 L. T. 739.

2. *Justices — Illegal distress — Action against magistrate issuing warrant—Statutory limitation for commencement of action—Act from which time begins to run—Public Authorities Protection Act*, 1893 (56 & 57 *Vict.* c. 61), *s.* 1 (*a*).—In an action for illegal distress against a magistrate, the six months within which the action must be brought, as provided by the Public Authorities Protection Act, 1893, begins to runs from the date of the levy on the premises and not from the date of the conviction, the distress being the act complained of.—POLLEY *v.* FORDHAM, *K.B.D.*, 48, 188; [1904] 2 K. B. 345; 73 L. J. K. B. 687; 90 L. T. 755.

3. *Limitation of actions—Action against public authority—Injury to person on tramway worked by municipal corporation—Act done in execution of Act of Parliament or public duty—"Neglect or default" —"Person"—Public Authorities Protection Act*, 1893 (56 & 57 *Vict.* c. 61), *s.* 1.—Where an action was brought against a municipal corporation working a tramway to recover damages for personal injury sustained by the plaintiff while a passenger on such tramway, through the alleged neglect or default of the defendants' servants, the defendants were held entitled to rely on the defence that the action had not been commenced within six months after the neglect or default complained of, the act of the defendants in the carriage of passengers being something done in the execution of their Act of Parliament as a public authority entitled to the benefit of such protection as was given by section 1 of the Public Authorities Protection Act, 1893.

The plaintiff's cause of action did not depend on contract, but arose out of a breach of duty to carry the plaintiff safely cast upon the defendants by the fact of his being a passenger; and such breach of duty was a neglect or default in such execution within the meaning of the section.

Decision of Bigham, J., affirmed.—LYLES *v.* SOUTHEND-ON-SEA CORPORATION, *C.A.*; [1905] 2 K. B. 1; 74 L. J. K. B. 484; 92 L. T. 586.

4. *Limitation of actions—Public Authorities Protection Act*, 1893 (56 & 57 *Vict.* c. 61), *s.* 1, *sub-section* (a)—*Negligence causing death—Action by personal representative—Fatal Accidents Act*, 1846 (9 & 10 *Vict.* c. 93).—The plaintiff's husband was injured by a negligent act of the defendants, done in the execution of a public duty, and in consequence thereof he died after the expiration of six months from the date of his injuries, without having brought an action against the defendants to recover damages. Within six months after his death his widow, who was his personal representative, brought an action under the Fatal Accidents Act, 1846, to recover damages for his death.

Held, that as the negligent act of the defendants causing the injury occurred more than six months before the death of the injured man, an action by the latter to recover damages would have been barred by section 1 (*a*) of the Public Authorities Protection Act, 1893, and therefore the action by the plaintiff was barred.—WILLIAMS *v.* MERSEY DOCKS AND HARBOUR BOARD, *C.A.*, 488; [1905] 1 K. B. 804; 74 L. J. K. B. 481; 92 L. T. 441.

See also Highway, 6.

PUBLIC HEALTH:—

1. *Drain or sewer—Premises within the same curtilage—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55).—Eighteen houses separately occupied are not "premises within the same curtilage" merely because they have a common access and a certain amount of common accommodation in the way of ashpits and water-closets.

Therefore an open channel taking the slop water from such houses is a sewer and not a drain within section 4 of the Public Health Act, 1875.—HARRIS *v.* SCURFIELD, *K.B.D.*; 91 L. T. 536.

2. *Unsound meat—Carcase deposited for purpose of sale—No exposure for sale—Offence—Person to whom article "belongs or did belong at the time of exposure for sale"—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act,* 1890 (53 & 54 *Vict. c.* 59), *s.* 28.—The owner of unsound meat who has deposited the same for the purpose of sale and intended for the food of man, upon premises other than his own where it is seized before it has been exposed for sale, does not, by so depositing the meat—there being no exposure for sale—become liable to a penalty either under section 117 of the Public Health Act, 1875, taken by itself, or under that section as amended and extended by section 28 of the Public Health Acts Amendment Act, 1890.

Barlow v. *Terret,* [1891] 2 Q. B. 107, followed.—FIRTH *v.* MCPHAIL, *K.B.D.*; [1905] 2 K. B. 300; 74 L. J. K. B. 458; 92 L. T. 567.

3. *Unsound meat—Exposed or deposited for sale—No evidence that, at the time of seizure on butcher's premises, meat would be sold for the food of man—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117.—The mere fact of unsound meat being found on premises where, in the ordinary course of business, it would be exposed for sale for the food of man is, in the absence of evidence that the unsound meat was in fact intended to be exposed and offered for sale, insufficient to constitute an offence within section 117 of the Public Health Act, 1875.

Mallinson v. *Carr,* 39 W. R. 270, [1891] 1 Q. B. 48, considered and distinguished.—WIELAND *v.* BUTLER-HOGAN, *K.B D*, 63; 73 L. J. K. B. 513; 90 L. T. 588.

RAILWAY:—

1. *Carriage of goods—Intent to avoid payment of "tolls"—Railways Clauses Act,* 1845 (8 & 9 *Vict. c.* 20), *ss.* 98, 99.—By sections 98 and 99 of the Railways Clauses Acts, 1845, the owner of goods passing or being upon the railway is bound on demand to give an account, and if he gives a false account with intent to avoid the payment of any tolls in respect thereof he is lable to a penalty.

Held, that under the above sections no express demand is necessary where there is evidence that there was an implied demand, that it is not necessary that the goods should be on the railway at the time the demand is made, and that the sections apply to cases where the railway company themselves are acting as carriers.—MOERING *v.* LONDON AND NORTH-WESTERN RAILWAY CO, *K.B.D.*, 605; [1905] 2 K. B. 113; 74 L. J. K. B. 540; 92 L. T. 421.

2. *Minerals—Lying under and near railway—Compensation for preventing working of minerals—Interest—Railways Clauses Act,* 1845 (8 & 9 *Vict. c.* 20), *s.* 78.—Where a mine owner gives notice to a railway company, under section 78 of the Railways Clauses Act, 1845, of his intention to work the minerals lying under or near the railway, and the railway give a counter-notice to the mine owner that the working of the minerals will be likely to damage the works of the railway, and that they are willing to make compensation for preventing the working of the minerals, and the question of the amount of compensation is referred to arbitration, the arbitrator has no power to award interest upon the compensation money from the date of the counter-notice to the date of the award.—RICHARD AND GREAT WESTERN RAILWAY CO., RE, *C.A.*, 83; [1905] 1 K B. 68; 74 L. J. K. B. 9; 91 L. T. 724.

3. *Private Act—Bridge over canal—Obligation to maintain at specified height—Subsidence.*—By the Rhymney Railway Act, 1882 (45 & 46 Vict. c. cclx.), *s.* 10, it was provided: "For the protection of the . . . canal company, the following provisions shall have effect: (*a*) The railways and works by this Act authorized shall not when completed interfere with the locks, waterway, or towing-path of the canal except by the bridge carrying the railway across the canal and towing-path, which bridge shall have a clear height of eight feet from the present level of the towing-path to the underside of the arch. (*b*) Neither during the construction of the bridge nor at any other time shall the free passage of traffic along the canal or towing-path be impeded."

The bridge was duly constructed in accordance with the Act, but afterwards the ground subsided from causes beyond the control either of the railway company or the canal company, so that the bridge was at a lower elevation above the towing-path and was an obstruction to the traffic.

Held (affirming the judgment of the court below), that the railway company were bound to maintain the bridge at the height above the towing-path prescribed by the Act.—RHYMNEY RAILWAY CO. *v.* GLAMORGANSHIRE CANAL CO. *H.L.*; 91 L. T. 113.

4. *Private owner—Agreement—Clause for protection of landowner—Third party*—Ultrà vires—*Bexley Heath Railway Act,* 1887 (50 & 51 *Vict. c. lxxx.*), *s.* 19—*South-Eastern and London, Chatham and Dover Railway Companies Act,* 1899 (62 & 63 *Vict. c. clxviii.*).—By a private Act of Parliament a a railway company were authorized to construct a line through the land of a private owner, H. B. By a section of the Act, after stating that it was for the protection of H. B., his heirs and assigns, and that certain provisions should, unless otherwise agreed, have effect, it provided, *inter alia,* that, *e.g.* the company should construct and maintain a station with all proper access and accommodation for passengers and goods to and from the estate of the owner, H. B., at a certain point. The defendants, as the successors in title to the said railway company, and in whom all their obligations were now vested, had agreed with the plaintiff, the owner of an adjoining estate, to remove the said station, and in lieu thereof erect another on ground adjoining the estate of the plaintiff in a more convenient situation. They had acted in *bonâ fide* ignorance of the above-mentioned provisions. On their discovering their mistake they refused to carry out the agreement.

Held, that the provisions in the Act were simply for H. B.'s benefit, his heirs and assigns, and that there was nothing to show it was for the benefit of the public. That that being so, the provisions were capable of being released by H. B., and that therefore, it being in the nature of an agreement to obtain such consent, it was not *ultrà vires* on the part of the defendants, but they would be liable in damages for breach of the agreement to obtain

such consent, though specific performance could not be enforced until such consent was obtained.—CORBETT *v.* SOUTH-EASTERN AND CHATHAM RAILWAY, *Ch.D. Farwell, J.*, 629.

5. *Statutory powers—Junction of new line with existing railway—Limits of deviation*—Medium filum—*Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 15.—Section 15 of the Railway Clauses Consolidation Act, 1845, as to the distance to which a railway company may deviate from the line delineated on the parliamentary plans, and the decisions under that section to the effect that the extreme limit of deviation is to be found by placing the *medium filum* of the proposed line upon the line of deviation as delineated in the parliamentary plan apply only to the construction of a new line of railway, and not to a junction of a new line with an existing line, according to the principle laid down, with regard to the widening of an existing line, in *Finck* v. *London and South-Western Railway Co.*, 38 W. R. 513, 44 Ch. D. 330.—CARDIFF RAILWAY *v.* TAFF VALE RAILWAY, *Ch.D. Swinfen Eady, J.*, 633; 74 L. J. Ch. 490.

6. *Traffic—Rates—Dissection of rate—Particulars of services—Particulars of charges—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 14.—Under section 14 of the Regulation of Railways Act, 1873, the Railway Commissioners have jurisdiction, on the application of an interested person, to order a railway company to state not only the items of the services in respect of which a rate is charged, but also the particular sums charged for each particular service.

Colman v. *Great Eastern Railway Co.*, 4 Ry. & Ca. Tr. Cas. 108, and *Birchgrove Steel Co.* v. *Midland Railway Co.*, 5 Ry. & Ca Tr. Cas. 229, approved.—PICKFORDS *v.* LONDON AND NORTH-WESTERN RAILWAY CO., *C.A.*, 468; [1905] 1 K. B. 752; 74 L. J. K. B. 634; 92 L. T. 607.

RATING:—

1. *Appeal—Time—Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.—Ratepayers who were aggrieved by a poor rate gave notice of objection to the valuation list to the assessment committee, but not until after two meetings of the assessment committee and one court of quarter sessions had been held since the making of the rate. Having failed to obtain relief from the assessment committee they gave twenty-one days' notice of appeal to the then next quarter sessions.

Held, that, having regard to section 1 of the Union Assessment Committee Amendment Act, 1864, which says that an objection to a valuation list may be heard after notice given at any time, the quarter sessions had jurisdiction to entertain the appeal.

Decision of the Divisional Court (*ante*, p. 349) affirmed.—IMPERIAL AND GRAND HOTELS CO. *v.* CHRISTCHURCH GUARDIANS, *C.A.*, 627; [1905] 2 K. B. 239; 74 L. J. K. B. 768; 92 L. T. 847.

2. *Dwelling-house—Authority of old decisions—Interpretation.*—The court will not readily overrule the decision of a court of inferior jurisdiction which has been acted on for a great number of years. The word "house" in 12 Car. 2, c. 37, means a dwelling-house—*i.e.*, a house which is in fact being used as a dwelling-house, or which can be so used without any structural alteration.

Surman v. *Darley*, 14 M. & W. 180, explained and followed.

Lewin and Others v. *George Newnes* (*Limited*), 90 L. T. 160, distinguished.—LEWIN *v.* END, *C.A.*, 406; [1905] 1 K. B. 669; 74 L. J. K. B. 406; 92 L. T. 486.

3. *Free library—Rateable occupation—Rateability—Scientific and Literary Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.—A free public library established and maintained by the corporation of a borough under statutory provisions requiring the authority to provide such a library, but leaving it to them to select such premises as they might be able to acquire for the purpose, with powers to transfer at any time the library to other premises and to dispose of the premises previously used for that purpose, in which books, newspapers, and periodicals are supplied, is not exempt from rating on the principle of *Lambeth Overseers* v. *London County Council*, [1897] A. C. 625, 45 W. R. Dig. 114, as capable of being occupied only for the benefit of the public nor as being a society instituted for the purposes of literature within the meaning of section 1 of the Scientific and Literary Societies Act, 1843.—LIVERPOOL CORPORATION *v.* WEST DERBY UNION, *K.B.D.*, 633; 92 L. T. 467.

4. *Occupation — Wooden structures — Structures erected near works for workmen to live in—Structures easily removable from place to place—Rateability—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 1.—The appellants, who were contractors for the construction of a line of railway, desired for the purposes of their business that certain of the men whom they employed should live near the works, and for that purpose they had by agreement with the owners or occupiers of certain pieces of land, erected upon these pieces of land wooden huts or structures. The structures were capable of being removed as occasion required without damage to the ground, and they contained no sanitary arrangements. Each structure was divided into a sleeping room, where about twenty men slept, a living room, sleeping-rooms for a caretaker and his family, and a pantry; and the structures had been in their then situation for upwards of a year.

It was admitted that if the structures were rateable in law, the appellants were the proper persons to be rated in respect of them.

Held, that the structures were rateable in law, and that the appellants were properly rated in respect thereof.—MITCHELL *v.* WORKSOP UNION, *K.B.D.*; 92 L. T. 62.

5. *Warehouse—Occupation.*—J. B. M. & Co. were the owners of a warehouse at L. During a certain period the warehouse was closed and had no goods in it whatever, and all the working appliances such as scales, weights, and trucks were removed and the water supply and hydraulic power was cut off. A notice was exhibited saying the warehouse was to let, but the owners did not intend to allow any part to be used unless they could obtain sufficient goods which would take up at least one-half of the available space of the warehouse and so make it commercially worth their while to open the warehouse.

On an application for a distress warrant for the rates for such period during which the warehouse was closed, the justices found as a fact that there had been no occupation of the warehouse during that period, and they refused the application.

Held, that the justices were justified in so finding.

Bootle Overseers v. *Liverpool Warehousing Co.*, 85 L. T. Rep. 45, followed.—REX *v.* HENDERSON, *K.B.D.*; 92 L. T. 662.

See also Distress, 1; Poor Law, 5; Water, 1.

RENT-CHARGE:—

Apportionment—Release of part of the hereditaments—Law of Property Amendment Act, 1859 (22 & 23 *Vict. c.* 35), *s.* 10.—Upon a release of a portion of hereditaments charged with a rent-charge, where the persons entitled to the remaining hereditaments concur in and confirm the release, the release operates only to bar the right to recover any part of the rent-charge out of the hereditaments released, and the remaining hereditaments remain liable to the whole of the rent-charge without apportionment.—PRICE *v.* JOHN, *Ch.D. Swinfen Eady, J.*, 456; [1905] 1 Ch. 744; 74 L. J. Ch. 469; 92 L. T. 768.

RESTRAINT OF TRADE:—

1. "*Any work or act*"—*Letter posted outside prohibited area to person within—Articles of clerkship—Solicitor.*—A solicitor by his articles of clerkship covenanted not to "do any work or act" for any person usually done by a solicitor within a certain radius from a certain place. The solicitor carried on his business from an office situated outside the radius, but he sent letters on the instructions of persons residing within the radius to other persons within the radius upon matters usually done by solicitors.

Held, that, although the letters were posted outside the radius, the sending them by post to a person within the radius was equivalent to going to such person, and was an act done within the radius and in breach of the covenant, and the defendant must be restrained.

Semble, it would have been equally a breach of the covenant if the clients for whom the letters were written had resided outside the radius.—EDMUNDSON *v.* RENDER, *Ch.D. Buckley, J.*, 632.

2. *Contract—Limit of space—"Eastern hemisphere"—Reasonableness—Public policy.*—Where by an agreement by which the defendant was appointed manager of the plaintiffs' business he had contracted that, if he left the plaintiffs' service, he should not engage or be employed during the following five years in any business similar to that of the plaintiffs "within the limit of the Eastern hemisphere," it was held (*dissentiente* Cozens-Hardy, L J.) that the agreement, whether regarded as applying to the United Kingdom only or as extending throughout the whole world, was not so wide as to go beyond what was reasonably necessary for the protection of the plaintiffs in their business, having regard to the peculiar nature of that business, and to the position occupied by the defendant therein.

Decision of Farwell, J., reversed.

Held, by Cozens-Hardy, L.J., that the case was covered by the decision in *Dowden & Pook* (*Limited*) *v. Pook*, [1904] 1 K. B. 35, and that the restrictive agreement was too wide to be enforceable by the plaintiffs. — LAMSON PNEUMATIC TUBE CO. *v.* PHILLIPS, *C.A.*; 91 L. T. 363.

RIVER:—

1. *Navigation—Maintenance of locks—Tolls—Right to close locks—Royal charter—Validity—Statute of Monopolies* (21 *Jac.* 1, *c.* 3).—A royal charter purporting to grant to the grantee "the sole and absolute benefit of all and singular the water carriage in and upon" a public navigable river, and also "the sole and exclusive passage and transit for boats, barges, and other vessels laden with . . . merchandize, through all that river . . . aforesaid," and also "the sole and exclusive licence and power of carrying . . . through all the river aforesaid . . . all manner of food . . . and merchandize whatsoever in ships, boats, barges, or other vessels," in consideration of a yearly rent payable to the Crown, is void both at common law and under the Statute of Monopolies (21 Jac. 1, c. 3).

The appellant's predecessor in title made, upon his own land, certain locks, and cuts leading thereto, in order to improve the navigation of a river, and was empowered to demand a toll from all vessels carrying merchandize through such locks. In course of time the navigation diminished to such an extent that the receipts from the tolls were not sufficient to pay for keeping the locks and cuts in proper repair.

Held, that the appellant was not bound to maintain and work the locks at a loss, and was justified in closing the locks and cuts.

Judgment of the court below reversed, Lords Davey and Lindley dissenting.

Per Lords Davey and Lindley: Under the circumstances the locks and cuts must be taken to have become part of the public navigable river, and the appellant was not entitled to close them and exclude the public from them.—SIMPSON *v.* ATTORNEY-GENERAL, *H.L.*; [1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610.

2. *Pollution—Channel—Stream or sewer—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 20.—Water from a spring or source above the defendants' mill was conveyed thereto by a channel, and was caught and accumulated by the defendants in a reservoir above such mill. After being used in such mill it was discharged in a channel in a polluted state. After leaving the mill the water so polluted ran past certain cottages into a stream and so into a river. Many cottages emptied their sewage into the channel until 1892, when a sewage scheme was put into operation, and at the present time two cottages discharged their slop water, and three small watercourses fell into the channel below the mill.

Held (affirming the decision of the county court judge), that the channel was a "stream" within section 20 of the Rivers Pollution Prevention Act, 1876.—WEST RIDING RIVERS BOARD *v.* PRESTON, *K.B.D.*; 92 L. T. 24.

3. *Pollution of river—Riparian owner.*—Where a corporation acting as the local sanitary authority has for many years discharged the sewage from its borough in a crude state into a river, and the pollution of the water perceptibly increased as new houses were built and contributed their sewage to the existing volume, in an action by a landowner whose estate was situated along the course of the river some distance below the town, and on whose land was an ornamental lake, fed by an intake from the river, at the outfall of the lake there being a water-wheel from which power was obtained to pump water from an adjacent well up to the plaintiff's castle, asking, firstly, for an injunction to restrain the corporation from polluting the river in such a way as to prevent him using the water for the purpose of his lake and water-wheel, and so as to be a nuisance to the castle and estate; secondly, for a mandatory order to compel them to do certain works of cleansing and removal of foul matter from the plaintiffs' land; and, thirdly, for damages for injuries done by the pollution of which they complain,

Held, firstly, that persons who have discharged their sewage for more than twenty years into the sewers had obtained a prescriptive right, and that it would be impossible to grant an injunction which would interfere with those prescriptive rights; also that, as regards sewers not twenty years old, the

county council had obtained an order under the Rivers Pollution Prevention Acts, 1876 and 1893, compelling the corporation to abstain from polluting the river after a certain date; and, as the corporation were carrying out works for the purpose of complying with that order, an injunction was unnecessary.

Held, secondly, that a mandatory order was impossible, and that the proper remedy was in damages.

Held, thirdly, that the plaintiffs were entitled to damages for the injury they had sustained.—EARL OF HARRINGTON *v.* CORPORATION OF DERBY, *Ch.D. Buckley, J.*; [1905] 1 Ch. 205; 74 L. J. Ch. 219; 92 L. T. 153.

SALE OF GOODS:—

1. *Breach of contract—Sale by description—Implied condition—Measure of damages—Arseneous sulphuric acid—Sale of Goods Act*, 1893 (56 & 57 *Vict.* c. 71), *ss.* 11, 13, 14, *sub-sections* 1, 2; *s.* 53, *sub-sections* 1, 2, 3; *s.* 54.—The defendants contracted to sell to the plaintiffs B. O. V. (sulphuric acid) commercially free from arsenic. The plaintiffs required the acid for the manufacture of brewing sugar. The plaintiffs did not expressly or by implication make known to the defendants the purpose for which the acid was required. The defendants supplied acid which contained arsenic, and which was not "commercially free from arsenic." With this acid the plaintiffs manufactured invert and glucose, which they sold to brewers who used them in brewing beer. The beer being poisonous the brewers suffered loss. The plaintiffs were liable to the brewers for such loss. The plaintiffs by using ordinary care could have discovered that there was arsenic in the acid supplied. The plaintiffs claimed as damages, for the breach of the implied condition that the acid should answer the description—(1) the amount of the brewers' claim; (2) the price paid for the acid which contained arsenic; (3) the value of the material spoilt by being mixed with the arseneous acid; and (4) compensation for the loss of the goodwill of the plaintiffs' business.

Held, that the contract was for a sale by description, that there had been a breach, and that the only damages that the plaintiffs were entitled to recover were—(1) the price of the acid; and (2) the value of the material spoilt by mixture with the acid.—BOSTOCK & CO. *v.* NICHOLSON & SONS, *K.B.D.*, 155; [1904] 1 K. B. 725; 73 L. J. K. B. 524; 91 L. T. 626.

2. *Conditions as to re-sale—Notice to purchaser—Right to disregard conditions as to re-sale.*—If, on the sale of goods, a condition is attached as to the price at which they may be re-sold, this cannot bind a subsequent purchaser, even though he bought with notice of the condition.

A retail trader purchased from H., who had purchased of the licensee of a patent an article manufactured by the licensee under the patent. Inside the boxes in which the article was packed was a printed condition, stating that the goods were not to be re-sold at less than a certain price specified therein. The retail trader having sold some of the goods at less than that specified price, in an action by the licensee to restrain the retailer from so doing,

Held, that the retailer had entered into no contract with the licensee; that the condition could not be made to run with the goods so as to bind the retailer, even though he was aware of such condition.

Taddy & Co. v. *Sterious & Co.*, 52 W. R. 152, [1904] 1 Ch. 354, approved.

Decision of Farwell, J., reversed.—MCGRUTHER *v.* PITCHER, *C.A.*, 138; [1904] 2 Ch. 306; 73 L. J. Ch. 653; 91 L. T. 678.

3. *Contract—Construction—Right to inspect bulk before or after payment—"Payment on arrival against shipping documents"—Sale of Goods Act*, 1893 (56 & 57 *Vict.* c. 71), *ss.* 15 (2) (b), 27, 34 (1), 55.—Where a contract for the sale of goods provides that payment is to be made . . . on the arrival of the goods against shipping or railway documents, the purchaser on the arrival of the goods and on the production of the shipping or railway documents cannot inspect the bulk with the sample before payment.

The right to subsequently reject if the goods are not in accordance with the sample is not impaired by the payment.—POLENGHI *v.* DRIED MILK CO., *K.B.D.*, 318; 92 L. T. 64.

4. *Quality not in accordance with sample—Right of buyer to reject—Custom limiting right—Validity of custom—Sale of Goods Act*, 1893 (56 & 57 *Vict.* c. 71), *ss.* 15, 55.—A custom limiting the right of the buyer in a sale by sample to reject the goods on the ground that the bulk is not in accordance with the sample, to cases where the difference is excessive and unreasonable, and was so found by arbitration finder the contract, is good in law, and is not void for unreasonableness or uncertainity, or on the ground that it contradicts the written contract.—WALKERS, WINSER, & CO *v.* SHAW & CO., *K.B.D.*, 79; [1904] 2 K. B. 152; 73 L. J. K. B. 325; 90 L. T. 454.

5. "*Sale for cash only or return*"—*Approbation note—Property in goods—Estoppel—Pawnbrokers—Sale of Goods Act*, 1893 (56 & 57 *Vict.* c. 71), *ss.* 18 (4), 21 (1), 25 (2).—The plaintiff handed goods to H. under the following terms of an approbation note: "On sale for cash only or return . . . goods had on approbation or on sale or return remain the property of W. (the plaintiff) until such goods are settled for or charged." H. had the option of buying at a fixed price. H. handed the goods to L., on the terms that he should pay immediate cash or return the goods in a day or two. L. obtained the goods by representing that he had a particular customer who wished to buy them. Such representation was false. L. pledged the goods with the defendants (pawnbrokers), the latter believing that L. was acting in good faith.

Held, that the plaintiff could recover the goods from the defendants. The property had not passed from the plaintiff, and there was no such conduct as to estop the plaintiff from saying that the property had not passed. Mere parting with possession is not sufficient to amount to an estoppel.—WEINER *v.* GILL. WEINER *v.* SMITH, *K.B.D.*, 553; [1905] 2 K B. 172; 92 L. T. 843.

6. *Warranty—Latent or undiscoverable defects—Particular purpose—Sale of Goods Act*, 1893 (56 & 57 *Vict.* c. 71), *s.* 14, *sub-section* 1.—Sale of Goods Act, 1893, s. 14, sub-section 1, enacts: "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. . . ."

Held, that this condition is an absolute condition so as to cover latent or undiscoverable defects.

Held, further, if the article or commodity—e.g.,

milk, bears on its face the purpose for which it is intended, then the buyer makes known the particular purpose to the seller by implication, as contemplated by the section.—FROST *v.* AYLESBURY DAIRY CO., *C.A.*, 354; [1905] 1 K. B. 608; 74 L. J. K. B. 386; 92 L. T. 527.

See also Auctioneer, 1; Criminal Law, 6.

SCHOOL:—

School teacher — Dismissal — Notice given before Education Act, 1902, *came into force—Expiration of notice after Act came into force—Education Act*, 1902 (2 *Ed.* 7, *c.* 42), *s.* 7 (1) (c).—The plaintiff was, in 1899, appointed head master of a national school by the then managers, who were appointed under a trust deed. The appointment was terminable on three months' notice. On the 6th of May, 1904, the then managers gave the plaintiff notice to determine his appointment on the 9th of August. Before that day arrived the Education Act, 1902, had come into operation in the district, and the county council, the local education authority, desired that the plaintiff should continue in office, and insisted that under section 7 (1) (c) of the Education Act, 1902, he could not be dismissed without their consent.

Held, that at the date when the Education Act, 1902, came into operation the only contract in existence was one to employ the plaintiff up to the 9th of August. On that date the contract came to an end by effluxion of time, and there was no dismissal of the plaintiff within section 7 (1) (c) of the Education Act, 1902.—JONES *v.* HUGHES, *C.A.*, 334; [1905] 1 Ch. 180; 74 L. J. Ch. 57; 92 L. T. 218.

SCOTLAND, LAW of:—

1. *Burgh — Powers of magistrates — Ice-cream vendors—Licence—Conditions*— Ultrà vires — *Edinburgh Corporation Act*, 1900 (63 & 64 *Vict. c.* 28.—By the Edinburgh Corporation Act, 1900, s. 80, it is enacted (*inter alia*) that any person selling ice cream, except in a duly licensed hotel, without a licence from the magistrates, "who are hereby empowered to grant the same," shall be liable to a penalty; provided that such licence shall run from the date of issue until the 15th of May ensuing, and upon renewal from the date of the expiration of the licence so renewed to the 15th of May following, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice cream under the provisions of the Act who shall . . . sell ice cream except during the hours between" 8 a.m. and 11 p.m. "on any lawful day, or at such extended hour at night as the magistrates may" permit in special cases, shall be liable to a penalty. The statute did not provide any form of licence. The magistrates proposed that the licences issued by them to vendors of ice cream should contain the following conditions: (1) That the licensee should not keep open his premises, or sell ice cream therein, on Sundays, or on other days set apart for public worship by lawful authority; (2) that he should not keep open his premises, or sell ice cream therein, before 8 a.m. or after 11 p.m.; (3) that the magistrates, or any of them, might any time revoke or suspend the licence.

Held (reversing the judgment of the court below), that the proposed conditions were *ultrà vires*, and that an ice-cream vendor was not bound to accept a licence containing such conditions.—ROSSI *v.* EDINBURGH CORPORATION, *H.L.*; [1905] A. C. 21; 91 L. T. 668.

2. *Marriage contract—Conquest—Wife's acquirenda — Accumulations of income* — Legitim — *Married Women's Property (Scotland) Act*, 1881 (44 & 45 *Vict. c.* 21), *ss.* 7, 8.—By ante-nuptial marriage contract executed in 1848 the wife bound herself to convey to trustees the whole funds and estate real and personal which she might hereafter "conquest and acquire by purchase, accession, or otherwise." The trustees were directed to pay the income of the trust estate to the wife during her life for her own separate benefit and use exclusive of the *jus mariti*, and by a clause in the contract the provisions in favour of children were to bar any claim they might make under the head of *legitim*.

Held, affirming the decision of the Court of Session (1902, 5 F. 191), (1) that the clause of conquest did not extend to estate which at the dissolution of the marriage by the death of the husband consisted of or was purchased with accumulations of the wife's separate income; (2) that the only child of the marriage was not entitled to *legitim* out of his mother's estate. — MACKENZIE *v.* ALLARDES, *H.L.*; [1905] A. C. 285.

SEPARATION DEED:—

Construction—Settlement—Trust for children—Resumption of cohabitation—Continuing validity.—SPARK'S TRUSTS, RE, *C.A.*, 41; [1904] 2 Ch. 121; 73 L. J. Ch. 576; 91 L. T. 237.

See also Husband and Wife, 2.

SETTLED LAND:—

1. *Compound settlement—Discharge of incumbrance on purchased land by mortgage of lands comprised in both settlements—Trustees for the purposes of the Settled Land Acts—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* 1, 8; *ss.* 45, *sub-section* 1—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 16, *sub-section* 1.—By his will R. C. devised a residential estate in settlement. Subsequently a tenant for life under the will purchased a neighbouring property, and, having mortgaged it, settled it on the subsisting uses of the will, but subject to the mortgage and the repayment to himself of the costs, charges, and expenses arising out of the transaction. There were no trustees of the original settlement. On an application by the tenant for life to have the amount of the mortgage and costs raised by a mortgage of both properties,

Held, that the main settlement and the subsidiary settlement constituted a compound settlement, and that trustees of the compound settlement should be appointed for the purposes of the Settled Land Act, with power to raise by mortgage of the entire property what was required to discharge the incumbrance on the lands comprised in the subsidiary settlement, together with the costs of this application, and to apply the amount raised accordingly. — COULL'S SETTLED ESTATES, RE, *Ch.D. Kekewich, J.*, 504; [1905] 1 Ch. 712; 74 L. J. Ch. 378; 92 L. T. 616.

2. *Improvements—Application of capital moneys—Additions to or alterations in buildings—Rebuilding vinery, peach-house, and greenhouse with a view to letting—Scheme submitted to trustees after long interval —House agent's commission—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21 25, *sub-section* 11—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13 (*ii.*), 15. —The rebuilding of an entirely new vinery and peach-house in place of two old glasshouses pulled down, in order to let the principal mansion-house, does not fall within sub-section 2 of section 13 of the Act of 1890, as "any additions or alterations in buildings reasonably necessary or proper to enable the same to be let," on which capital moneys in the hands of trustees can be expended, and the rebuilding of a new greenhouse in place of an old one in a dilapidated condition is in the same position. But the

building of loose boxes and the making of a sunk fence in the park to keep out cattle is within the meaning of "repairs" on which capital money can be spent. The commission chargeable by an agent for obtaining a tenant of the mansion-house on a short tenancy is an ordinary income charge, and neither the whole nor any part is properly payable out of capital.—LEVESON-GOWER, RE, *Ch.D. Swinfen Eady, J.*, 524; [1905] 2 Ch. 95; 74 L. J. Ch. 540; 92 L. T. 836.

3. *Mines—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 10 (*iv.*); *ss.* 6, 7, *sub-sections* 2, 3—*Mining lease—Reservation of mining lease—Support to surface—Lease of power to let down surface—Tenant for life.*—Under section 6 of the Settled Land Act, 1882, a tenant for life of settled land has power to grant a lease of a right to let down the surface of the land for mining operations.

Sir G. Sitwell by his marriage settlement conveyed land of which he was owner in fee to uses under which he became tenant for life. The deed contained an exception from the conveyance of all mines under the land in question, with power to work the same. Any person exercising these reserved rights was to make reasonable compensation to the trustees of the settlement for all damages caused to the inheritance, and also to the persons for the time being entitled to the surface of the land for damage to things upon the surface.

Held, that Sir G. Sitwell had no power under the exception to authorize lessees to work the mines so as to let down the surface of the settled land, but that as tenant for life he could, under section 6 of the Settled Land Act, 1882, grant a right to do so by lease. — SITWELL *v.* LONDESBOROUGH (EARL), *Ch.D. Warrington, J.*, 445; [1905] 1 Ch. 460; 74 L. J. Ch. 254.

4. *Person having powers of tenant for life—Conditional residence—Invalidity of condition—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 51, 58, *sub-section* 1, *clause* 2.—A testatrix devised her residuary real and personal estate to her niece upon condition that she resided in the house of the testatrix during the lifetime of the sister of the testatrix, and there kept a home for the sister whenever she should so require it; if this condition were not complied with, then the property was to pass over to another niece upon the same condition. The sister of the testatrix was a lunatic not so found, and had been subject to restraint for twelve years.

Held, that the provision as to residence was a condition and not a trust or reservation for the benefit of the lunatic, and the devisee being a person having the powers of a tenant for life within the meaning of section 58, sub-section 1, clause 2, of the Settled Land Act, 1882, the condition in question was void under section 51 of that Act.—RICHARDSON, RE, RICHARDSON *v.* RICHARDSON, *Ch.D. Joyce, J.*, 11; [1904] 2 Ch. 777; 73 L. J. Ch. 783; 91 L. T. 775.

5. *Powers of tenant for life—Restrictions—Agreement for lease—Park—"Usually occupied" with principal mansion-house — Easement — Damages — Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7, 31, 54; *and* 1890 (53 & 54 *Vict. c.* 69), *s.* 10.—The word "park" is not used in the Settled Land Acts in a legal or technical sense, but with the meaning attached to it in common parlance.

The words "usually occupied therewith" in section 10 of the Act of 1890 do not qualify the preceding words, "pleasure-grounds and park," but only the words "and lands (if any)," which they immediately follow.

A tenant for life agreed in writing not under seal to let a farm of 309 acres, of which fifty-five acres adjoined the principal mansion-house on the estate, and was called a park, and to supply the tenants gratuitously with water from a tower erected for supplying the mansion. No consent of trustees or order of court had been obtained. The tenants had not investigated the title of the intending lessor, who had since died, nor had they applied for a formal lease, but they had gone into occupation.

Held, that the park was within section 10 of the Settled Land Act, 1890, whether it was or was not usually occupied with the principal mansion-house; that, consequently, the agreement, in the absence of consent of trustees or order of the court, was invalid; and that the tenants were not entitled to damages against the executrix of the deceased tenant for life.

Held, also (following *Sutherland* v. *Sutherland*, 42 W. R. 12, [1893] 3 Ch. 169), that the instrument was invalid as being an agreement to grant an easement over the principal mansion-house.—PEASE *v.* COURTNEY, *Ch.D. Swinfen Eady, J.*, 75; [1904] 2 Ch. 503; 73 L. J. Ch. 760; 91 L. T. 341.

6. *Work required by local authority — Sanitary works—Cost—Tenant for life and remainderman—Capital or income — Permanent improvements* — A notice under the Public Health (London) Act, 1891, was served on the trustees of settled property, requiring them as the owners to do certain sanitary work on the premises. The plaintiffs, who were assignees of the life interest of the equitable tenant for life, agreed with the trustees that they would do the work without prejudice to the question by whom the expenses should ultimately be borne, and they duly carried out the work.

Held, that under the circumstances the plaintiffs were entitled to be subrogated to the rights of the trustees, and to have a charge upon the *corpus* for the amount expended upon such of the works as were permanent improvements.

Decision of Kekewich, J., reversed.

Semble, that in cases of this description, in determining as between tenant for life and remainderman how the costs of the repairs ought to be borne, the court is not bound by any hard and fast rule, but has a discretion, and has jurisdiction to inquire as to the nature of the repairs, and generally into the circumstances of the case.—FARNHAM'S TRUSTS, RE, LAW UNION AND CROWN INSURANCE CO. *v.* HARTOPP, *C.A.*; [1904] 2 Ch. 561; 73 L. J. Ch. 667; 91 L. T. 780.

SETTLEMENT:—

1. *After-acquired property — Tenant for life — Irish Land Acts — Covenant for settling after-acquired property—Interpretation.*—The bonus given to the vendor of real estate in Ireland under section 48 of the Irish Land Act, 1903 (3 Ed. 7, c. 37), is so closely connected with the land that it must be regarded as an interest in the land.

A. was tenant for life of real estate under a deed of settlement of real estate, and also tenant for life under a deed of settlement of personalty containing a covenant to settle after-acquired property, with certain specified exceptions, including (*inter alia*) the real estates settled by the realty settlement, or "A.'s estate or interest" therein. Part of the real estate was situate in Ireland, and under the Irish Land Act, 1903, was purchased by the occupying tenants for a gross sum of £340,380, with the result that A. was entitled, as vendor, to a bonus of £40,845 by section 48 of the said Act.

Held, that this bonus was not subject to the covenant to settle after-acquired property contained

in the personalty settlement, as it was an interest in real estate specifically excepted from the operation of the said covenant.

Held, further, that as it was not within the covenant, it belonged to A. for her sole use under section 3 of the Land Purchase (Ireland) Act, 1904 (4 Ed. 7, c. 34).

In re Ely's Estates, [1904] I. R. 66, considered.—LADY ANNALY'S TRUSTS, RE, ANNALY *v.* BOURKE, *Ch.D. Kekewich, J.*, 150; 92 L. T. 13.

2. *Condition—Marriage with consent—No limitation as to time—Gift over—Forfeiture—Validity of condition.*—A condition imposing a partial restraint on marriage, by requiring the marriage to be with consent, with a gift over in the event of marriage without the required consent, is valid and enforceable, notwithstanding that it is not limited as to time but operates during the whole life of the beneficiary, provided that any of the persons whose consent is required survives.

Dashwood v. *Lord Bulkeley*, 10 Ves. 230, and *Lloyd* v. *Branton*, 3 Mer. 108, followed.—WHITING'S SETTLEMENT, RE, WHITING *v.* DE RUTZEN, *C.A.*, 293; [1905] 1 Ch. 96; 74 L. J. Ch. 207; 91 L. T. 821.

3. *Covenant to settle after-acquired property—Wife entitled to vested reversionary interest before marriage—Interest falling into possession during coverture—"Become entitled"—Entitled in "interest" or in "enjoyment."*—By an ante-nuptial marriage settlement dated the 15th of June, 1895, it was agreed that all property to which the wife during her then intended coverture should "become entitled" should be settled upon the trusts of the settlement. At the date of the settlement the wife was entitled to certain vested reversionary interests. The marriage took place, the coverture was still existing, and the reversionary interests had not yet fallen into possession.

Upon summons asking whether these interests were now bound by the agreement to settle after-acquired property, or would be bound if they fell into possession during the coverture,

Held, that they were not now bound, nor if they fell into possession during the coverture would they be bound by the agreement. — BLAND'S SETTLEMENT, RE, *Ch.D. Kekewich, J.*; [1905] 1 Ch. 4; 74 L. J. Ch. 28; 91 L. T. 681.

4. *Equitable estate in realty—Grant without words of limitation—Estate for life or in fee simple—Assignment to trustees.*—An equitable estate of inheritance in real property cannot be passed by grant or assignment without proper words of limitation, and the intention of the grantor or assignor to pass it, even although manifest, is not sufficient, except in two cases—(1) where the grant or assignment is expressed to be for the same estate as that for which other property has been granted or assigned, where this latter grant or assignment has been in terms absolute; and (2) where the grant or assignment is expressed to be for the whole estate which the grantor has in the property.

A. being possessed of an equity of redemption in certain freeholds and of the right to have other freeholds conveyed to him which he had purchased, by post-nuptial settlement assigned all these freeholds to trustees, without using any words of limitation, upon the usual trusts for sale and investment, and to hold the proceeds for himself, his wife, and children, with the usual provisions.

Held, that the trustees only took an estate for their joint lives and the life of the survivor.

In re Hudson, 72 L. T. 692, followed.

In re Tringham, 20 Times L. R. 657, distinguished.—IRWIN'S SETTLEMENT, RE, *Ch.D. Buckley, J.*, 200; [1904] 2 Ch. 752; 73 L. J. Ch. 832.

5. *Limitations—Equitable interest in real estate—No words of inheritance.*—An equitable estate in fee simple may be conferred in a deed without words of inheritance, if a clear intention to confer it appears.

Pugh v. *Drew*, 17 W. R. 988, followed.

Copyholds were in 1831 limited by surrender and deed of settlement to the use of two trustees and the survivor of them and the heirs of such survivor in trust for A. for life, and after her death for her husband for life, and on the death of the survivor of her and her husband in trust for all the children of the marriage equally to be divided between them as tenants in common, and in default of issue of the marriage to such uses as A. should declare by will, with remainder to her right heirs. On a summons taken out to determine whether A.'s children took equitable estates in customary fee simple or life estates only,

Held, that they took equitable estates in fee, the intention to confer absolute interests on them being plain. — TRINGHAM, RE, TRINGHAM *v.* GREENHILL, *Ch.D. Joyce, J.*; [1904] 2 Ch. 487; 73 L. J. Ch. 693; 91 L. T. 370.

6. *Marriage settlement—Covenant—"Survive her coverture" — Divorce — Variation of settlement.* — Covenant in ante-nuptial settlement by the father to pay £10,000 to his daughter absolutely in the event of there being no issue and of her surviving her coverture.

Held, that, the marriage having been dissolved by the Divorce Court, she had survived her coverture so as to entitle her to the money under the covenant although the husband was still alive.—CRAWFORD, RE, COOKE *v.* GIBSON, *Ch.D. Kekewich, J.*, 107; [1905] 1 Ch. 11; 74 L. J. Ch. 22; 91 L. T. 683.

7. *Marriage settlement—Covenant to settle after-acquired property—Accumulations of income of settled property—Investment of accumulations—"At one and the same time"—Construction.*—Property purchased by a wife with the accumulations of income derived from property settled by a marriage settlement is not property to which she becomes entitled during the coverture so as to fall within the meaning of the ordinary covenant to settle after-acquired property; and where the covenant is expressed to apply only to sums of a specified value to which she becomes entitled "at one and the same time," and the sums accumulated are each less than the specified amount, these words are an additional reason why the covenant does not apply.

Finlay v. *Darling*, 45 W. R. 445, [1897] 1 Ch. 719, followed.

In re Bendy, 43 W. R. 345, [1895] 1 Ch. 109, dissented from.

Lewis v. *Maddocks*, 8 Ves. 150, 17 Ves. 48, explained. — CLUTTERBUCK'S SETTLEMENT, RE, BLOXAM *v.* CLUTTERBUCK, *Ch.D. Buckley, J.*, 10; [1905] 1 Ch. 200; 73 L. J. Ch. 698.

8. *Tenant for life and remainderman—Capital and income—Settled fund—Mortgage—Authorized security—Arrears of interest—Deficient security.*—If a fund, which is settled upon a tenant for life and remainderman, is properly invested on a mortgage which proves insufficient to pay principal and interest in full, the sum realized ought to be divided between the tenant for life and remainderman in the proportion which the amount of interest in arrear bears to the amount of principal due under the mortgage, without taking into consideration

any sums received by the tenant for life by way of interest from the security.

In re Foster, 39 W. R. 31, and *In re Phillimore*, [1903] 1 Ch. 42, disapproved.

In re Moore, 33 W. R. 447, and *In re Alston*, [1901] 2 Ch. 584, followed. — ATKINSON, RE, BARBERS COMPANY *v.* GROSE-SMITH, *C.A.*, 7; [1904] 2 Ch. 160; 73 L. J. Ch. 585; 90 L. T. 825.

SHERIFF:—

Levying distress—Execution on goods—Fees—Writ of fi. fa.*—Sheriff's officer in possession—Several writs—Possession money—Out-of-pocket expenses—Poundage and mileage—Sheriffs Act,* 1887 (50 & 51 *Vict. c.* 55), *s.* 20, *sub-sections* 1 *and* 2*—Rules and Table of Fees of* 1888 *under the Sheriffs Act.*—Where a sheriff who is already in possession of a judgment debtor's goods under a writ of *fi. fa.* is served with another writ of *fi. fa.* by another execution creditor for levying execution on the same debtor's goods, and has been paid in respect of his seizure, mileage, and possession by the first execution creditor, as there has been one seizure there has therefore been only one man in possession, and the sheriff cannot recover from the second execution creditor the same sum again in respect of seizure, mileage, and possession which he has already received from the first execution creditor, as this would be contrary to the true intent and meaning of the rules and orders under the Sheriffs Act, 1887. Under these rules the sheriff is entitled to his poundage, and as regards his fees, only to cover his actual out-of-pocket expenses.—GLASSBROOK *v.* DAVID, *K.B.D.*, 408; [1905] 1 K. B. 615; 74 L. J. K. B. 492; 92 L. T. 299.

SHIP:—

1. *Appeal—Co-defendant made third party—Right to appeal from judgment for plaintiff against co-defendant—Contract—Damages—Indemnity—Costs—Reasonably defending action.*—The plaintiffs loaded goods on board a barge belonging to one of the defendants for conveyance to a steamer. The barge-owners employed a tug belonging to the other defendants on their own account, and not on behalf of the plaintiffs, upon the following terms: "Gaselee & Son" (the tug-owners) "hereby give notice that they will not be answerable for any loss or damage which may happen to, or be occasioned by, any barge or vessel, or its cargo, while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise; and the services of their tugs must be understood and agreed to be engaged or accepted upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults or defaults of their servants or any claim therefor by whomsoever made. And the customers of the said Gaselee & Son undertake and agree to bear, satisfy, and indemnify them accordingly." While being towed the barge collided with a vessel at anchor, and her cargo was damaged. The plaintiffs sued both the defendants to recover the damage, and the tug-owners served a third-party notice upon the barge-owners claiming indemnity in respect of any damages and costs which they might have to pay. No order was made under ord. 16, r. 53, as to the mode and extent in or to which the barge-owners should be bound or made liable by the judgment in the action as against the tug-owners. At the trial the tug was held alone to blame for the collision, and judgment was given for the plaintiffs against the tug-owners, and for the barge-owners against the plaintiffs, the plaintiffs to recover from the tug-owners with their damages and costs the costs payable by them to the barge-owners. It was further held that the barge-owners were liable to indemnify the tug-owners against the damages and costs, and also against the tug-owners' costs of the action. The barge-owners appealed (1) against so much of the judgment as held the tug-owners liable to the plaintiffs; and (2) against the judgment holding them liable to indemnify the tug-owners.

Held, as to the first appeal, that the barge-owners had no right of appeal from the judgment against the tug-owners; as to the second appeal (1) that the contract of towage did not relieve the tug-owners from liability for loss or damage to third persons, but only gave them an indemnity from the person employing them in respect of such liability; and (2) that the tug-owners, having reasonably defended the action, were entitled to recover from the barge-owners the costs as well as the damages.—"MILLWALL," THE, *C.A.*, 471; [1905] P. 155; 74 L. J. P. 82.

2. *Bill of lading — Charter-party — Custom of port for steamers—Discharge according to custom of port—Rate of discharge—Unreasonableness of custom—Altered circumstances since origin of custom.*—A bill of lading (incorporating conditions of a charter-party) provided "Time for discharging at destination shall be according to the custom of the port for steamers at port of discharge, demurrage, if incurred, to be paid by consignees at the rate of fourpence sterling per gross register ton per day." An alleged custom was set up to the effect that the consignee could not be required to take delivery at a faster rate than about 500 tons per day at the port of Bristol for River Plate grain cargoes. A vessel discharged a grain cargo, under the above bill of lading, at the Avonmouth Dock, Bristol. The alleged custom had been a matter of dispute for years. The facilities of discharge as regard ships and the three docks in the port of Bristol had increased since the origin of the alleged custom. The rate of discharge, in fact, was often in excess of 500 tons per day.

Held, that no such custom now existed at Bristol for grain steamers generally or for River Plate grain steamers. The charter-party must be read as "custom, if any, at the port of discharge." Where a custom relates directly to the obligations of parties under certain circumstances, it must, in order to be valid and to be binding on parties who do not know of the existence of the custom as a fact, be reasonable. The custom was quite inapplicable to the state of things at present existing, and that there was no such settled and established practice in the port as to satisfy the words of the charter-party. If the custom applied to the altered circumstances, it was unreasonable. Contracting out of a custom may become so general as to destroy the custom. When a custom becomes the exception and not the rule, there is no longer a custom.—ROPNER *v.* STOATE, HOSEGOOD, & Co., *K.B.D.*; 92 L. T. 328.

3. *Bill of lading—Exception—Shipowner's negligence—Warranty of seaworthiness of ship—Fitness of ship to carry goods.*—Meat was shipped at Melbourne for carriage to London under a bill of lading which contained the following clause in large print exempting the shipowner from liability "for any loss or damage (to the goods) whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not," and "for the consequences of any act,

neglect, default, or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners or charterers," or "from any cause whatsoever." There was also a small print clause exempting the shipowners from liability for loss or damage resulting from (*inter alia*) "defects, latent or otherwise, in hull, tackle, boilers or machinery, refrigerating or otherwise, or their appurtenances (whether arising or not existing at the time of the goods being loaded or at the commencement or any stage of the voyage), if reasonable means have been taken to provide against such defects or unseaworthiness." The meat was damaged in consequence of the tainted condition of the ship at the commencement of the voyage, arising from the use of carbolic acid for disinfecting and cleansing the ship at Melbourne, which damage would not have occurred if proper skill and care had been used by the shipowners before the ship started on her voyage.

Held, that the shipowners were liable.

Decision of the Court of Appeal (52 W. R. 439, [1904] 1 K. B. 319) affirmed.—ELDERSLIE STEAMSHIP CO. *v.* BORTHWICK, *H.L.*, 401; [1905] A. C. 93; 74 L. J. K. B. 338; 92 L. T. 274.

4. *Bill of lading—Warranty—Seaworthiness—Fitness to receive cargo—Loading stage—Application of principle of voyage in stages—Harter Act.*—The warrant of seaworthiness at the time of loading a cargo is that the vessel is fit to receive her cargo, and does not extend until the time of the sailing of the vessel. That warranty, though not a continuing warranty, is an absolute warranty, and the incorporation of the provisions of the Harter Act in a bill of lading does not limit the shipowners' obligation to an undertaking to exercise due diligence to make his vessel fit to receive the cargo. —MCFADDEN *v.* BLUE STAR LINE, *K.B.D.*, 576; [1905] 1 K.B. 697; 74 L. J. K. B. 423.

5. *Charter-party — Construction — Exceptions — Accident caused by servants' negligence—Liability of shipowners.*—In the construction of a contract the maxim *expressio unius exclusio alterius* is not applicable where the expression is found only in one and not in the other clauses of the same contract. There is no exception in the case of contracts of charter-party. — WADE & CO. *v.* COCKERLINE & CO., *C.A.*, 420.

6. *Charter-party—Demurrage—Lay days—Grain cargoes—London Corn Trade Association Contract—Construction.*—The London Corn Trade Association Contract, which was incorporated in a charter-party, provided that the time for discharge of a cargo of grain should be: "One running day for every 400 tons up to 2,800 tons, and, for all quantities in excess, 500 tons per day; but in no case less than five days."

Held (affirming the judgment of Walton, J.), that, upon the true construction of the contract, the time to be allowed for discharge of a cargo, whatever its size, was one day for every 400 tons up to 2,800 tons, and one day for every 500 tons in excess of 2,800 tons.—TURNER & CO. *v.* BANNATYNE, *C.A.*; 91 L. T. 618.

7. *Charter-party—Lay days—Fractions of a day—Sundays—Delays caused by ballasting—Demurrage.*—By the terms of a charter-party the ship was to discharge a cargo at a stipulated rate, at which rate the cargo could have been discharged in 29 and $\frac{1}{10}$ days. On two Sundays cargo was in fact discharged. Part of the time allowed for discharging was occupied in ballasting the ship.

Held, that the charterers were entitled to thirty lay days in which to discharge, that the two Sundays were not to be counted as lay days, and that the time occupied in ballasting was not to be excluded from the time allowed for discharging.—HOULDER BROTHERS *v.* WEIR, *K.B.D.*; [1905] 2 K. B. 267; 74 L. J. K. B. 729; 92 L. T. 861.

8. *Charter-party—Previous verbal representation as to carrying capacity of vessel—Breach of warranty.*—During negotiations for the chartering of a vessel the owners' agents represented that the vessel had carried a certain quantity of cargo. The charterers acted on the representation, which, in fact, was untrue, and entered into a charter-party, containing no reference to the previous cargo.

Held, that, the representation being untrue, the charterers could recover as for breach of a collateral verbal warranty.—HASSAN *v.* RUNCIMAN, *K.B.D.*; 91 L. T. 808.

9. *Charter-party—Sub-charter—Lien for freight—Bill of lading—Notice of charter-party.*—Notice of a charter-party given to a shipper has not the effect of incorporating into the bill of lading any terms inconsistent with it, which the captain was not bound to embody in it.

Therefore a shipowner is not entitled to a lien for freight payable under a time charter on goods shipped by a person not a party to that charter, whose goods were carried in the ship under a sub-charter and bill of lading.

Judgment of the court below affirmed.—TURNER *v.* HAJI GOOLAM MAHOMED AZAM, *P.C.*; [1904] A. C. 826; 74 L. J. P. C. 17; 91 L. T. 216.

10. *Charter-party — Sub-charter-party — Bill of lading—Contract—Shipowner's lien for unpaid hire —Hire accruing due—Withdrawal of ship—Payment of hire.*—When a ship is chartered, the charter-party being in the ordinary form and not amounting to a demise of the ship, and subsequently the ship is sub-chartered for a single voyage and bills of lading are signed by the captain in respect of cargo carried on that voyage, the contract contained in the bills of lading is a contract with the owner of the ship. The owner, or the captain as his agent, is entitled to collect the bills of lading freight, and to deduct from it any charter-party hire then owing, accounting for the balance, if any, to the sub-charterers. The rights of the parties are the same if the freight is collected by the ship's agent, appointed by the sub-charterers, he being for this purpose either the agent of the owner or the agent of all parties.

Marquand v. *Banner*, (1856) 6 E. & B. 232, distinguished.

A shipowner is not entitled to exercise a lien on freight in the hands of the ship's agent for charter-party hire not due but accruing due at the time the lien purported to have been exercised.

Where a charter-party provides that hire is to be paid half-monthly in advance, and that in default of payment the owner may withdraw the ship from the service of the charterer without prejudice to any claim the owner may otherwise have against the charterer, if the owner withdraws the ship in the middle of a half-month, he is only entitled to be paid hire in respect of that portion of the half-month during which the ship was in the service of the charterer.—WEHNER *v.* DENE STEAM SHIPPING CO., *K.B.D.*; [1905] 2 K. B. 92; 74 L. J. K. B. 550.

11. *Collision—Both to blame—Appeal—Costs.*—Where one vessel has been held alone to blame for a collision, and there is an appeal by the owners of that vessel solely on the ground that both vessels were in default, and the appeal is allowed, the appellants are entitled to the costs of the appeal.

The Lebanon v. *The Ceto*, 14 App. Cas. 670, 38

W. R. Dig. 187, followed.—"LONDON," THE, *C.A.*, 419; [1905] P. 152; 74 L. J. P. 71.

12. *Collision—Both to blame—Division of loss—Seamen drowned — Payments to relatives — Claim against other ship for half payments.*—Seamen on board a Spanish ship were drowned in a collision with another ship, and the Spanish shipowners were compelled by Spanish law without proof of negligence to make payments to the relatives of the seamen. The action arising out of the collision was settled on the basis of both ships being to blame. Under the Admiralty rule of division of loss the Spanish shipowners claimed to recover from the owners of the other ship half the amount of these payments.

Held, that the claim must be rejected.—"CIRCE," THE, *P.D. & Ad.D.*; 74 L. J. P. 106.

13. *Collision—Crossing vessels—Arts.* 19 *and* 22 *Rules for Preventing Collisions at Sea—River Humber.*—The plaintiffs' vessel was proceeding up the Humber on the starboard side side of the channel between the Bull and the Cleeness buoys on a course N.W. magnetic, making about eight knots. The defendants' vessel was outward bound, and making about ten knots over the ground on a course S.E. by E. ¾ E. magnetic. A collision occurred at a place very close to the Cleeness buoy. The vessels approached green to red, and the defendants' vessel being jammed up close to the buoy struck the plaintiffs' vessel on the starboard side about thirty feet abaft the stern, doing considerable damage.

The Court held that the facts of the case showed that both vessels were to blame. It considered that the crossing rule ought to be observed in that locality, and therefore the plaintiffs' vessel ought to have kept her course and speed, and that the defendants' vessel ought not to have attempted to cross, but should have stopped her engines and reversed.—"ASHTON," THE, *P.D. & Ad.D.*, 639; [1905] P. 21; 74 L. J. P. 28; 92 L. T. 811.

14. *Collision—Fog signal forward of beam—Duty to stop engines—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16.—Two steam vessels, proceeding in opposite directions, came into collision during a dense fog off the coast of Portugal. Those in charge of the plaintiffs' vessel did not "stop her engines" in accordance with article 16 of the Regulations for Preventing Collisions at Sea, on "hearing, apparently forward of her beam, the fog signal of" the defendants' vessel, because another vessel was sounding her whistle apparently on the port quarter and overtaking her; whilst those in charge of the defendants' vessel alleged that they did not stop her engines on first hearing the whistle of the plaintiffs' vessel because two other vessels sounding their whistles, one on each bow, helped to ascertain the position of the defendants' vessel, which was a long way off, and as soon as the whistle was distinctly made out to be on the starboard bow the engines were stopped.

Held, by Gorell Barnes, J., that both vessels were to blame, as both had infringed the positive directions as to stopping the engines contained in article 16. In the case of the plaintiffs' vessel it would have been incumbent on the alleged overtaking vessel to have stopped when she heard the whistle of the plaintiffs' vessel indicating that she was stopped, so that any danger would have been averted. In the case of the defendants' vessel, as distance and bearing cannot be at once definitely determined in fog, it was no excuse for a breach of the rule that the whistle of the other vessel was heard apparently a long way off.—"BRITANNIA," THE, *P.D. & Ad.D.*; [1905] P. 98; 74 L. J. P. 46; 92 L. T. 634.

15. *Collison—Harwich Harbour—Compulsory pilotage.*—The defendants' vessel was brought into Harwich Harbour and brought to anchorage in a proper place by a properly licensed pilot, the pilotage thus far being admittedly compulsory. The vessel while being brought from her anchorage to her berth, and still in charge of the pilot, did damage by colliding with the plaintiff's vessel. It appeared that there was a custom recognized by the Trinity House of giving the pilot further remuneration for berthing his vessel if he brought her on from an anchorage, and it was contended that it was manifest that the compulsory pilotage ceased at the anchorage.

The Court held that the compulsory pilotage did not cease when the vessel was brought to anchor, but was continuing at the time of the collision, and that the defendants were not liable.—"OLE BULL," THE, *P.D. & Ad.D.* 590; [1905] P. 52; 74 L. J. P. 75; 92 L. T. 807.

16. *Collision—Injured ship damaged by second collision—Ship dry docked for repairs—Apportionment of expenses of dry docking.*—The plaintiffs' ship was injured by a collision with another ship, and the owners of the latter ship admitted liability for 50 per cent. of the damage sustained. It was necessary to dry dock the plaintiffs' ship to repair the damage caused by that collision. Before the ship was taken into dry dock she received further injuries through collision with the defendants' ship, for which the defendants admitted liability. It was necessary to dry dock the plaintiffs' ship in order to repair the damage caused by the second collision. The ship was taken into dry dock and both sets of damage were repaired at the same time. The time occupied in repairing the damage caused by the first collision considerably exceeded the time occupied in repairing the damage caused by the second collision, and the ship was not detained in dock longer than it would have been detained if the damage caused by the first collision had alone to be repaired.

Held, upon the authority of *Marine Insurance Co.* v. *China Transpacific Steamship Co.*, 35 W. R. 169, 11 App. Cas. 573, that the plaintiffs were entitled to recover from the defendants a proportionate part—viz., one-half—of the expenses of dry docking the ship during the time that the damage caused by the second collision was being repaired, but that they were not entitled to recover any sum for demurrage.—"HAVERSHAM GRANGE," THE, *C.A.*, 675.

17. *Collision—Limitation of liability—Loss of life or personal injury—Proof of ownership at date of collision.*—Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 503, 504, and the evidence in support of their claim is given by affidavit, the affidavit as to whether loss of life or personal injury was occasioned by the collision should be made by some person having knowledge of the facts, and the certified copy of the register proving the ownership of the vessel should be a certified copy of the register at the date of the collision.—"ROSSLYN," THE, *P.D. & Ad.D.*; 92 L. T. 177.

18. *Collision—Practice—Action* in personam—*Foreign plaintiffs — Counterclaim — Security for damages—Admiralty Court Act*, 1861 (24 & 25 Vict. c. 10), *s.* 34—*Judicature Act*, 1873 (36 & 37 Vict. c. 66), *s.* 24, *sub-sections* 5, 7.—The foreign owners of

a tug, sunk in collision in the English Channel with a British vessel, brought an admiralty action *in personam* against the owners of the British vessel, who appeared, counterclaimed, and applied that all proceedings in the action might be ordered to be stayed until the foreign plaintiffs gave security for damages under the counterclaim.

Held, by the Court of Appeal (Collins, M.R., and Stirling, L.J.), affirming the decision of Gorell Barnes, J., that there was no jurisdiction to make the order, either under the special powers conferred on the Admiralty Court by section 34 of the Admiralty Court Act, 1861, or under the general powers of the courts of law and equity kept alive, and conferred on the High Court and the Court of Appeal, by sub-sections 5, 7 of section 24 of the Judicature Act, 1873.—"JAMES WESTOLL." THE, *C.A.*; [1905] P. 47; 74 L. J. P. 9; 92 L. T. 150.

19. *Collision—Queenstown Harbour—Regulations for Preventing Collisions at Sea, art.* 25.—The entrance to Queenstown Harbour must be deemed to be a narrow channel within the meaning of article 25 of the Regulations for Preventing Collisions at Sea.—"GLENGARIFF," THE. *P.D. & Ad.D.*, 537; [1905] P. 106; 74 L. J. P. 90.

20. *Collision—Regulations for Preventing Collisions at Sea,* 1897, *art.* 25—"*Narrow channel.*"—Four red conical lighted bouys having been placed approximately in the central line of Sea Reach, in the River Thames, to mark the northern side of the deepest water, a collision occurred between the plaintiffs' vessel, which was proceeding up, and the defendants' vessel, which was coming down the river, the collision occurring on the plaintiffs' starboard side of the channel thus marked.

The Court held that the defendants were in fault, inasmuch as the four red conical lighted bouys indicated a "narrow channel" between them and the buoys to the south of them, within the meaning of article 25 of the Regulations for Preventing Collisions at Sea.—"GUSTAFSBERG," THE, *P.D. & Ad.D.*, 350; [1905] P. 10; 74 L. J. P. 42; 92 L. T. 630.

21. *Collision—Steam vessel trawling—Fog signals—Duty of vessel in fog to stop on hearing whistle forward of the beam—Regulations for Preventing Collisions at Sea,* 1884 *and* 1897—*Art.* 10 (g), 1884—*Arts.* 9 (g), 15, 16, 1897.—A steam vessel trawling in a fog, and alleged to be sounding the fog signals prescribed by article 15 for a steamship under way in a fog—namely, a prolonged blast at intervals of not more than two minutes—came in collision with a steamship under way.

Held, that the trawler was to blame for the collision, for article 9 (*g*) applied, and that the trawler should have sounded a foghorn and rung a bell alternately at intervals of not more than two minutes.

The steamship colliding with the trawler had heard the whistle of another vessel, not the trawler, and had not stopped.

Held, that there was no obligation on the steamship to stop, from whether the whistle proceeded from the trawler or not, it was heard abaft the beam.

Semble, the steamship would have been held to blame for not stopping if the whistle heard had been forward of the beam, even though the whistle heard did not proceed from the vessel collided with. —"LONDON," THE, *P.D. & Ad.D.*; [1904] P. 355; 73 L. J. P. 125; 91 L. T. 327.

22. *Collision—Substituted expense—Compromise—Reasonableness of compromise—Loss arising out of collision.*—A collier steamship chartered by the plaintiffs to carry a cargo of coal from the Tyne to Cape Town came into collision with a steamship of the defendants and put into the Thames for repairs. An agreement was entered into between the plaintiffs and the owners of the collier by which the voyage was to be abandoned, the cargo was to be sold, and a sum of money was to be paid by the plaintiffs to the owners of the collier as a "substituted expense" in lieu of the estimated greater expense of storing the cargo during the repairs and reshipping it after the repairs had been effected. Both vessels were held to blame for the collision, and the defendants paid the owners of the collier a half of the damage sustained by them. The plaintiffs then issued a writ against the defendants and claimed a half of the sum paid by them as a substituted expense. No part of this claim had been dealt with in the proceedings between the two vessels.

Held, that the plaintiffs were entitled to recover the sum claimed.

Judgment of Bucknill, J. (52 W. R. 672, [1904] P. 202), reversed.—"MINNETONKA," THE, *C.A.*, 521.

23. *Collision—Tow and vessel at anchor—Negligence of tug—Damage to cargo in tow—Action by cargo owner against tug and tow owners—Contract between tug and tow—Indemnity of tug owner by tow owner.*—A barge in tow of a tug came into collision with a barge at anchor. The collision was caused by the negligence of those on the tug. The cargo on the barge which was being towed was damaged. The cargo owners brought an action for tort against both the barge and tug owners for the damage, and also brought their action against the barge owners alternatively for breach of contract to carry safely and deliver the cargo. In that action the claim of the cargo owners against the owners of the barge was dismissed with costs, but the owners of the cargo recovered against the owners of the tug in tort, with costs, and the tug owners were also ordered to pay to the cargo owners the costs of the cargo owners' unsuccessful action against the barge owners.

The tug owners had contracted to tow the barge on the following terms: "They will not be answerable for any loss or damage which may happen to any barge or its cargo while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise, and the services of their tugs must be understood and agreed to be engaged upon the terms that they are to be held harmless, and indemnified from any such loss or damage, and against the faults or defaults of their servants or any claim therefor, by whomsoever made. And the customers of the said Gaselee & Sons undertake and agree to bear, satisfy, and indemnify them accordingly." The tug owners claimed to be indemnified by the barge owners for the damages and costs which they had paid to the cargo owners.

Held, that the barge owners were liable under the contract to indemnify the tug owners even against the results of the tug owners' negligence and that the barge owners should pay to the tug owners the amount of the damages and costs recovered by the cargo owners from the tug owners, including the costs paid to the barge owners by the cargo owners, and which the cargo owners had in the first instance recovered from the tug owners.—"MILLWALL," THE, *P.D. & Ad.D.*; [1905] P. 155; 74 L. J. P. 13; 91 L. T. 695.

24. *Collision—Tug and tow—Pilot cutter lashed*

alongside tow—Duty of vessel alongside.—While a sailing ship in tow of two tugs was proceeding down the Bristol Channel with a pilot cutter waiting to take off the pilot lashed alongside, a collision occurred with a schooner, whereby the cutter was sunk.

Held, that while the tugs were to blame for having infringed the collision regulation which directed them to avoid crossing ahead of the schooner, those on board the cutter were not emancipated from the duty of keeping a good look-out and taking all reasonable and proper steps to avoid a collision, and therefore the cutter was also to blame.—"HARVEST HOME," THE, *C.A.*; [1905] P. 177; 74 L. J. P. 65.

25. *Collision—Tyne Navigation Rules, Nos.* 21 *and* 22.—Rule 21 requires that "every vessel when under way, and requiring to pass over a part of the channel which is not within that half reserved for its navigation, for the purpose of proceeding to or from any landing, mooring, or other place, shall be navigated so as to cause no obstruction, injury, or damage to any other vessel; and every vessel continuing its navigation, after reaching such landing, mooring, or other place, shall be navigated as soon as practicable to the side of the river specified as the proper side for its navigation, and so as to cause no obstruction, injury, or damage to any other vessel." Rule 22 provides that "every vessel crossing the river, and every vessel turning, shall be navigated so as not to cause obstruction, injury, or damage to any other vessel."

The Court held that what the substance of the two rules indicated was that the crossing vessel must be so navigated as not to cause obstruction to another vessel. In other words, the crossing vessel may cross if there is time and opportunity to do so without hampering another vessel, and that another vessel which sees a vessel about to cross must act reasonably with regard to that crossing vessel, and if the crossing vessel requires a little more room to assist her in crossing such more room must be given. —"SKIPSEA," THE, *P.D. & Ad.D.*, 538; [1905] P. 32; 74 L. J. P. 34.

26. *Crimping—Foreign ship—Unauthorized person going on board—Foreign ship arriving at British port, though not at end of voyage—"End of their voyage" —Order in Council—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 218, 219.—Section 218 of the Merchant Shipping Act, 1894, makes it an offence, where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, for any unathorized person to go on board the ship, without the permission of the master, "before the seamen lawfully leave the ship at the end of their engagement or are discharged"; and section 219 enables the Crown, where an arrangement has been made between this country and a foreign country whose government is desirous that the provisions of section 218 should apply to unauthorized persons going on board ships of that foreign country within the British territorial jurisdiction, by an Order in Council to order that those provisions shall apply to the ships of that foreign country, and have effect "as if the ships of that country arriving, about to arrive, or having arrived at the end of their voyage, were British ships."

Held, that a foreign ship to which the above provisions have been applied by an Order in Council, arrives at the end of her voyage within the meaning of the section and comes within the above provisions, when in the course of her voyage she arrives at any British port, although that may not be the end of the voyage for which the crew signed articles.—BOARD OF TRADE *v.* ABRAHAMS, *K.B D.*; [1904] 2 K. B. 859; 73 L. J. K. B. 973; 91 L. T. 493.

27. *Jurisdiction—Action* in rem—*Res sold by private person—Action against proceeds of sale.*—Where property which might have been the subject of an action *in rem* under Admiralty jurisdiction has been sold by a private person, there is no right of action *in rem* against the proceeds of sale in the hands of such person.—"OPTIMA," THE, *P.D. & Ad.D.*; 74 L. J. P. 94.

28. *Mortgage of ship—Mortgagors in possession—Contract impairing the security—Charter-party for carriage of contraband of war—Debenture trust deed.* Where mortgagors in possession of a ship entered into a charter-party by which she was chartered for the carriage of contraband of war to a port of one of two belligerent states, which would involve great risk of her capture by the other belligerent, and the ship was not insured against such risks,

Held, that the mortgagees were entitled to a declaration that the charter-party was not binding on them on the grouud that it impaired the security, although the ship had sailed with her cargo on the voyage under the charter-party.

Collins v. *Lamport*, (1864) 4 D. J. & S. 500, followed.

The Celtic King, [1894] P. 175, discussed.—LAW GUARANTEE AND TRUST SOCIETY *v.* RUSSIAN BANK FOR FOREIGN TRADE. *C.A.*; [1905] 1 K. B. 815; 74 L. J. K. B. 577; 92 L. T. 435.

29. *Necessaries—Disbursements by master—Bill of exchange—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 167-742.—A master defended, and lost, an action on a bill of exchange given by him for necessaries supplied to his ship, which bill was dishonoured by his owners.

The Court held that in the circumstances of the case the costs of the action incurred by the master were not liabilities properly incurred on account of the ship within the meaning of section 167 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), inasmuch as the defence did not appear to be reasonably necessary in the interest of the ship.—"ELMVILLE," THE. *P.D. & Ad.D.*, 287; [1904] P. 422; 73 L. J. P. 120; 91 L. T. 330.

30. *Offence—Going on board ship at end of voyage without authority—Liability to six months' imprisonment—Offence to be "prosecuted summarily"—Right to trial by jury—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 218, 680, *sub-section* 1 (b)—*Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *s.* 17.—Section 680, sub-section 1 (*b*), of the Merchant Shipping Act, 1894, provides that an offence under the Act made punishable with imprisonment for a term not exceeding six months, or by a fine not exceeding £100, "shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts."

Held, that this sub-section does not exclude section 17 of the Summary Jurisdiction Act, 1879, under which a person charged before a court of summary jurisdiction with an offence in respect of which he is liable to imprisonment for a term exceeding three months, has a right to be tried by a jury; and, consequently, if a person is charged under section 218 of the Merchant Shipping Act with unlawfully going on board a ship which has arrived at the end of her voyage, whereby he becomes liable under that section to a fine not exceeding £100, or, at the discretion of the court, to imprisonment not exceeding six months, such person has the right, upon being charged before the court of summary

jurisdiction, to claim to be tried by a jury.—REX *v.* GOLDBERG, *K.B.D.*; [1904] 2 K. B. 866; 73 L. J. K. B. 970; 91 L. T. 490.

31. *Practice — Jurisdiction — Salvage action — Counterclaim for breach of charter-party — Embarrassment—Ord.* 19, *r.* 27—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 24, *sub-section* 3. —The Admiralty Division has jurisdiction to entertain a claim *in personam* for damages for breach of a charter-party.

An action *in rem* was brought in the Admiralty Division to recover remuneration for salvage services rendered by the plaintiffs' vessel to the defendants' vessel when the latter took the ground in crossing the bar of the river. The defendants, besides denying that any salvage services had been rendered, counterclaimed *in personam* against the plaintiffs, who were foreigners resident abroad, as charterers of their vessel, for damages for breach of charter-party in delay in loading the defendants' vessel, whereby she was too late in crossing the bar. The judge having refused to strike out the counterclaim,

Held, that the judge of the Admiralty Division had jurisdiction to try the counterclaim, and that he had rightly exercised his discretion in refusing to strike it out.—"CHEAPSIDE," THE, *C.A.*, 120; [1904] P. 339; 73 L. J. P. 117; 91 L. T. 83.

32. *Salvage—Agreement to render services between owners of salving and salved vessels—Service begun before agreement entered into—Independent right of master and crew of salving vessel to salvage.*—The owners of a vessel resident in Liverpool learnt that their vessel was disabled, and agreed with the owners of a tug resident in Liverpool, which was thought to be in the neighbourhood of the disabled vessel, that the tug should tow the disabled vessel to Liverpool on the usual towage terms per tide; before the agreement was made or the owners of the tug could communicate with the tug master, the tug master had picked up the disabled vessel, and had begun to tow her to Liverpool.

In an action for salvage brought by the owners, master, and crew of the tug against the disabled vessel, her cargo, and freight,

Held, that the owners of the tug were bound by the towage agreement; but that her master and crew had an independent right to salvage remuneration.

The Inchmaree, 8 Asp. Mar. Law Cas. 486, followed.—"FRIESLAND," THE, *P.D. & Ad.D.*; [1904] P. 345; 73 L. J. P. 121; 91 L. T. 324.

33. *Salvage—Appeal—Costs—Reduction of award.* —The Court of Appeal, having reduced the amount of a salvage award, allowed the successful appellants the costs of the appeal.

The Kilmaho, 16 T. L. R. 155, and *The Prince Llewellyn*, [1904] P. 83, followed.

The Gypsy Queen, 43 W. R. 359, [1895] P. 176, not followed.—"TOSCANA," THE, *C.A.*, 405; [1905] P. 148; 74 L. J. P. 54.

34. *Seaman—Contract for service—Increase of risk —Carrying contraband of war — Termination of voyage by capture—"Loss of the ship"—Right to wages—Damages—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 158.—A British seaman signed ship's articles to serve on an ordinary trading voyage on a British ship between ports in the East for two years, the engagement to end at a port of discharge in the United Kingdom or certain ports on the Continent of Europe. While the ship was in the East, after the outbreak of war between Russia and Japan, she was chartered by the owners for six months to carry railway materials from Japan to Korean ports and was captured by one of the belligerents and confiscated by a Prize Court. The owners knew, but the seaman did not, that railway materials had been declared contraband of war. The crew were sent back to London, and suffered hardships on the journey.

Held, that as the shipowners had broken the agreement by altering the character of the voyage, and the ship was captured owing to the wilful action of the owners in carrying contraband of war, the voyage was not terminated "by reason of the loss of the vessel" within the meaning of section 158 of the Merchant Shipping Act, 1894, and therefore the seaman was entitled to wages up to the date of his arrival in London.

Quære, whether in any case the capture of a ship confiscated for carrying contraband of war would be included in the word "loss" in section 158 as terminating the voyage before the date contemplated in the agreement.—AUSTIN FRIARS STEAM SHIPPING CO. *v.* STRACK, *K.B.D.*, 661; [1905] 2 K. B. 315; 74 L. J. K. B. 683.

SLANDER:—

1. *Charge of bringing blackmailing action—No special damage—Imputation of criminal offence.*—To accuse a man of having brought a blackmailing action is to use words which are capable of being understood by the hearers as imputing an indictable offence to the person so accused, and an action for slander is consequently maintainable, even though no special damage be alleged.—MARKS *v.* SAMUEL, *C.A.*, 88; [1904] 2 K. B. 287; 73 L. J. K. B. 587; 90 L. T. 590.

2. *Privilege—Ecclesiastical commission of inquiry —Absolute immunity—Pluralities Act*, 1838 (1 & 2 *Vict. c.* 106), *s.* 77—*Pluralities Acts Amendment Act*, 1885 (48 & 49 *Vict. c.* 54), *s.* 3—*Practice—Interrogatories—Right to refuse to answer—Alternative defences.*—Where a bishop issues a commission under section 77 of the Pluralities Act, 1838, as amended by section 3 of the Pluralities Acts Amendment Act, 1885, to inquire as to whether the incumbent of a benefice has inadequately performed his ecclesiastical duties, evidence given before the commissioners comes within the rule under which evidence given in a court of justice is exempt from being made the subject-matter of an action of slander. Therefore in an action of slander, in which the plaintiff complains of such evidence, the defendant cannot be interrogated as to whether he spoke the words complained of.

In an action of slander the defendant pleaded that he did not speak the alleged words, and in the alternative that if he spoke them he did so upon the invitation of the plaintiff. The plaintiff administered interrogatories to the defendant asking whether he did not speak the alleged words, and how and when the plaintiff invited him to speak them. The defendant answered that he did not speak the alleged words, but that he did speak certain other words which he set out, and further that, as the alleged words were not the words he spoke, he was not called upon to answer the interrogatory as to how and when the plaintiff invited him to speak the alleged words.

Held, that the defendant must answer the last-mentioned interrogatory.—BARRATT *v.* KEARNS, *C.A.*, 356; [1905] 1 K. B. 504; 74 L. J. K. B. 318; 92 L. T. 255.

SOLICITOR:—

1. *Costs—Charge on property recovered or preserved —Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—

Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.—A limited company being unable to meet its liabilities, executions were levied on the company's property by creditors, and other creditors threatened actions. An extraordinary meeting of the company was then held, and resolutions were duly passed to wind up the company voluntarily. It was further resolved that the liquidator should submit a proposal for the reconstruction of the company.

A scheme of arrangement, sanctioned by order of the court, under the Joint Stock Companies Arrangement Act, 1870, provided that a new company should be incorporated; that one of its objects should be the acquisition and undertaking of the assets and liabilities of the company; that the new company should discharge the unsecured debts of the company by allotting to the unsecured creditors fully paid-up shares in the new company in full discharge of their claims against the company; and that the shareholders of the company should receive partly paid-up shares in the new company. It was also provided that the new company should pay all the costs of the winding-up and of the scheme of arrangement.

In pursuance of this order an agreement, subsequently adopted by the new company, was made between the liquidator and the trustee of the future new company whereby it was provided that part of the consideration payable by the new company to the liquidator should be cash. The new company did not pay cash, and the assets of the company accordingly were not transferred to the new company.

Held, that the company's assets purchased by the new company and retained by the liquidator were to be charged with the costs of the company's solicitor which had arisen in connection with the winding-up and reconstruction of the company, the company's property having been "recovered or preserved" through the instrumentality of the solicitor within the meaning of section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 12).—CLAYTON, RE, *Ch.D. Bukley, J.*; 92 L. T. 223.

2. *Costs—Past costs—Oral agreement to pay lump sum—Account stated—Bill of costs.*—Where a solicitor has a bill of costs against his client on the one hand, and the client on the other hand has a claim against the solicitor for work done not of a professional nature, then if the solicitor and client meet and strike a balance, in favour of the solicitor, that is not an agreement by the client to pay his solicitor a lump sum which would require to be in writing within the meaning of the Solicitors' Remuneration Acts.—TURNER & SON *v.* WILLIS, *K.B.D.*, 348; [1905] 1 K. B. 468; 74 L. J. K. B. 365; 92 L. T. 412.

3. *Costs—Public body—Right to elect—Practice—Taxation—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Aug.*, 1882, *r.* 6 —The right of a solicitor under rule 6 of the general order under the Solicitors' Remuneration Act, 1881, to elect to charge according to the old system as altered by Schedule II. to the order, instead of by scale, is not taken away by the fact that his clients are a public body or persons in a fiduciary capacity; nor is it the duty of public bodies or persons in a fiduciary capacity to prevent their solicitors from so electing.

A school board instructed a solicitor to act for them in the matter of a purchase of a school site for £350. The solicitor duly signified to the board his election under rule 6 of the general order to charge on the old system as altered by Schedule II. The board consented. The matter was completed, and the solicitor sent in a bill for £50 2s. On taxation the taxing-master reduced the bill to £13, the amount of the scale charge and disbursements, and stated in answer to objections that the school board, being a public body charged with the administration of public funds, were in a fiduciary position, and it was their duty not to employ a solicitor who insisted on the more expensive mode of payment.

Held, that no such duty was cast on a public body or persons in a fiduciary position, and that the bill must be referred back to be taxed according to the solicitor's election.—EVANS (A SOLICITOR), RE, *Ch.D. Farwell, J.*; [1905] 1 Ch. 290; 74 L. J. Ch. 204; 92 L. T. 151.

4. *Costs—Taxation—Recitals in order—Implied authority of wife to pledge her husband's credit—Divorce — Judicial separation — Alimony — Second divorce petition—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 26.—Section 26 of the Matrimonial Causes Act, 1857, absolutely deprives the wife, from the date of a decree for judicial separation, of all right and power to pledge her husband's credit or to contract on his behalf during the continuation of the judicial separation, unless the husband fails to pay the alimony which has been decreed; and the wife has no power to pledge her husband's credit even for necessaries which the alimony could not have been supposed to cover, and the principle of *Turner v. Rookes*, 10 Ad. & E. 47, no longer applies.

Decision of Warrington, J., reversed.

The provision in that section that in the case of a judicial separation the husband shall not be liable in respect of any engagement or contract the wife may have entered into, is governed by the words "whilst so separated" in the previous part of the section, and refers only to engagements and contracts entered into by the wife during the separation; and the section does not relieve the husband from liability in respect of contracts properly made by the wife on the husband's account which were in existence at the date of the decree for the judicial separation.

Whether, where an order for taxation obtained by a solicitor under section 37 of the Solicitors Act, 1843, contains a specific statement of a retainer in in a particular transaction, and the client goes on under that order, he can dispute that retainer—*Quære.*

In re Jones, 36 Ch. D. 105, considered on this point.

A wife, under her implied authority to pledge her husband's credit for that purpose, retained solicitors for her defence in a divorce suit commenced by her husband and also to commence an action of detinue against the husband for her clothes. The divorce suit was dismissed with costs and a judicial separation was granted to the wife. Shortly afterwards the husband presented a second petition for divorce. The wife then obtained an order increasing the interim alimony allowed her, and the action for detinue was shortly afterwards decided in her favour.

The second divorce petition was afterwards dismissed with costs and an order for permanent alimony was also made. The husband had duly paid the alimony as ordered.

Held (reversing the decision of Warrington, J.) that the husband was not liable for the costs of the second divorce petition; but (affirming the decision of Warrington, J.) that he was liable for all the costs of the detinue action, and also of the alimony proceedings, the latter being part of the proceedings in the first divorce petition.—WINGFIELD &

BLEW, RE, *C.A.*; [1904] 2 Ch. 665; 73 L. J. Ch. 797; 91 L. T. 783.

5. *Costs — Taxation — Third party—Agreement—Indemnity—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.—A third party, who has agreed to pay the costs incurred in an action of another party, does not by obtaining an order for taxation under section 38 of the Solicitors Act, 1843, enlarge his liability, and cannot be charged with items which could only be claimed by the solicitor as against his own client by virtue of express instructions.

In re Longbotham & Sons, 52 W. R. 660, followed.

Judgment of Swinfen Eady, J. (*ante*, p. 315, [1905] 1 Ch. 345), affirmed.—COHEN & COHEN, RE, *C.A.*, 529; [1905] 2 Ch. 137; 74 L. J. Ch. 517; 92 L. T. 782.

6. *Lien—Country solicitor and town agent—Trustee in bankruptcy—Right to production of documents in order to vouch bill of costs—Waiver of lien.*—The town agent of a country solicitor who has given notice to the country client of his lien, has a right of lien upon all the documents which have come into his possession during the course of the proceedings for the whole amount of the costs due from the country client to the country solicitor; and this right of lien is not waived because the town agent has acted for the country client in obtaining an order to tax the country solicitor's bill of costs.—JONES & ROBERTS, RE, *Ch.D. Joyce, J.*, 444; [1905] 2 Ch. 219; 74 L. J. Ch. 458; 92 L. T. 562.

7. *Unqualified person—Carrying on proceedings—Entering appearance as agent for defendant—Motion to attach—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 2—*Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 26—*Rules of the Supreme Court, ord.* 12, *rr.* 9, 11.—Held, that giving notice of appearance as agent on behalf of the defendant in an action was "carrying on a proceeding" within the meaning of section 2 of the Solicitors Act, 1843; and, therefore, when such notice was given to the plaintiffs by an unqualified person, such person was guilty of a contempt of court by virtue of section 26 of the Solicitors Act, 1860.—AINSWORTH, RE, *K.B.D.*, 533; [1905] 2 K. B. 103; 74 L. J. K. B. 462; 92 L. T. 652.

See also Trustee, 5.

STATUTE:—

Interpretation—Teignmouth Harbour Act, 1853 (16 *Vict. c. xxxvi.*).—The word "person," when used in a statute, does not include corporation where the statute contains expressions that are repugnant to that construction: Thus, under a statute providing that the persons present at a meeting may vote, but that a proxy shall not be admitted, a corporation, though a person in law, is debarred from voting.—WILLS *v.* TOZER, *Ch.D. Farwell, J.*, 74.

STOCK EXCHANGE:—

1. *Broker—Bankruptcy—Completion by jobber with broker's customers—Right of jobber to sue broker—Stock Exchange creditor's right to petition in bankruptcy.*—Where a broker on the London Stock Exchange was declared a defaulter, and there were due from him to a jobber £986 in respect of the purchase and sale of shares, and a further sum of £281 paid by the jobber to the official assignee under the Stock Exchange Rules in completing the broker's transactions, then the proceedings in the Stock Exchange liquidation are not a discharge of the broker, but an action is still maintainable against him by the jobber for both sums less the amount of dividend received.

The judgment in the action is sufficient to support a bankruptcy petition against the defaulter.

Decisions of the Court of Appeal (51 W. R. 3, [1902] 2 K. B. 653, and [1903] 1 K. B. 216) affirmed.—MENDELSSOHN *v.* RATCLIFF, *H.L.*, 240; [1904] A. C. 456; 73 L. J. K. B. 1027; 91 L. T. 204.

2. *Defaulter — Assets — Official assignee — Money paid into court by defendant in action by defaulter—Charging order by judgment creditor of defaulter.*—The plaintiff, who was not a member of the Stock Exchange, recovered judgment against the defendants, who were members, in respect of a loan which had no connection with Stock Exchange transactions.

The defendants had previously been declared defaulters, and the official assignee had brought an action in their name to recover a sum of money in respect of Stock Exchange transactions from a third person, who had paid into court a sum of money shortly before the plaintiff recovered his judgment.

This money being still in court, the plaintiff sought to obtain a charging order thereon in respect of his judgment.

Held (dismissing the appeal), that, all the assets of the defaulters having been assigned to the official assignee by the operation of the rules of the Stock Exchange, the plaintiff was not entitled to a charging order upon the money paid into court.—LOMAS *v.* GRAVES & Co., *C.A.*; [1904] 2 K. B. 557; 73 L. J. K. B. 803; 91 L. T. 616.

See also Bankruptcy, 1; Gaming, 2; Partnership, 2.

TELEPHONE:—

"*Restricted intercommunication*"—"*Proper facilities*"—*Telegraph Act*, 1899 (62 & 63 *Vict. c.* 38), *s.* 3 (5)—*Telegraph* (*Telephonic Intercommunication*) *Order*, 1899.—Where a licensee of the Postmaster-General providing public telephonic communication in a defined area requests another licensee to give facilities for intercommunication between the subscribers of their respective systems, in the absence of an order of the Postmaster-General prescribing the terms and conditions of such intercommunication, the court will not prescribe any particular method; but if the method insisted on by the party applied to amounts, in the opinion of the court, to a refusal of proper facilities, the court may declare that the party applied to has so refused, and that the other party is entitled to be afforded proper facilities, and may order the party applied to to grant such facilities.—SWANSEA CORPORATION *v.* NATIONAL TELEPHONE Co., *Ch.D. Buckley, J.*, 505; 74 L. J. Ch. 449; 92 L. T. 799.

TRADE-MARK:—

1. *Registration — Application to remove — Fancy word — "Tabloid" — Long user — Presumption — Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.—In and previously to 1884 B. manufactured and sold compressed drugs in a solid form, and of a lenticular or bi-convex shape, and had registered the word "Tablets" as a trade-mark in connection with them.

In 1884 B. invented the word "Tabloid," and registered it as a trade-mark under the Patents, Designs, and Trade-Marks Act, 1883, in respect of substances used in medicine and pharmacy, and had since manufactured and sold compressed drugs of the same shape and size as before as "Tabloids."

Held, that at the date of registration the word "Tabloid" was not descriptive, and was a distinctive fancy word not in common use.

Decision of Byrne, J., affirmed.

When a trade-mark is impeached which has

been on the register for a long period, and has been openly and largely made use of, there is a presumption that it is properly on the register, and the onus of proof that it was improperly registered is on the person applying to have it expunged.

In re Chesebrough Manufacturing Co.'s Trade-mark "Vaseline," 86 L. T. Rep. 665, [1902] 2 Ch. 1, followed.—BURROUGHS, WELLCOME, & CO., RE, *C.A.*; [1904] 1 Ch. 736; 73 L. J. Ch. 474; 91 L. T. 58.

2. *Word—Invented word—Descriptive—Patents, &c., Acts,* 1883 (46 & 47 *Vict. c.* 57), *s.* 64 (1) (d) (*e*), *and* 1888 (51 & 52 *Vict. c.* 50), *s.* 10.—In order to determine what words are proper for registration as trade-marks, the court will look at the word itself in every case. "Absorbine," applied to an absorbent medicament, is not an invented word but a variation of "absorb," and has reference to the character or quality of the article; it is consequently not a proper word for registration.—CHRISTY *v.* TIPPER, *C.A.*, 147; [1905] 1 Ch. 1; 74 L. J. Ch. 55; 91 L. T. 712.

See also County Court, 4.

TRADE-NAME:—

Advertisement—Imitation.—No trader is justified in taking the peculiar symbol, device, or mark by which another trader distinguishes his goods on the market, and so attracting custom to himself from his rival.

The appellants sold their goods in boxes, with the name of the article printed in a particular manner on a "scroll." The respondents sold precisely similar goods under the same name, also printed on a similar scroll, with the addition of their initials "C.B." There was no evidence that any customers were in fact deceived, and after the commencement of the action the respondents discontinued the use of the scroll.

Held (reversing the judgment of the court below, Lord Robertson dissenting), that the appellants were entitled to an injunction to restrain the respondents from using the scroll in connection with their goods, and to an account of profits derived by the respondents from the sale of goods in boxes distinguished by the scroll.—WEINGARTEN *v.* BAYER, *H.L.*; 92 L. T. 511.

TRADE UNION:—

1. *Application of funds to unauthorized purposes—Action by individual member—Injunction—Form of order—Trade Union Act,* 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-section* 3.—An action is maintainable by a member of a trade union to restrain the union from dealing with its funds in a manner contrary to its then existing rules. Such an action is not prohibited by section 4, sub-section 3, of the Trade Union Act, 1871.

Decision of the Court of Appeal ([1903] 1 K. B. 308, 51 W. R. Dig. 162) (Lords Davey and James of Hereford dissenting) affirmed, but form of order varied. — YORKSHIRE MINERS' ASSOCIATION *v.* HOWDEN, *H.L.*, 667; [1905] A. C. 256; 74 L. J. K. B. 511; 92 L. T. 701.

2. *Master and workman—Procuring breach of contract—Just cause or excuse—Malice—*Bonâ fide *advice.*—The absence of malice or sinister motives is not a legal justification for persons procuring a breach of contract by others.

The South Wales Miners' Federation directed the men to stop work, which they did, on certain days, and thereby occasioned loss to the employers. There was no personal *animus* against the masters, but it was considered that the workmen would benefit by an ultimate advance in the price of coal.

Held, that an action by the employers against the federation would lie.

Decision of the Court of Appeal (52 W. R. 165, [1903] 2 K. B. 545) affirmed.—SOUTH WALES MINERS' FEDERATION *v.* GLAMORGAN COAL CO., *H.L.*, 593; [1905] A. C. 239; 74 L. J. K. B. 521; 92 L. T. 710.

3. *Unlawful objects—Directly enforcing agreement—Infliction of fine on members—Jurisdiction of court—Injunction—Trade Union Act,* 1871 (34 & 35 *Vict. c.* 31), *ss.* 3, 4, *sub-sections* 2, 3.—Where the executive committee of a registered trade union have passed a resolution inflicting fines upon members who have acted in a manner prejudicial to the welfare of the society by working in the same shop with a non-member the society will not be restrained at the instance of the members on whom such fines have been stated to have been imposed from levying them even on the assumption that the rules give no direct power of fining. To prohibit the defendants from levying such fines at the instance of parties who still wish to retain the benefit of membership of the society with its attendant advantages would be entertaining legal proceedings instituted with a view to directly enforcing an agreement within section 4 of the Trade Union Act, 1871.

Rigby v. *Connol*, 42 L. T. Rep. 139, 14 Ch. D. 482, and *Chamberlain's Wharf (Limited)* v. *Smith*, 82 L. T. Rep. 238, [1900] 2 Ch. 605, followed.

Howden v. *Yorkshire Miners' Association*, 88 L. T. Rep. 134, [1903] 1 K. B. 309, distinguished.—MULLETT *v.* UNITED FRENCH POLISHERS' SOCIETY, *Ch.D. Kekewich, J.*; 91 L. T. 133.

TRAMWAY:—

1. *Bye-law—Ticket—Failure to produce—Refusal to deliver up—Offence.*—By a tramway bye-law made by the corporation of S., "Each passenger when tickets are issued shall as and when requested to do so show his ticket to the conductor or other servant of the corporation acting in performance of his duty, and shall also when requested to do so by the conductor or other servant of the corporation acting in the performance of his duty deliver up his ticket or, in case of failure to produce such ticket, pay the fare legally demandable for the distance travelled over by such passenger."

The appellant, a passenger on one of the tramcars of the corporation of S., paid his fare, but refused to accept the ticket tendered by the conductor, on account of a condition printed on the back of it. The ticket fell on the floor of the top of the tramcar. Later an inspector asked the appellant for his ticket, who pointed it out to him lying on the floor, but refused to take it up or to pay another penny for his fare.

Held, that the appellant had not committed any offence under the bye-law.—WILSON *v.* FEARNLEY, *K.B.D.*; 92 L. T. 647.

2. *Construction of Act—Maintain and keep in good condition "junction" of company's paving and corporation's surface.*—By the Norwich Electric Tramways Act, 1897, the defendant company were to maintain and keep in good condition "the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation."

Held, that the word "junction" could not only mean the mere point or place where the two surfaces met, but that the defendant company had to maintain the even contour of the road at the junction of the two surfaces.—NORWICH CORPORATION *v.* NORWICH TRAMWAYS CO., *K.B.D.*; 92 L. T. 558.

3. *Light railway—"Hackney carriage"—"Omnibus"—Tramcars run on rails in street and worked by electric energy—Town Police Clauses Act*, 1847 (11 & 12 *Vict. c.* 89), *ss.* 37, 45—*Town Police Clauses Act*, 1889 (52 & 53 *Vict. c.* 89), *ss.* 3, 6—*Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48)—*Spen Valley Light Railway Order*, 1901.—The appellants were a light railway company formed under provisional orders made in accordance with the Light Railways Act, 1896, who had been summoned and convicted for allowing one of their cars to ply for hire in the borough without a licence, contrary to the provisions of the Town Police Clauses Act, 1847, as extended by the Town Police Clauses Act, 1889.

Held, that the appellants had been wrongly convicted, since the provisions in the Town Police Clauses Act, 1889, which enlarged the definition of hackney carriage in the Town Police Clauses Act, 1847, so as to include omnibuses, did not apply to a car plying for hire on a street railway or tram line constructed and worked under an order made under the Light Railways Act, 1896, for such car was not a hackney carriage within the meaning of the Town Police Acts.—YORKSHIRE ELECTRIC TRAMWAYS *v.* ELLIS, *K.B.D.*, 303; [1905] 1 K. B. 396; 74 L. J. K. B. 172; 92 L. T. 202.

4. *Purchase of tramway—Cost of widening streets—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.—A local authority in pursuance of its powers under section 43 of the Tramways Act, 1870, gave notice to purchase certain tramways. At the date of the construction of the tramways it was not the practice (as at present) to require tramways to contribute towards the cost of widening the streets. At a reference held to determine the value of the tramways the tramway company claimed that the value of the tramways was enhanced by reason of their being free from such liability to contribute, and tendered evidence to show what such contribution would have amounted to.

Held, that the referee was right in rejecting such evidence, and that the claim of the company was not well founded.—LONDON, DEPTFORD, AND GREENWICH TRAMWAY CO. *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 411; [1905] 1 K. B. 316; 74 L. J. K. B. 143; 92 L. T. 124.

See also Highway, 8.

TRUST:—

1. *Church—Property held in trust for religious body—Power to unite with other religious body—Variation of fundamental tenets—Position of dissentient minority—Right to trust fund.*—Where property is held in trust for a religious body holding certain definite tenets, it is not lawful for a majority of such body, by agreeing to unite with another religious body differing from them on some essential points, to alienate the trust property from its original destination for the use of such united body, in the absence of an express power to modify their original tenets; but a dissentient minority, who disapprove of the union, and hold to the original tenets of the founders of the body, are entitled to retain the trust property.

The position is not affected by the fact that the two bodies proposing to unite agree to regard certain points upon which they differ as open questions.

Judgment of the court below reversed, Lords Macnaghten and Lindley dissenting on the question of whether there was in the particular case a power to modify the original tenets of the founders.

Craigdaillie v. *Aikman*, 2 Bli. 529, 1 Dow. 1, followed.—FREE CHURCH OF SCOTLAND *v.* OVERTOUN (LORD), *H.L.*; [1904] A. C. 515; 91 L. T. 394.

2. *Release—Breach of trust—Joint and several liability—Compromise with one trustee—Release* pro tanto *of the others—Right to prove in the bankruptcy of another trustee for full amount of debt.*—Where in an action against trustees for breach of trust a sum is certified to be due from the defendants to the plaintiff, the acceptance by the plaintiff of a payment by one trustee by way of compromise in discharge of his liability does not operate as a release *pro tanto* of the others; consequently the plaintiff may prove in the bankruptcy of another trustee for the full amount of the certified debt without giving credit for the compromise.—EDWARDS *v.* HOOD-BARRS, *Ch.D. Kekewich, J.*; [1905] 1 Ch. 20; 74 L. J. Ch. 167; 91 L. T. 766.

3. *Resulting trust—Fund raised by subscription for the education of certain children—Children attain full age—Unapplied surplus—No resulting trust for subscribers—Fund divided among children.*—A fund was raised by subscription in 1889 for the education of the children of the late Bishop of Jerusalem. In a letter written by the collector of the fund it was stated that "it was not intended for the exclusive use of any one of them in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education." All the children had now attained full age. The expenses of their education having been defrayed partly out of their father's estate and partly out of this fund, of which a balance remained unexpended, the children claimed that this balance should be divided among them in the proportion in which the shares of their father's estate had been diminished by payments for their education and maintenance.

Held, that there was no resulting trust in favour of the subscribers, the term "education" being construed in the broadest sense and as only an indication of the motive of the gift, and that the division of the balance of the fund ought to be among all the children equally.—ANDREW, RE, CARTER *v.* ANDREW, *Ch.D. Kekewich, J.*, 585; [1905] 2 Ch. 48; 74 L. J. Ch. 462; 92 L. T. 766.

4. *Trustee and* cestui que trust*—Administration—Tenants for life — Over-payments — Adjustment—Trustee also a beneficiary—Right to impound.*—Where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, and died before any adjustment had been made,

Held, that the executors of the deceased trustee were not entitled to recover from the other beneficiaries the amounts so overpaid, or to have accrued or future income impounded till the shares were equalized, by reason of the fact that their testator was, as trustee, himself the person responsible for the mistake that had been made.—HORNE, RE, WILSON *v.* COX-SINCLAIR, *Ch.D. Warrington. J.*, 317; [1905] 1 Ch. 76; 74 L. J. Ch. 25; 92 L. T. 263.

TRUSTEE:—

1. *Appointment—Power to appoint new trustees—Appointment of corporation jointly with individual—Bodies Corporate (Joint Tenancy) Act*, 1899 (62 & 63 *Vict. c.* 20).—A marriage settlement contained a proviso that, if the trustees thereby constituted or either of them, or any trustees or trustee thereby appointed, should die . . . it should be lawful for the husband and wife to appoint a new trustee

or new trustees in the place of the trustee or trustees so dying. One of the trustees having died, the husband and wife proposed to appoint a corporation to be new trustee jointly with the surviving trustee.

Held, that since the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), had enabled corporate bodies to hold property in joint tenancy with individuals, the appointment could legally be made under the power.—THOMPSON'S SETTLEMENT, RE, THOMPSON *v.* ALEXANDER, *Ch.D. Swinfen Eady, J.*; [1905] 1 Ch. 229; 74 L. J. Ch. 133; 91 L. T. 835.

2. *Breach of trust—Consent of beneficiary—Replacement of lost fund by trustee—Impounding interest of consenting beneficiary.*—Mere acquiescence in a breach of trust on the part of a beneficiary, who derives no personal benefit from the breach of trust, does not render such beneficiary's interest in the trust estate liable to be impounded in order to indemnify the trustee liable to make good the loss occasioned by the breach. But in the absence of special circumstances, such as the existence of a peculiarly confidential relation between the trustee and the beneficiary, a beneficiary who has consented to a breach of trust cannot make the trustee liable to him for any damage suffered in respect of his interest in the trust estate. Nor if the loss be made good by the trustee at the instance of other beneficiaries, is the beneficiary, who has consented to the breach of trust which gave rise to the loss, entitled as against the trustee to any benefit from the fund so made good.—FLETCHER *v.* COLLIS, *C.A.*, 516; [1905] 2 Ch. 24; 74 L. J. Ch. 502; 92 L. T. 749.

3. *Breach of trust—Trustee partner—Employing assets in business—Account of profits—Right to goodwill.*—Under articles of partnership entered into in 1872, C. N. and his brothers E. N. and G. N., with two other persons, became partners for a term of ten years for the carrying on of an already existing business consisting of the manufacture and sale of isinglass, gelatine, and glue. Under the provisions of the articles as modified by a declaration of trust executed by the brothers N. in March, 1877, the capital of any one of the brothers dying during the term was to remain in the business till the expiration of the term, and was then to be held by the survivors on trust to dispose of it as his will should direct. C. N. died in August, 1877, having by his will of the preceding March appointed E. N., G. N., and another executors, and bequeathed to them his capital and shares of profits of the business. Until the expiration of the partnership term the shares of profits were to be divided between testator's children, with provisions for maintenance and accumulation, and thereafter the capital and shares of profits were to be held by the executors on trust to enter into such arrangements as they might think desirable for carrying on the business in partnership with such persons as they might think proper. The testator declared his ultimate object to be the introduction of one or more of his sons into the business, but made provision for the division of the profits on his share among all his children. He left numerous children, most of whom were infants at his death, and on the determination of the partnership in 1882 his share, with accumulations, amounted to about £30,000. The two surviving brothers N. formed a new partnership with another person, and until 1887 employed the testator's share in the business, paying his children interest thereon of 10 per cent. The profits made were much larger. In 1887 the business was converted into a limited company, and the children were allotted 10 per cent. preference shares to the value of the £30,000 at par.

In an action by the children of C. N. against E. N. (G. N. having died) claiming a declaration that the defendant was bound to make good the profits made between 1882 and 1887 attributable to the shares of C. N. employed in the business, and also claiming a share in the goodwill,

Held, that the plaintiffs were not entitled to anything in respect of goodwill, and that, with regard to the former part of the claim, the case was not materially different from *Vyse* v. *Foster*, L. R. 7 H. L. 318, and that the plaintiffs were not entitled to more than the 10 per cent., which they had received.—SMITH *v.* NELSON, *Ch.D. Joyce, J.*; 92 L. T. 313.

4. *Costs—Appeal—Trustees served with notice of appeal—Appearance by counsel—Taxation.*—Notwithstanding the usual practice that trustees served with notice of an appeal upon the construction of a will are entitled to their costs of appearance by counsel, yet, in taxing such costs, the taxing-master should have regard to the position of the trustees, and especially whether it was such that, at the hearing of the appeal, their appearance would probably be required by the court.

Per Vaughan Williams, L.J.: Trustees served with notice of appeal and holding a merely neutral position, without any intention of taking part in the argument, ought not to appear by separate counsel on the appeal.—CARROLL *v.* GRAHAM, *C.A.*, 549; [1905] 1 Ch. 478; 74 L. J. Ch. 398; 92 L. T. 68.

5. *Co-trustee—Solicitor-trustee—Unreasonable conduct—Action against the trustees—Indemnity—Costs of lay trustee.*—Where one of two trustees is a solicitor who takes an active part in the administration of the trust estate, the other trustee is entitled to expect the solicitor-trustee to act as a solicitor in a reasonable and businesslike manner, and if he does not do this, and an action is in consequence brought against the trustees by the beneficiaries, the solicitor-trustee must indemnify his co-trustee both against any costs he may have to pay the plaintiffs in the action and also against his own costs as between solicitor and client, even where there has been no loss owing to the breach of trust.—LINSLEY, RE, CATTLEY *v.* WEST, *Ch.D. Warrington, J.*, 172; [1904] 2 Ch. 785; 73 L. J. Ch. 841.

6. *Directors' fees—Capital or income—Trustee for life tenant and remaindermen.*—What trustees receive in respect of services rendered belongs, in the absence of special provision in the trust instrument, to the estate for which they are trustees. Therefore directors' fees paid by way of remuneration to trustees as directors of a company for their services, they being elected directors in respect of shares bequeathed to them in trust for a life tenant and remaindermen, belong to the trust estate as capital, and form an accretion to the shares.

The principle to be found in *Noble* v. *Cass*, 2 Sim. 343, applied.—FRANCIS, RE, BARRETT *v.* FISHER, *Ch.D. Kekewich, J.*; 74 L. J. Ch. 198; 92 L. T. 77.

7. *Purchase of inscribed stock by broker co-trustee—Acceptance of half commission—Liability for loss of trust property through fraud of co-trustee—Trustee Act,* 1893 (56 & 57 *Vict.* c. 53), s. 24.—*Judicial*

Trustee Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—A trustee is not liable for the fraud of a broker co-trustee where, the latter having been instructed to buy inscribed stock, the former has done all that could be expected of an ordinary prudent man to see that the investment has in fact been made. The fact that a share of the commission has been accepted from the broker co-trustee, who is entitled to remuneration under the terms of the trust deed, does not affect his liability.

Speight v. *Gaunt*, 32 W. R. 435, (1883) 9 App. Cas. 1, and *Jobson* v. *Palmer*, 41 W. R. 264, [1893] 1 Ch. 71, considered.—SHEPHERD *v.* HARRIS, *Ch.D. Farwell, J.*, 570.

See also Charging Order, 1; Victoria, Law of, 2.

VALUER:—

Negligence—Contract—Exercise of reasonable care and skill.—C., a solicitor, was applied to by V., who was not his client, but who owned a mineral water factory and three licensed houses, to find someone who would advance money on the premises. C. knew that R., another solicitor who represented under a power of attorney the plaintiff, had money to advance, and at an interview between C. and R. it was arranged that an advance, to be guaranteed by an insurance society, should be made to V., but no stipulation for an independent valuation of the premises was then made. C., with authority to conduct the mortgage on these lines, requested the L. T. and T. Society to insure the mortgage, knowing that the society usually employed the defendant M., a local valuer of repute. C. applied to the society for a copy of M.'s valuation, and this application was ultimately acceded to by them, they saying that on future occasions when C. was acting for the mortgagee he should have a copy. The society repudiated responsibility for M.'s fee, which was afterwards paid by V. through C. The society instructed M. to value the premises, and he reported to them by a valuation written on their printed form. C. relied to the knowledge of M. on M.'s valuation in making the advance on mortgage to V.

Held, that M. was not the agent of C. as principal, in making this valuation, and that the above facts did not establish that contractual relation which, according to the decisions in *Le Lievre* v. *Gould*, (1893) 1 Q. B. 491, and *Scholes* v. *Brook*, 63 L. T. Rep. 837, was necessary to enable the plaintiff to maintain an action for negligence in making the valuation against M.

Held, further, that, upon the evidence, there is no absolute rule as regards the proper method of ascertaining the value in such cases as the present; and although M., valuing the premises, adopted methods which might have been improved upon, still they were methods which a man of position, endeavouring to do his duty, might fairly adopt without its being said that he was wanting in reasonable care and skill.

Observations as to the duty of a licensed valuer to examine the takings books of managed licensed houses and premises of a like character, and as to the number of years' purchase on which he ought to proceed in making his valuation.

Semble, it is not within the province of a valuer to give an opinion as to what may properly be advanced on property. — LOVE *v.* MACK, *Ch.D. Kekewich, J.*; 92 L. T. 345.

VENDOR AND PURCHASER:—

1. *Covenants—Purchase of freeholds subject to restrictive covenants—Covenants for indemnity by purchaser.*—On a purchase of freehold land subject to restrictive covenants, the vendor having covenanted with his vendor to perform and observe those covenants and to idemnify his vendor, the purchaser ought to enter into a similar covenant with his vendor, but the covenant should be prefaced with the words, "with the object and intention of affording to the vendor, his heirs, executors, and administrators, a full and sufficient indemnity in respect of the restrictive covenants, but not further or otherwise."—POOLE AND CLARKE'S CONTRACT, RE, *C.A.*, 122; [1904] 2 Ch. 173; 73 L. J. Ch. 612; 91 L. T. 275.

2. *Covenants for title—Defect in title—Right of way—Railway company—Compensation—Breach of covenants—Measure of damages—Solicitor and client costs—Conveyancing Act*, 1881, *s.* 7.—F. sold land to a railway company, conveying it as beneficial owner. He had previously granted a right of way over part of it, which had become vested in J. The company knew at the time of the conveyance that other persons probably had rights over the land. The intention of the parties was, however, that, as between themselves, the land should be conveyed freed from any rights of way over it. The company blocked the land over which J.'s right of way existed. J. claimed and was awarded in arbitration a certain sum as compensation for loss of his way. The company contesting his right of way, defended an action brought against them by J. to establish it and enforce the award, and had judgment given against them with costs. They then sued F. for damages for breach of his covenant for title.

Held, that the action lay; that the damages were (1) the sum awarded to J. as compensation; (2) the costs of J. in the arbitration paid by the company; and (3) their own costs therein, and that these latter were the costs taxed as between solicitor and client.

But held, that the damages did not include the costs of the action brought by J. against the company, who should not have defended it.

Turner v. *Moon*, 50 W. R. 237 [1901] 2 Ch. 825, followed.

Barnett v. *Corporation of Eccles*, [1900] 2 Q. B. 423, 48 W. R. Dig. 101, distinguished.—GREAT WESTERN RAILWAY CO. *v.* FISHER, *Ch.D. Buckley, J.*, 279; [1905] 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104.

3. *Real estate—Payment of deposit—Purchaser's interest in land—Action for rescission—Compromise—Payment by vendor to purchaser—Judgment creditor of purchaser — Equitable execution — Receiver — Security perfected after compromise.*—In June, 1901, a purchaser under a contract for sale paid a deposit and was let into possession of certain land. The purchaser having failed to complete in March, 1902, the vendor gave him notice rescinding the contract and forfeiting the deposit. In May the purchaser commenced an action for return of the deposit, and the vendor counterclaimed for specific performance. In August, 1902, a judgment creditor of the purchaser obtained an order appointing himself, upon giving security, receiver of the rents, &c., receivable in respect of the purchaser's interest in the land in question. Notice of the order was served on the vendor, and it was registered under the Land Charges Registration and Searches Act, 1888, and the Land Charges Act, 1900, but the creditor did not perfect his security as receiver till May, 1903. In January, 1903, the action between the purchaser and the vendor was compromised, a consent order being

made for rescission of the contract and delivery up of possession by the purchaser on payment to him by the vendor of £110. The judgment creditor then commenced an action against the vendor, claiming to have a lien on the land for the amount of his judgment debt, and also claiming payment of the judgment debt by the vendor.

Held, that the £110 was not paid to the purchaser in respect of any interest that he had in the land, but on the basis that he had no interest in it. Consequently the action must fail.

Decision of Farwell, J., affirmed.—RIDOUT *v.* FOWLER, *C.A.*, 42; [1904] 2 Ch. 93; 73 L J. Ch. 579; 91 L. T. 509.

4. *Specific performance—Verbal agreement—Unequivocal acts—Admission of parol evidence—Part performance—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—Action for specific performance of a verbal agreement between plaintiffs and defendant for the sale by the plaintiffs to the defendant of a plot of land and a house to be erected thereon by the plaintiffs. The house was erected.

The defendant pleaded the Statute of Frauds.

During the building the defendant frequently visited the works, and induced the plaintiffs to make alterations in the plans as being carried out.

Held, that the alterations induced by the defendant amounted to part performance, taking the case out of the statute.—DICKENSON *v.* BARROW, *Ch.D. Kekewich, J.*; [1904] 2 Ch. 339; 73 L. J. Ch. 701; 91 L. T. 161.

5. *Title—"Objection to title"—No title to minerals—Right to rescind—Completion with compensation.*—Where a vendor is unable to show any title whatever to a portion of the property which he has agreed to sell, he is not entitled to rescind the contract under a condition contained in the contract enabling him to rescind in the event of the purchaser insisting on any objection or requisition as to title or evidence of title which the vendor shall be unable or on the ground of expense shall decline to remove or comply with. The total absence of title to part of the property will, however, enable the purchaser to take advantage of a condition that an omission in the particulars shall not annul the sale, but shall form the subject of compensation.—JACKSON AND HADEN, RE, *Ch.D. Buckley, J.*, 428; [1905] 1 Ch. 603; 74 L. J. Ch. 389; 92 L. T. 591.

6. *Title—Settlement—Investment clause—"Securities"—Power to vary—Purchase of ground-rents—Implied power to sell—Trustees for purposes of Settled Land Acts.*—By a settlement made on the marriage of the plaintiff it was agreed that the trustees should stand possessed of the shares, stock, and securities mentioned in the schedule thereto, upon trust to permit the same to remain in their then present state of investment, or to sell the same or any part thereof, and invest the proceeds in (*inter alia*) the purchase of freehold ground-rents, with power to vary or transfer such stocks, funds, shares, or securities into or for others of the same or a like nature. The investments mentioned in the schedule comprised certain shares and debentures and debenture stock and a bond of the plaintiff, with certain leasehold premises by way of collateral security. The plaintiff was the first tenant for life under the settlement. In 1898 and 1899 the trustees under the powers of the settlement purchased certain freehold ground-rents. In February, 1905, the plaintiff, as tenant for life under the Settled Land Acts, agreed to sell these ground-rents to the defendants.

Upon the investigation of the title the defendants took the objection that the trustees of the settlement were not trustees for the purposes of the Settled Land Acts, inasmuch as the power in the settlement to vary stocks, funds, shares, and securities did not include the ground-rents in question. The plaintiff took out this summons for a declaration that the objection was unfounded.

Kekewich, J., came to the conclusion upon the whole of this settlement that these ground-rents were securities for the purposes of that instrument. Consequently the trustees of the settlement had power to sell, and were trustees for the purposes of the Settled Land Acts.—TAPP AND LONDON DOCK CO.'S CONTRACT, RE, *Ch.D. Kekewich, J.*; 74 L. J. Ch. 523; 92 L. T. 829.

7. *Trustees—Trust funds to be laid out in purchase of freehold lands—"Vary and transpose"—"Securities"—No trust for conversion or reconversion—Concurrence of beneficiaries.*—A testator by his will had authorized his trustees to sell his real estate and to lay out and invest such moneys coming to their hands under the trusts of his will in the purchase or upon mortgage of freehold or leasehold properties in England or in Government stocks or funds or certain railway debenture or preference stock, or in any investments in which they could legally invest trust funds, with full power to vary and transpose such securities for others of a like description thereinbefore authorized. In pursuance of this power the trustees entered into a contract to sell certain freehold ground-rents which it appeared from the abstract of title they had previously purchased under their power in the will to purchase freehold land. In the contract for sale they were expressed to be selling as trustees, and there was a condition stating that the beneficiaries were not to be required to concur in the sale. On an objection by the purchasers that there was no trust for conversion or reconversion, and that the beneficiaries must concur,

Held, that the trustees had a power of reconversion having regard to the words in the will "vary and transpose such securities"; that the word "securities" was synonymous with "investments"; and that the trustees could therefore show a good title without the concurrence of the beneficiaries in the conveyance, or receipt of the purchase-money.

In re Rayner, Rayner v. *Rayner*, 52 W. R. 274; [1903] 1 Ch. 176, discussed.—GENT AND HASON, RE, *Ch.D. Farwell, J.*, 330; [1905] 1 Ch. 386; 74 L. J. Ch. 333; 92 L. T. 356.

See also Covenant, 2.

VICTORIA, LAW of:—

1. *Melbourne Tramway and Omnibus Co.'s Act*, 1883 (47 *Vict. No.* 765)—*Licensed Carriages Statute*, 1864—*Carriages Act*, 1890 (54 *Vict. No.* 1070)—*Liability to pay for licences.*—A tramway "trust" leased a tramway for an agreed rent to the appellant company, who were the owners of the cars running on it, and the employers of the drivers and conductors. The lease contained a clause providing that "The company shall be liable to no other payment to the trust . . . for portion of profits or otherwise howsoever except for municipal rates."

Held (affirming the judgment of the court below), that this did not exempt the company from the liability to pay licence duties lawfully imposed under statutory powers.—MELBOURNE TRAMWAY CO. *v.* KIDNEY, *P.C.*; [1905] A. C. 358; 92 L. T. 584.

2. *Trustees—Liability—Payment under mistake of law—Acting honestly and reasonably—Trusts Act*, 1901, *s.* 3.—Trustees took out letters of administration *de bonos non*, and afterwards, acting *bonâ fide* and on the advice of their solicitor, paid away a portion of the estate to persons who were not legally entitled to it.

Held (affirming the judgment of the court below), that they were liable to make good the amount so paid to the assignees of the person really entitled, and were not freed from the liability by the operation of section 3 of the Victorian Trusts Act, 1901.

Doyle v. *Blake*, 2 Sch. & Lef. 231, followed.

Speight v. *Gaunt*, 9 App. Cas. 1, distinguished.—NATIONAL TRUSTEES, EXECUTORS, AND AGENCY CO. *v.* GENERAL FINANCE AGENCY CO., *P.C.*; [1905] A. C. 373; 92 L. T. 736.

WATER:—

1. *Rate—On "annual rack-rent or value" of premises—Rate payable by owner—Owner paying other rates—Gross or net.*—By the Bury and District Joint Water Board Act, 1903, the respondents were to supply water at specified rates—viz., "where the annual rack-rent or value of such house shall not exceed £20, at a rate per centum per annum not exceeding £10."

The appellant was the owner of three cottages let to tenants, and the appellant paid all the rates on such cottages.

Held, that, in order to arrive at the "annual rack-rent or value," upon which he was liable to pay the water rate, the appellant was entitled to deduct the rates so paid by him.—WILKINSON *v.* BURY WATER BOARD, *K.B.D.*; 92 L. T. 417.

2. *Riparian owner—Abstraction of water—Purposes for which taken.*—A railway company owning a small strip of land adjoining a natural stream have no right to abstract water for the purpose of supplying the locomotive engines of their railway; and a lower riparian owner is entitled to an injunction to restrain the company exercising such an alleged right, even though he suffers no substantial injury.

Decision of the Court of Appeal in Ireland reversed.

Sandwich (Earl) v. *Great Northern Railway*, 27 W. R. 616, 10 Ch. D. 707, overruled.—MCCARTNEY *v.* LONDONDERRY AND LOUGH SWILLY RAILWAY, *H.L.*, 385; [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105.

WAY, RIGHT of:—

National monument—Public right of access—Public road—Dedication—Terminus ad quem—*Cul-de-sac.*—Action brought by the Attorney-General, on the relation of persons interested in preserving public rights in open spaces and footpaths, against the owner of Stonehenge for an order that he should remove certain fencing with which he had inclosed the stones, and an injunction against the erection of any such fencing. The claim was based upon two grounds: (1) That Stonehenge, being a national monument of great interest which had from time immemorial been open to the public, must be deemed to be subject to a trust for its free user by the public. (2) That there were public roads running up to and through Stonehenge which had been blocked by the defendant's fencing.

Farwell, J., said that a *jus spatiandi* or right in the public of visiting, walking about, and inspecting the stones was a right unknown to the law, and no trust could be presumed in favour of such a right against the clear documentary title of the defendant, on which no trust appeared. On the second point, he held upon the facts that the plaintiffs had not proved any user by the public of the roads claimed as roads running through Stonehenge from one place to another. A public road was *primâ facie* a road which led from one public place to another, and though the existence of a *terminus ad quem* was not essential to the existence of a public road, mere user by the public had never been held sufficient to establish the dedication of a road without such a terminus. In all the cases in which a cul-de-sac had been held to be a public road there had been expenditure upon it by the local authority. The action must be dismissed with costs.—ATTORNEY-GENERAL *v.* ANTROBUS, *Ch.D.* *Farwell, J.*; [1905] 2 Ch. 188; 92 L. T. 790.

See also Easement, 5; Foreshore, 2.

WEIGHTS AND MEASURES:—

1. *Coal dealers—Bye-laws—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21).—A bye-law was made by a county council under powers given to it by the Weight and Measures Act, 1889, to the effect that coal dealers who offered coal for sale from their carts should carry scales and weights amounting to 2 cwt. A., a coal dealer, had in his cart sacks of coal weighing, some 1 cwt. and some ½ cwt.; there were also scales on the cart and a weight of ½ cwt.

Held, that there was not a proper compliance with the bye-law, although it was possible to weigh any of the sacks of coal by means of the ½ cwt.—CRICK *v.* NICHOLLS, *K.B.D.*, 431; [1905] 1 K. B. 501; 74 L. J. K. B. 283; 92 L. T. 169.

2. *"False and unjust" scales—Paper bag placed under scale—Scales used in a particular way at request of customer—Absence of fraudulent intention—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.—The respondents, who were wholesale tea merchants, with a view to expedite the weighing out of tea to certain of their customers—retail dealers who requested to be supplied with parcels of tea of such weight that each with its wrapper would be of some given weight, for instance, ¼lb.—made it their practice to temporarily adjust the scales while weighing a series of parcels for such a customer by placing a paper bag supplied by such a customer under the goods scoop; special pains were taken to prevent the scales in that condition from being used by any other customer.

Held, that the scales were rendered "false and unjust" within the meaning of section 25 of the Weights and Measures Act, 1878, and that the respondents were liable to a penalty accordingly.

London County Council v. *Payne & Co.*, 52 W. R. 299, [1904] 1 K. B. 194, explained and followed.—LONDON COUNTY COUNCIL *v.* PAYNE & CO., *K.B.D.*, 319; [1905] 1 K. B. 410; 74 L. J. K. B. 108; 92 L. T. 120.

3. *Scale—Fraudulent use of scale—Goods weighed with paper wrapper included—Scale just—Evidence of custom in trade to weigh goods with wrapper—Admissibility of—Weights and Measures Act*, 1878—(41 & 42 *Vict. c.* 49), *s.* 26.—A person went into a grocer's shop and asked for 4oz. of tea. The grocer's assistant, acting under the instructions of the grocer, put some tea into a paper wrapper and weighed both tea and wrapper together in the presence of the purchaser, and then delivered it to him. The tea thus supplied was less than the 4oz. asked for by the weight of the paper which was included in the 4oz. The scales were just and

accurate, and gave the gross weight of the tea and paper correctly.

Upon an information under section 26 of the Weights and Measures Act, 1878, against the grocer for being a party to wilfully committing a fraud in using the scale by adding the paper wrapper to the goods pan when weighing the tea, the justices refused to receive evidence tendered to show that it was the custom or usage for grocers to weigh tea in the paper wrapper in which it was sold, and convicted,

Held, that the mere fact of weighing the tea with the wrapper included would not necessarily constitute the offence under section 26 of wilfully committing a fraud in the use of the scales if the purchaser knew that the weight of the wrapper was included in the weight; and that, having regard to the fact that the weighing was done in the presence of the purchaser, before the conviction could be sustained the case required further consideration as to whether what was done amounted to a wilfully fraudulent use of the scales.

Held, further, that evidence of the alleged custom ought to have been admitted, as having a bearing on the question whether there had been a wilful commission of a fraud within the meaning of the section.—KING *v.* SPENCER, *K.B.D.*; 91 L. T. 470.

4. *Weighing machine—Fraudulent use of machine—Weighing article sold with paper wrapper—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 26.—Section 26 of the Weights and Measures Act, 1878, enacts that "Where any fraud is wilfully committed in the using of any weight, measure, scale," &c., the person committing such fraud shall be liable to a fine.

The appellant, a grocer, made up a number of packages of sugar wrapped in paper, each package being weighed by him, or his servants, on his scales and weighing exactly one pound weight of combined sugar and paper. The scales were just and accurate and gave the weight of each package correctly. Subsequently the appellant supplied one of those packages to a purchaser who had asked for one pound of sugar. The sugar without the paper wrapper weighed three-quarters of an ounce less than one pound.

Held, that, as there had been no fraudulent using or manipulation of the scales in the act of weighing, section 26 did not apply, and the appellant could not be convicted of the offence specified therein.—STONE *v.* TYLER, *K.B.D.*; [1905] 1 K. B. 290; 74 L. J. K. B. 18; 92 L. T. 83.

5. *Weight found to be unjust — Official stamp defaced by inspector — Seizure of unjust machine — Prior test with local standards—Misconduct.*—The respondent, an inspector of weights and measures, having found that certain weights carried by a coal carman were unjust, defaced the official stamps thereon, but did not seize or detain them. He also ascertained that the weighing machine carried by the carman was unjust by testing it with some 56lb. weights on the van, and nine small local standard weights.

Two informations having been preferred by the appellant against the respondent under section 49 of the Weights and Measures Act, 1878, alleging misconduct on the part of the respondent,

Held, that the justices rightly dismissed both informations.—WEDDERBURN *v.* SMITH, *K.B.D.*; 92 L. T. 853.

WILL:—

1. *Absolute gift—Legacy on condition—Share of residue at time of testator's decease or at any time prior to actual payment of share—Gift over on bankruptcy—"Actual payment"—"Actual receipt"—Vesting of legacy—Notice—Assignment by trustee in bankruptcy—Effect of gift over—Authorities.*—Bequest by a testator after death of a tenant for life of a share of residue to J., "but if J. should be unable at the time of his (the testator's) decease, or at any time prior to the actual payment to him of his share or any part thereof on the division of the estate, to give a receipt to his trustees for his share by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share either in whole or in part," then in such case the share, or that part which he could not receive for his own benefit, was to be divided equally between J.'s children. On the day of distribution by the trustees they received notice that two bankruptcy notices had been served on J., and accordingly refused to pay him his share of the residue.

Held, on the construction of the will, that the divesting had happened before the legacy had taken effect, and that the gift over was valid, and must be given effect to.

Johnson v. *Crook*, 28 W. R. 12, 12 Ch. D. 639; *In re Chaston, Chaston* v. *Sango*, 29 W. R. 778, 18 Ch. D. 218; *In re Wilkins, Spencer* v. *Duckworth*, 29 W. R. 911, 18 Ch. D. 634, followed.

Martin v. *Martin*, 14 W. R. 986, L. R. 2 Eq. 404, and *Bubb* v. *Padwick*, 28 W. R. 382, 13 Ch. D. 517, disapproved.—GOULDER, RE, *Ch.D. Swinfen Eady, J.*, 531; [1905] 2 Ch. 100.

2. *Ambiguity—Latent ambiguity—Gift to "my granddaughter"—Partial blank—Parol evidence—Grant of probate.*—Although a complete blank in a will cannot be filled up, a partial blank may be explained by extrinsic evidence.

Thus, where a testatrix appointed as executrix and legatee a person described in the will as "my granddaughter ——," evidence was admitted for the purpose of explaining the latent ambiguity which arose from the fact that, at the date of the will and at the date of the death, the testatrix had three granddaughters, and the will was thereupon pronounced for, and probate was granted to the one whom the court found, from the extrinsic evidence, to be the person intended by the testatrix.—HUBBUCK, IN THE ESTATE OF, *P.D. & Ad.D.*; [1905] P. 129; 74 L. J. P. 58; 92 L. T. 665.

3. *Annuity — Charge on land — Estate duty — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 9, 14.—By his will T. gave to his wife an annuity of £500, and made it a first charge on specific freeholds, of which there was no specific devise.

Held, on the true construction of the will, that this was a mere personal annuity, not payable primarily out of the specific freeholds, but payable out of the personalty.

The statement in Theobald on Wills (5th ed.), at p. 442, discussed and explained.—TRENCHARD, RE, TRENCHARD *v.* TRENCHARD, *Ch.D. Warrington, J.*, 235; [1905] 1 Ch. 82; 74 L. J. Ch. 135; 92 L. T. 265.

4. *Charitable bequest—Proviso of cesser—Gift over—Residuary legatee—Rule against perpetuities—Construction—Education Act*, 1902 (2 *Ed.* 7, *c.* 42), *Part III.*—A testatrix bequeathed the income of a sum of money in trust for certain schools so long as they should be carried on under the conditions of the deed of trust of the schools, and declared that if the funds for carrying on the schools should be

raised under an Act of Parliament then the payment of the income to the schools should cease, and the fund should fall into her residuary estate.

Held, that as by the operation of the Education Act, 1902, the schools were no longer carried on under the conditions of the deed of trust, and as the funds for carrying them on were to some extent supplied under that Act, the trust for the schools had ceased, and the fund fell into the residue.

Held, also, that the rule against perpetuities did not apply, as the gift over was to the same persons as became entitled under the rules of law.

In re Randell, 36 W. R. 543, 38 Ch. D. 213, followed.

In re Bowen, 41 W. R. 535, [1893] 2 Ch. 491, distinguished.—BLUNT'S TRUSTS, RE. WIGAN *v.* CLINCH. *Ch.D. Buckley, J.*, 152; [1904] 2 Ch. 767; 74 L. J. Ch. 33; 91 L. T. 687.

5. *Charity—Bequest to—Condition—"Subject to my trustees being made members"—Impossible condition—Condition precedent or subsequent.*—A testator bequeathed legacies to two charities, B. and S., "subject to my trustees being made members or governors . . . to the intent that they may have votes and voices in the maintenance and conduct of such societies to the fullest possible extent." The B. charity had no governors, but had members who were entitled to vote at general meetings. The S. charity had neither members nor governors. One of the trustees refused to become a member of the B. charity.

Held, that the condition was a condition precedent, not subsequent; that it referred to the obligation of the charities, not to that of the trustees; and that consequently the gift to B. was good and the gift to S. failed.—EMSON, RE, GRAIN *v.* GRAIN, *Ch.D. Kekewich, J.*; 74 L. J. Ch. 565.

6. *Construction—Eldest son of my sister.*—A testator devised an estate "to the eldest son of my sister and his heirs for ever." At the date of the will the sister had two sons, but the elder of these two died in the testator's lifetime.

Held, that at the date of the will there was a person in existence answering the description in the will, and the words used were sufficient to pass the fee simple to him, had he survived the testator; but as he predeceased the testator, that there was an intestacy.—AMYOTT *v.* DWARRIS, *P.C.*, 16; [1904] A. C. 268; 73 L. J. P. C. 40; 90 L. T. 102.

7. *Construction—Gift of property of which testator was tenant in common, and which had not been partitioned—Tenancy in common of interest in New River Co.—Separate receipt of dividends—No formal partition—Extrinsic evidence—Admissibility.*—R. was tenant in common with his brother C., under their father's will, of an interest in the New River Co. The dividends were paid separately to R. and C., and they were regarded by the company as being each the owner of an undivided share in the interest. No formal partition of the property, however, was at any time effected, and in an agreement between R. and C. relating to the partition of other property of which they were tenants in common it was recited that they had agreed not to partition the interest in the New River Co., but to retain it for the present in their joint ownership. R. afterwards died, having devised to C. all his share and interest of and in all the real estate derived under the will of his father, which he held as tenant in common with C., and which should not, at the date of R.'s death, have been partitioned. At the date of R.'s death there was other real estate of which R. and C. were tenants in common under their father's will, and which had not in any way been partitioned. On a summons taken out for the determination of the question whether R.'s share in the interest in the New River Co. passed to C. under the above devise or not,

Held, that in view of the separate receipt of dividends by R. and C. there had ceased to be unity of possession in the interest, that it had been fully partitioned and R. and C. had ceased to be tenants in common of it, and that it therefore did not pass by the devise.

Held, also, that the recital in the agreement for the partition of the other property was not admissible as evidence of the testator's intention.—TRIMMER, RE, *Ch.D. Joyce, J.*; 91 L. T. 26.

8. *Construction—Gift to members of a class who shall attain twenty-five—Remoteness.*—A testatrix directed her trustees to pay one-half share of residue to children of R. who should attain the age of twenty-five or the lawful issue of such children who should have married and predeceased R., such issue only to take their parents' share. The other share was given to the children of C. on similar terms. One of R.'s children had attained twenty-five at the testatrix's death, but none of C.'s children had attained that age.

Held, that there was a valid disposition of the share given to R.'s children, not infringing the rule against perpetuities; but that the disposition of the other share infringed that rule and was invalid.—BARKER, RE, CAPON *v.* FLICK, *Ch.D. Joyce, J.*; 92 L. T. 831.

9. *Construction—Legacies—Servants—Employment for five years previously to death of testator—Servants at yearly wages—Servants at weekly wages.*—A bequest to all servants who should be in the employment of a testator at his death, and should have been in his employment "for five years previously thereto of one year's wages," was held to exclude therefrom servants with weekly wages paid monthly or fortnightly, with corresponding conditions as to notice to determine the employment.

Blackwell v. *Pennant*, 9 Hare 551, and *Breslin* v. *Waldron*, 4 Ir. Rep. Ch. 333, followed.

Decision of Joyce, J., affirmed.—RAVENSWORTH, RE, RAVENSWORTH *v.* TINDALE, *C.A.*; [1905] 2 Ch. 1; 74 L. J. Ch. 353; 92 L. T. 490.

10. *Construction—Realty—"What is left"—Devise after death of wife to some of co-heiresses—Life estate by implication—Intestacy.*—By his will a testator, after bequeathing his household effects to his wife, E. W., gave the following direction: "And at my death the said E. W. to have power to sell all property and land belonging to me, and at her death what is left to be divided between . . . my two daughters by second wife."

Held, that there were no express words of gift to E. W. of the testator's property and land, nor could any gift to her be extracted out of the words "what is left." By these words was meant the net residue after payment of debts and costs of realization.

The testator, who was twice married, had several children. Four daughters and the children of a deceased daughter were living at his death, so that his two daughters by his second wife were some but not all of his co-heiresses.

Held, that E. W. did not take a life estate in the testator's realty by necessary implication.

A devise of real estate after the death of A. to

some but not all of the co-heiresses of a testator does not confer a life estate on A. by necessary implication.

Hutton v. *Simpson*, 2 Vern. 722, considered.—WILLATTS, RE, *Ch.D. Farwell, J.*; [1905] 1 Ch. 378; 74 L. J. Ch. 269; 92 L. T. 195. Appeal allowed on facts: [1905] 2 Ch. 135.

11. *Deposit note—"Ready money"—"Pecuniary investments"—Money in bank on deposit.*—Money which is on deposit at a bank, and which is subject to more than twenty-four hours' notice of withdrawal is not a "pecuniary investment" in its popular meaning, and therefore will not, in ordinary circumstances, pass under a gift of "ready money" contained in a will, nor, without special circumstances, under the words "pecuniary investments."—PRICE, RE, PRICE *v.* NEWTON, *Ch.D. Farwell, J.*, 600; [1905] 2 Ch. 55; 74 L. J. Ch. 437.

12. *Estate duty—"The death duties payable out of my estate"—Settlement estate duty—Specific fund—Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-section* 1.—The expression in a will "the death duties payable out of my estate," if expressly directed to be paid out of a fund therein specified, falls within section 19, sub-section 1, of the Finance Act, 1896, and is an "express provision" within the sub-section. It therefore extends to all death duties, settlement estate duty, as well as estate duty, and therefore the duties on certain chattels settled by the will must be borne by the specific fund.

In re Lewis, [1900] 2 Ch. 176, discussed and distinguished.

The decision in *In re Pimm, Sharpe* v. *Hodgson*, 52 W. R. 648, [1904] 2 Ch. 345, adopted.—CAYLEY, RE, AWDRY *v.* CAYLEY, *Ch.D. Swinfen Eady, J.*, 260; [1904] 2 Ch. 781; 74 L. J. Ch. 31; 91 L. T. 743.

13. *Estate tail—Devise to sons "born in the testator's lifetime"—Divesting clause—Children* en ventre sa mère—*Practice of conveyancers.*—A testator by his will gave and devised certain hereditaments to his brother, A. R., for life, remainder to A. R.'s two eldest sons, then living, one after the other, remainder to the third, fourth, and every son or sons of A. R., and he further declared that any such third or fourth son, born in the testator's lifetime, should not take a larger interest in the said estates than for life with remainder to his issue in tail. At the death of the testator, A. R. had only two sons, but two weeks after the death of the testator a third son, W. B. R., was born. A. R. and the two eldest sons having died, the question arose whether W. B. R. took an estate tail or only one for life.

Held, that the clear intention of the testator must be given effect to, that the words "born in my lifetime" meant exactly what they said, and that W. B. R., having not been born within the prescribed time, took an estate tail.—VILLAR *v.* GILBY, *Ch.D. Swinfen Eady, J.*, 658; 74 L. J. Ch. 529.

14. *Exoneration—Real estate charged with payment of testator's debts—Personal estate not exonerated.*—Where a testator gives the whole of his personal estate to a legatee absolutely, and devises all his real estate to trustees, subject to the payment of his just debts and funeral and testamentary expenses, upon trust to manage and cultivate it, and let it from year to year, he does not intend to exonerate the personalty from being the fund primarily liable for payment of his just debts, funeral and testamentary expenses. In such a case the realty is charged in aid of the personalty.

In order to make the realty primarily liable for payment of debts, it is necessary not only to charge the realty with payment of them, but to discharge the personalty therefrom.—BANKS, RE, BANKS *v.* BUSBRIDGE, *Ch.D. Buckley, J.*; [1905] 1 Ch. 547; 74 L. J. Ch. 336; 92 L. T. 225.

15. *Forfeiture clause—Assignment or attempted or affected assignment—Administration of testator's estate by court—Appointment of receiver—Request by life tenant to receiver to pay to a creditor.*—A testator settled a share of his estate on each of his daughters, and directed the trustees of his will, after the decease of any of his daughters who had married, to pay one-third of the income of her share to her husband "during his life or until he shall become bankrupt or assign, charge, or incumber, or attempt or affect to assign, charge, or incumber," the same or any part thereof. G. married one of the daughters, who predeceased him. The testator's estate was administered by the court, and a receiver was appointed. In November, 1902, G. wrote a letter asking the receiver to deduct from any sum that might become due to G. on the passing of the receiver's accounts on the ensuing 5th of January the sum of £5 and to pay it to a certain creditor of G. It was admitted that at the date of the letter the receiver had in his hands more than £5 to which G. was entitled.

Held, that G.'s letter to the receiver did not cause a forfeiture of his interest under the will as there was at the date of it sufficient money in the receiver's hands to pay the amount; and where such a document is ambiguous it ought to be construed so as not to create a forfeiture if capable of such a construction.

Decision of Joyce, J. (91 L. T. Rep. 187), affirmed.—DURRAN *v.* DURRAN, *C.A.*; 91 L. T. 819.

16. *Forfeiture clause — Marriage of a son or daughter within certain prohibited degrees—Marriage in testator's lifetime.*—A testator devised all his real and personal estate to trustees upon trust for sale, and to be divided, after certain payments, among his children, sons and daughters (other than A., a daughter), in equal shares; he then inserted a clause to the effect that if any child should contract a marriage with any person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter without the previous written consent of the trustees or trustee of his will, then he or she should forfeit his or her right to the share in his trust estate. Subsequently the respondent, another daughter, married her first cousin in the testator's lifetime, and on his death claimed to be entitled to a share in his trust estate.

Held, that there was sufficient in the will to show that the testator intended that these acts of forfeiture should take effect only after his death, and that the respondent had not therefore forfeited her interest in his trust estate.

Decision of the Court of Appeal (52 W. R. 46[illegible], [1904] 1 Ch. 431) affirmed.—CHAPMAN *v.* PERKINS, *H.L.*, 485; [1905] A. C. 106; 74 L. J. Ch. 331; 92 L. T. 372.

17. *Heirlooms—Altering words—Reading "or" "of"—Devise of mansion-house in strict settlement—Gift of chattels to devolve as heirlooms—Clause of defeasance — Gift over.* — A testator devised a mansion-house and other real estate in strict

settlement on his sons and daughters and their issue in tail male, and bequeathed certain chattels to devolve as heirlooms with the mansion-house, yet so that they should not "vest absolutely in or become the property of a son or any person hereby made tenant for life of the said mansion-house unless such son or other person shall attain the age of twenty-one years."

The first tenant in tail died an infant. On a summons taken out to determine whether he had become absolutely entitled to the heirlooms,

Held, that the above words as they stood were nonsensical, and that "or" must be read "of," and that he had therefore not become absolutely entitled.

Held, further, that the clause of defeasance carried on the heirlooms to the persons entitled in remainder until a tenant in tail should become absolutely entitled, on the principle of *Christie* v. *Gosling*, L. R. 1 H. L. 279.—DAYRELL, RE, HASTIE *v.* DAYRELL, *Ch.D. Joyce, J.*; [1904] 2 Ch. 496; 73 L. J. Ch. 795; 91 L. T. 373.

18. *Illegitimacy—"Children belonging to me"—Illegitimate child—Distinction between will of mother and will of father of illegitimate child or children—Probate granted to illegitimate child born after date of will—Construction of will.*—A distinction is to be drawn between benefits conferred by deed or will upon future illegitimate children, according to whether the person purporting to confer the benefit is the mother or the father.

A spinster made a will in 1876 by which she purported to leave her property in trust for all the children who might belong to her at the date of her death. In 1878 she gave birth to an illegitimate child, who survived her.

Held, that the child was entitled to take under the will.—FROGLEY, IN THE ESTATE OF, *P.D. & Ad.D.*; [1905] P. 137; 74 L. J. P. 72; 92 L. T. 429.

19. *Illegitimate son described as "son"—Residuary gift to grandchildren—Children of illegitimate son.*—A testatrix having described her illegitimate son George as "my son George," gave her residue to "all my grandchildren." George left three children, and three legitimate children of the testatrix also left issue.

Held, that the children of George were entitled to share in the residuary gift in favour of grandchildren.—KIDDLE, RE, GENT *v.* KIDDLE, *Ch.D. Kekewich, J.*, 616; 92 L. T. 724.

20. *Investment by trustees—Purchase of leasehold ground-rents—Power to invest on freehold or leasehold ground-rents — Construction — Breach of trust.*—A testator bequeathed the residue of his estate to his trustees upon trust to invest the same on Government securities, "or upon freehold ground-rents, or upon leasehold ground-rents not having less than sixty years unexpired, and held direct from the freeholder." The trustees were authorized to receive "the dividends, rents, and annual income thereof," and to divide and pay the same unto and equally between the testator's two daughters for and during their lives. On the death of either of them the *corpus* of her share was to go to her issue.

Held, that the trustees were authorized by the above clause to invest the residue in the purchase of freehold ground-rents or of leasehold ground-rents of the specified character.

Decision of Kekewich, J., reversed.—MORDAN, RE, LEGG *v.* MORDAN, *C.A.*, 599; [1905] 1 Ch. 515; 74 L. J. Ch. 319; 92 L. T. 488.

21. *Lapse—Gift of remainder—Appointment of residuary legatee—Right to lapsed legacies.*—Where a testator gives pecuniary legacies to certain persons who were alive at the date of the will, but predecease him, and provides that the remainder of his property shall be divided amongst his nephews and nieces in certain proportions, and appoints as residuary legatee one not interested in the remainder,

Held, that the lapsed legacies fell into the remainder and did not pass to the residuary legatee.

The case of *In re Jessop*, 11 Ir. Ch. 424, distinguished.—ISAAC, RE, HARRISON *v.* ISAAC, *Ch.D. Buckley, J.*; [1905] 1 Ch. 427; 74 L. J. Ch. 277; 92 L. T. 227.

22. *Legacy—Gift of duty—No residuary estate—Settlement estate duty—Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.—A testatrix gave various legacies "free from duty." Her estate was insufficient to pay the legacies in full, and there was no residuary estate.

Held, that the duties were to be considered legacies, and that all legacies should abate in proportion together. Also that a bequest of a legacy free from duty included payment of settlement estate duty; and that a legacy to her husband with a declaration that if he predeceased her the legacy should vest in his representatives, to be dealt with as part of his personal estate, as if he had died after testatrix, carried legacy duty on disposition of such gift by the husband in his will.

In re Wilkins, 33 W. R. 42, 27 Ch. D. 703; *Farrer* v. *St. Catherine's College, Cambridge*. 21 W. R. 643, 16 Eq. 19; *In re Bridger*, 42 W. R. 179, [1894] 1 Ch. 297, approved of.

Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19, discussed.—TURNBULL, RE, SKIPPER *v.* WADE, *Ch.D. Farwell, J.*, 440; [1905] 1 Ch. 726; 74 L. J. Ch. 438.

23. Lex loci—*Leaseholds in England—Holograph in accordance with law of place where made—Wills (Lord Kingsdown's) Act*, 1861 (24 & 25 *Vict. c.* 114), *s.* 1.—A will made abroad by a British subject, which is valid according to the law of the place where it is made, is well executed, not only for the purpose of being admitted in England and Ireland to probate, but also for the purpose of disposing of leasehold property in England comprised in it.—GRASSI, RE, STUBBERFIELD *v.* GRASSI, *Ch D. Buckley, J.*, 396; [1905] 1 Ch. 584; 74 L. J. Ch. 341; 92 L. T. 455.

24. *Mutual wills, agreement to make—Revocation of one—Relief to survivor.*—The testator who dies first of the two who have made mutual wills dies with the promise of the survivor that the agreement shall stand, and if the survivor after taking any benefit of the agreement alters his will his personal representative will take the property on trust to perform the agreement. But if the testator who dies first has revoked his will, the survivor cannot claim any relief against a later will of the testator who dies first, either by way of declaration of trust or otherwise.—STONE *v.* HOSKINS, *P.D. & Ad.D.*; [1905] P. 194; 74 L. J. P. 110.

25. *Perpetuity — Real estate — Legal contingent remainders.*—A devise of real estate was made to trustees upon trust for testatrix's children for life with benefit of survivorship, then to grandchildren born within twenty-one years of testatrix's death for life, with benefit of survivorship, remainder

to last surviving grandchild in tail, remainder over.

The estate tail was held bad for remoteness, although, if good, it could have been determined within the prescribed period, and although it was a legal contingent remainder supported by a particular estate.

Doctrine of perpetuity and its applicability to legal contingent remainders discussed.

In re Hargreaves, 38 W. R. 470, 43 Ch. D. 401; *Evans* v. *Walker*, 25 W. R. 7, 3 Ch. D. 211; and *Garland* v. *Brown*, 10 L. T. Rep. 292, upheld.

In re Frost, 38 W. R. 264, 43 Ch. D. 246, discussed.—ASHFORTH, RE, ASHFORTH *v.* SIBLEY, *Ch.D. Farwell, J.*, 328; [1905] 1 Ch. 535; 74 L. J. Ch. 361; 92 L. T. 534.

26. *Precatory trust—"In full confidence"—Gift over in default of disposition.*—A testator gave, bequeathed, and devised to his wife the whole of his real and personal estate absolutely "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." The testator died childless, leaving a widow and seven nieces surviving him.

Held (Lord Lindley dissenting), that the widow took an absolute estate, subject to a conditional executory limitation to the testator's nieces living at her death, in case she should not have made a will devising the estate to one or more of such nieces.

Decision of the Court of Appeal (52 W. R. 662, [1904] 1 Ch. 415) reversed.—COMISKEY *v.* BOWRING-HANBURY, *H.L.*, 402; [1905] A. C. 84; 74 L. J. Ch. 263; 92 L. T. 241.

27. *Settled share—Gift to niece for life with power to appoint to husband—Gift in remainder (subject to trusts aforesaid) to children of niece—Gift in default of children—Remoteness—Perpetuity—Power—Independent trust.*—A testatrix by a codicil to her will directed her executors to hold a sum on trust as to income for a married niece for her life, and empowered her to appoint the whole or any part to a surviving husband, and subject to trusts aforesaid she gave the principal on trust for the children of such niece.

She gave three sums of like amounts to three unmarried nieces upon similar trusts, and after a trust as to the income of the share of any niece dying without leaving husband or children as aforesaid directed that in case no niece should have any child who should become entitled to the principal sums under the trusts aforesaid all the principal sums should be held in trust for such of the sons of a sister of the testatrix who should be living, or for the issue of such sons as should have died.

No niece had any children or made any appointment in favour of a husband. The last surviving niece made an appointment in favour of two persons who were objects of the power. This appointment in no way infringed the rule against perpetuities. The question was raised whether in view of the fact that each niece had power to appoint in favour of a husband, and that such husband need not have been born during the life of the testatrix, the later trusts did not fail in view of the rule against perpetuity.

Held, that the power was in the nature of an alternative independent gift within the principle laid down in *Monypenny* v. *Derring*, 2 D. M. & G. 145, that as it was never exercised the later limitations could be supported as independent alternative gifts, and consequently that the rule against perpetuities was not infringed by the appointment.—BOWLES, RE, PAGE *v.* PAGE, *Ch D. Farwell, J.*; [1905] 1 Ch. 371; 74 L. J. Ch. 338; 92 L. T. 556.

28. *Tenant for life and remainderman—Postponement of conversion—Unauthorized securities—Enjoyment in specie.*—A testator devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert, with power to postpone conversion at their discretion, and to retain any investments subsisting at his death, whether authorized by his will or not, and to invest the proceeds and hold the investments upon trust to pay the income thereof to his wife for life. The trustees proposed to sell certain shares in a coal mining company, as being of a speculative, though not of a wasting, character. Pending sale they refused to pay the widow the full dividends on these shares.

Held, there is no difference for this purpose between unauthorized securities of a wasting and unauthorized securities not of a wasting character; and that the widow was only entitled to interest at 3 per cent. on the value of the shares in question at the testator's death.

Bulkeley v. *Stephens*, 3 New Rep. 105, 12 W. R. Dig. 3, not followed.—CHAYTOR, RE, CHAYTOR *v.* HORN, *Ch.D. Warrington, J.*, 251; [1905] 1 Ch. 233; 74 L. J. Ch. 106; 92 L. T. 290.

29. *Uncertainty—Bequest to charitable or religious institutions.*—A testator by his will directed his trustees, in the events which happened, to divide a third part of the residue of his estate "to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select, and in such proportion to each or any as they may fix."

Held (reversing the judgment of the court below), that the bequest was void for uncertainty.—GRIMOND *v.* GRIMOND, *H.L.*; [1905] A. C. 124; 74 L. J. P. C. 35; 92 L. T. 477.

30. *Vesting—Real estate—Devise to A. "when she shall attain twenty-five years of age"—Vested or contingent gift—Residuary devise and bequest.*—Where, in a will, there is a devise to A. "when he shall attain the age of twenty-five years," or any given age, and such devise stands alone and is not preceded by any intermediate interest, nor aided by any preceding or subsequent context, then such devise will be deemed to be a contingent devise on the devisee attaining the prescribed age, and the attainment of such age is a condition precedent to the estate vesting in the devisee. In such a case no distinction can be drawn between "when" and "if" the devisee attains the required age.

A testator by his will gave, devised, and bequeathed certain freehold houses to his niece H. "when she shall attain the age of twenty-five years." He made similar devises to another niece and nephew on similar conditions, and he gave all his residuary real and personal estate to his brother C. F. absolutely, whom he also appointed executor. The brother had always treated the nieces and nephew (his own children) as having merely contingent interests under the will, subject to executory limitations over on their each attaining twenty-five. On a summons being taken out to determine whether the specific devise was contin-

gent on their each attaining twenty-five or whether each took a vested interest liable to be divested on death under that age.

Held, that the devise to each, standing alone, and not preceded by any intermediate interest or aided by the context of the will, must be treated as contingent, and the attainment of twenty-five was a condition precedent to the estate vesting in each niece and the nephew.

Love v. *Love*, 7 L. R. Ir. 306, followed.—FRANCIS, RE, FRANCIS *v.* FRANCIS, *Ch.D. Swinfen Eady, J.*, 571; 74 L. J. Ch. 487.

See also Charity, 9, 10; *Donatio Mortis Causâ*, 1; Probate, 1-6.

WORKMAN.—See Master and Servant.

WRIT.—See Practice, 18, 19, 23.

[THE END.]

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